CONFIDENTIALITY AND IN-HOUSE COUNSEL'S CAUSE OF ACTION FOR RETALIATORY DISCHARGE

by

Paula Schaefer*

For almost twenty years, courts have struggled with the issue of whether in-house counsel[1] should be allowed a tort cause of action for retaliatory discharge.[2] In-house counsel's obligation of confidentiality has been a central issue in the debate. Courts considering whether to allow a cause of action for retaliatory discharge have considered whether the cause of action would be damaging to the attorney-client relationship and whether public policy would be furthered by the cause of action. Confidentiality has been a significant issue in these determinations. While some courts have permitted in-house counsel to pursue a cause of action for retaliatory discharge, even those courts have disagreed in their analysis of whether counsel should be allowed to use confidential information to prove the claim. The first part of this article introduces the tort of retaliatory discharge and then considers how courts have dealt with the issue of confidentiality and in-house counsel's cause of action for retaliatory discharge.[3]

Following corporate scandals and the enactment of the Sarbanes-Oxley Act of 2002, two new sets of ethics rules emerged that will impact the retaliatory discharge analysis for cases involving in-house counsel. These rules give attorneys permission to reveal client confidences to prevent crime, fraud, securities laws violations, and other illegal acts likely to injure the financial interests of third parties or the client.[4] Under the authority of the Sarbanes-Oxley Act, the Securities and Exchange Commission adopted ethics rules for attorneys practicing before the SEC. Shortly thereafter, the American Bar Association amended two of its Model Rules of Professional Conduct (hereinafter, "Model Rules"); both amended Model Rules addressed confidentiality and added significant new exceptions to an attorney's duty of confidentiality. The second part of this article discusses the new ethics rules and explains the significance of the rules' confidentiality provisions to in-house attorneys' future causes of action for retaliatory discharge.[5]

I. History of Confidentiality and In-House Counsel's Cause of Action for Retaliatory Discharge

A. Employment at Will, the Tort of Retaliatory Discharge, and Confidentiality

A cause of action for retaliatory discharge is an exception to the general rule of employment at will. Under the employment at will doctrine, the employer and the employee can terminate the employment relationship for any reason.[6] The tort of retaliatory discharge, however, provides a cause of action for an employee who was fired for reasons that undermine an important public policy.[7] The tort seeks to create the proper balance among "the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out."[8] Retaliatory discharge cases typically arise when an employee refuses to commit an unlawful act, performs an important public obligation, or exercises a statutory right or privilege.[9]

Protection of public policy is the key to the tort. What is "public policy" is variously defined by state courts, but generally is stated to be a policy for the protection of the public that is clearly defined and well-established in state constitutions, statutes, and other law.[10] The Tennessee Supreme Court has explained an at-will employee may not be discharged "for attempting to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy which is evidenced by an unambiguous constitutional, statutory, or regulatory provision."[11] To state a claim for retaliatory discharge in Illinois, a plaintiff must prove the employee was discharged "in contravention of a clearly mandated public policy."[12] Illinois courts admit there is no precise definition of the term public policy, but state that it concerns "what is right and just and what affects the citizens of the State collectively"; in Illinois, public policy is "found in the State's constitution and statutes, and when they are silent, in its judicial decisions."[13] In Texas, the public policy exception is so narrow that it only includes "discharge of an employee for the sole reason that the employee refused to perform an illegal act."[14] The California Supreme Court has explained that the public policy protected by the tort of retaliatory discharge must be "fundamental" and clearly established in the Constitution and "positive law of the state."[15]

Courts have struggled with the issue of whether in-house counsel should be permitted to bring a cause of action for retaliatory discharge, with confidentiality concerns being of paramount importance in their determinations.[16] Subject to defined exceptions, an attorney generally has an ethical obligation to maintain the confidentiality of all information obtained in the representation of a client.[17] ABA Model Rule 1.6 addresses an attorney's obligation of confidentiality to his or her client.[18] Prior to 2003, Model Rule 1.6 provided generally that a lawyer "shall not reveal information relating to representation of a client" unless the client consents to the disclosure or the disclosure is impliedly authorized to carry out the representation or as allowed by some other exception.[19] The exceptions provided under the pre-2003 rule allowed an attorney to disclose confidential information to the extent the lawyer reasonably believed necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;
(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
(4) to comply with other law or a court order.[20]

As the following retaliatory discharge cases reflect, the states do not have uniform attorney ethics rules[21] governing confidentiality.[22] While the ABA Model Rules are generally adopted by every state, the states have adopted widely varying versions of Model Rule 1.6.[23] According to the ABA, the reason for this variation is disagreement with the ABA's very limited view of the circumstances in which attorneys may or must reveal confidential information to protect third parties.[24] Forty-one states did not adopt the pre-2003 version of Model Rule 1.6 and instead allowed a lawyer to reveal otherwise confidential client information to prevent a client from committing a crime (of these, four required such disclosure). Further, nineteen states adopted confidentiality rules that permitted disclosure to rectify substantial financial loss resulting from the client using the lawyer's services in commission of a crime or fraud (of these three required such disclosure).[25]

Although the terms "confidential" and "privileged" are sometimes thought to be synonymous, attorney-client confidentiality is related to but distinct from the attorney-client privilege.[26] Unlike confidentiality rules that are found in the states' attorney disciplinary rules, privilege doctrine is embodied in evidence law.[27] The attorney-client privilege provides that an attorney or client cannot be compelled in judicial proceedings to disclose information communicated between attorney and client in confidence for the purpose of obtaining or providing legal assistance, unless an exception applies.[28] By definition, confidentiality encompasses substantially more information – all information communicated from any source for any purpose relating to the representation of the client.[29] Both confidentiality and privilege are relevant to a court's consideration of whether in-house counsel can prosecute a retaliatory discharge claim, because the court must consider: (1) is the information confidential, prohibiting its disclosure by the attorney?; and (2) is the information privileged, prohibiting disclosure by the attorney?[30] In order for the information to be used, the answer to both questions must be "no."[31]

It is against the backdrop of the state variants of Model Rule 1.6's confidentiality provisions (and related evidence rules governing privilege), that state courts have considered in-house counsel's claim for retaliatory discharge. The following cases reveal several important ways that confidentiality concerns impact in-house counsel's claim.

B. Three Views of In-House Counsel's Retaliatory Discharge Cause of Action

The facts and reasoning of the following cases reveal that three views have emerged regarding the availability of the retaliatory discharge cause of action, and when available, the means of proving the claim.[32] The first view is that the cause of action is not available. Courts following this view have reasoned that allowing a cause of action would damage the attorney-client relationship and that public policy is already adequately served by an attorney complying with his or her ethics obligations.[33] The second view is that an attorney is allowed to bring a cause of action for retaliatory discharge in defined circumstances, but that the attorney may not use confidential information to prove the claim.[34] Finally, the third view recognizes that in-house counsel has a cause of action for retaliatory discharge and finds that an exception to the rules of confidentiality allows an attorney to use confidential information offensively to prove the claim against the former client/employer.[35]

1. View 1: In-House Counsel Has No Cause of Action for Retaliatory Discharge

In the 1991 case *Balla v. Gambro*, the Illinois Supreme Court held that in-house counsel does not have a cause of action for retaliatory discharge.[36] Prior to *Balla*, other courts had considered and rejected an in-house attorney's cause of action for retaliatory discharge.[37] *Balla*, however, is considered by many to be leading opinion stating the "no cause of action" view.[38]

Balla was general counsel and manager of regulatory affairs to Gambro, a distributor of kidney dialysis equipment. When Balla learned of problems with a shipment of dialyzers, Balla told Gambro's president to reject the dialyzers because they did not comply with FDA regulations.[39] When the president ignored this advice and accepted the dialyzers, Balla told the president that Balla would "do whatever necessary to stop the sale of the dialyzers."[40] Shortly thereafter, Balla was fired. The next day, Balla reported the problems with the dialyzers to the FDA, who in turn seized the shipment and determined that the dialyzers had been adulterated.[41] Balla filed suit claiming that Gambro was liable for the tort of retaliatory discharge. Relying on a prior Illinois Court of Appeals case, *Herbster v. North American Co. for Life & Health Ins*urance, the trial court granted Gambro's motion for summary judgment finding that the attorney did not have a cause of action for retaliatory discharge.[42]

The Illinois Supreme Court concluded that not extending the tort of retaliatory discharge to in-house counsel was necessary to protect the "special attorney-client relationship," agreeing with the conclusion of *Herbster*.[43] The court noted that the following factors make that relationship special: "the attorney-client privilege regarding confidential

communications, the fiduciary duty an attorney owes to a client, the right of the client to terminate the relationship with or without cause, and the fact that a client has exclusive control over the subject matter of the litigation and a client may dismiss or settle a cause of action regardless of the attorney's advice."[44] The court reasoned that the attorney-client relationship is based on trust, and that if employers can be sued by in-house counsel for retaliatory discharge, they may be less likely to be "forthright and candid" with in-house counsel.[45] From there, the court concluded, "Employers might be hesitant to turn to their in-house counsel for advice regarding potentially questionable corporate conduct knowing that their in-house counsel could use this information in a retaliatory discharge suit."[46]

The *Balla* court stated that its decision was not only based on protection of the special attorney-client relationship, but was also based equally on the "nature and purpose of the tort of retaliatory discharge."[47] The court explained that the public policy (here, the protection of human life) is adequately safeguarded by the attorney's duty under the applicable ethics rule.[48] The court cited the requirement of its Rule 1.6(b): "A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily injury."[49] Because the attorney was obligated to make the disclosure under the rule, the court concluded it is unnecessary to extend the tort of retaliatory discharge to protect the public.[50]

The court rejected the argument that the attorney was faced with a "Hobson's Choice" of complying with the client/employer's wishes and risking license and criminal sanctions, or declining complying with the client/employer's wishes and risking the loss of employment.[51] The court explained that there is no such dilemma because an attorney licensed in Illinois has no choice but to follow the ethics rules.[52] The court noted that the ethical rules also require counsel to withdraw from representation if his continued represented would result in a violation of ethics rules.[53]

2. View 2: In-House Counsel Has a Cause of Action for Retaliatory Discharge in Defined Circumstances, but Cannot Use Confidential Information to Prove the Claim

The second view of in-house counsel's retaliatory discharge claim emerged in the 1994 case General *Dynamics Corp. v. Superior Court*, when the California Supreme Court found that in-house counsel can bring a claim for retaliatory discharge in some limited circumstances, but cautioned that confidential and privileged information cannot be used to prosecute the claim.[54] In the case, Rose alleged that he was terminated from his position as in-house counsel in retaliation for his investigation into employee drug use, his insistence upon an investigation of the bugging of the company's chief of security's office, and because he had advised that the company's salary policy might violate the Fair Labor Standards Act.[55] Rose alleged his termination was wrongful because it violated fundamental public policies.[56] General Dynamics filed a demurrer, asserting Rose had failed to state a claim, arguing the company could fire in-house counsel "for any reason or no reason."[57] The Supreme Court affirmed the trial court's and appellate court's rulings that Rose had stated a cause of action.[58]

In considering Rose's claim of retaliatory discharge in violation of public policy, the California Supreme Court explained the tort is provided not to compensate the employee for the loss of employment, but to vindicate the underlying fundamental public policy.[59] The court rejected the reasoning of *Balla* and other cases, which it summarized as standing for the propositions that (1) allowing the cause of action is harmful to the attorney-client relationship which is based upon trust; and (2) that a tort remedy for in-house counsel is redundant because in-house attorneys are under an ethical obligation to resign if they are asked to act illegally or unethically by their client/employer.[60]

The *General Dynamics* court concluded that an in-house attorney has a cause of action where employment is terminated for the attorney adhering to the requirements of a *mandatory* professional duty embodied in the rules of professional conduct, "either by an affirmative act required by the ethical code or statute or by resisting a demand of the employer on the ground that it is unequivocally barred by the professional code."[61] Examples of such mandatory duties are that an attorney may not be a party to the commission of a crime, destroy evidence, or suborn perjury.[62]

In addition, the *General Dynamics* court held that in-house counsel may state a claim for retaliatory discharge in the "limited circumstances" where a non-attorney would have a cause of action for retaliatory discharge and "governing professional rules or statutes expressly remove the requirement of attorney confidentiality."[63] It is in this second category that the court stated that the analysis required is more complex, because the court must consider whether a non-attorney could state a claim under applicable law and "whether some statute or ethical rule, such as the statutory exceptions to the attorney-client privilege . . . specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer and engage in the 'nonfiduciary' conduct for which he was terminated."[64] The court noted one such exception is found in the evidence code provision that provides no privilege if the lawyer reasonably believes that the disclosure of confidential information is necessary to prevent the client from committing a criminal act that is likely to result in death or substantial bodily harm.[65]

The *General Dynamics* court then cautioned that "where elements of a wrongful discharge in violation of fundamental public policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege."[66] The court noted that matters related to commission of a crime or fraud or actions likely to result in death or substantial bodily harm are exceptions to the attorney-client privilege, and that disclosure of such matters in a retaliatory discharge case are permitted.[67] The court

ultimately remanded the case to allow Rose to attempt to plead a cause of action under the new rules articulated by the court.[68]

Shortly after the *General Dynamics* decision, the Supreme Judicial Court of Massachusetts considered the in-house counsel retaliatory discharge question in *GTE Products Corp. v. Stewart.*[69] Stewart claimed that he was constructively discharged from GTE Products Corporation ("GTE") in wrongful retaliation for his attempts to convince GTE to warn the public about safety risks associated with certain products and for his insistence that GTE comply with laws governing disposal of hazardous waste.[70] The *GTE* court agreed with the *General Dynamics* court's reasoning, and held that in-house counsel can only state a cause of action for retaliatory discharge in limited circumstances. If in-house counsel's cause of action depends on a claim that compliance with employer demands would have resulted in the violation of a statute or disciplinary rule, the attorney must prove explicit statutory and ethical norms that embody policies of importance to the public at large.[71] In a footnote, the court noted that some ethics rules permit the disclosure of client confidences to prevent the commission of a crime. The court concluded, "In view of the inherent ability of a legal practitioner to affect the resolution of controversies affecting private parties and the public good, an attorney's discharge for compliance with these precepts at least, may, in appropriate circumstances, give rise to a claim for wrongful discharge."[72]

The *GTE* court also agreed with the General Dynamics' view that unless disclosure is permitted by disciplinary rule, an attorney may not prove a claim for retaliatory discharge by disclosing client secrets.[73] The court explained that the exceptions to confidentiality under the Massachusetts attorney disciplinary rules are extremely limited, but noted that the court was considering adopting a new disciplinary rule that would allow disclosure in more circumstances which might affect the ability of counsel to prove its claim.[74]

The following year, this same approach was followed in *Willy v. Coastal States Management Co.*[75] The Willy court considered approaches of various courts and concluded that the rationale of the *General Dynamics* and *GTE* cases more persuasive.[76] In considering whether a Texas attorney can use confidential information in proving the retaliatory discharge claim, the *Willy* court noted the limited exceptions to the general rule of confidentiality in effect at the time Willy filed suit.[77] The court explained that an attorney may reveal "confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct," but concluded this exception does not allow an attorney to use confidential information to prove a claim against a client.[78] Finding no exception to the general rule of confidentiality would allow Willy to prove his claim, the court found in favor of Coastal on its asserted point of error that Willy's claim is barred.[79]

3. View 3: In-House Counsel Has a Cause of Action for Retaliatory Discharge and Can Use Confidential Information to the Extent Necessary to Prove the Claim

During the past five years, a new trend has emerged of allowing in-house counsel to pursue a cause of action for retaliatory discharge and to use confidential information to prove the claim. The following cases have held that ethics rules will allow former in-house counsel to utilize confidential information to the extent necessary to prove a claim for retaliatory discharge.[80]

a. State Ethics Rule's "Claim or Defense" Exception to Confidentiality Interpreted to Allow Confidential Information to be used in a Retaliatory Discharge Case filed by Former In-House Counsel

In the 2000 case *Burkhart v. Semitool, Inc.*, the Montana Supreme Court became the first court to allow in-house counsel to use confidential information to prove a claim of retaliatory discharge.[81] Burkhart had served as in-house patent counsel for Semitool. Burkhart alleged that he was fired for refusing to file a fraudulent patent application.[82] Burkhart filed suit, alleging in part that he had been discharged in violation of Montana's Wrongful Discharge from Employment Act (hereinafter, "WDEA") which prohibits retaliation against an employee who refuses to violate public policy.[83] The trial court granted summary judgment, holding that an employee hired to provide legal services is precluded from bringing a claim that will require disclosure of confidential information.[84]

The *Burkhart* court recognized that two different views have emerged from states considering claims for retaliatory discharge by in-house counsel: the first denying a cause of action and the second allowing a cause of action but prohibiting counsel from revealing client confidences.[85] The court noted that the trial court had followed the reasoning of *Balla*, finding that Burkhart's obligations under the Rules of Professional Conduct served the same purpose to protect public policy as a cause of action for retaliatory discharge.[86] The Montana Supreme Court rejected this analysis, finding the reasoning of the *General Dynamics* decision and similar cases more persuasive and concluding that in-house counsel has a cause of action for retaliatory discharge under WDEA[87]

The *Burkhart* court then addressed the attorney's ability to use confidential information in the case. The court cited Montana Rule of Professional Conduct 1.6, which was based on the ABA Model Rule. Subsection b of the Montana rule provides that a lawyer "may reveal" confidential information to the extent the lawyer "reasonably believes necessary: (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. . . ." (hereinafter, the

"claim or defense" exception).[88] The court rejected the employer's argument that the comment to the Model Rule limits the application of the rule to permit disclosure of confidential information only to make a claim for an attorney's fee; the court was persuaded that Model Rule 1.6 was intended to allow the offensive use of confidential information in broader circumstances than the ABA's prior rule which only allowed offensive disclosure by an attorney to "establish or collect his fee."[89] For these reasons, the Montana Supreme Court concluded that its Rule 1.6 contemplates that a lawyer may reveal confidential attorney-client information, "to the extent the lawyer reasonably believes necessary to establish an employment-related claim against an employer who is also a client."[90] The court explained that the client's confidentiality can be protected in such cases by sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, in camera proceedings.[91]

b. Creating a "Claim or Defense" Exception to Allow In-House Counsel to Prove a Retaliatory Discharge Claim

In 2002, Tennessee followed the *Burkhart* reasoning in *Crews v. Buckman Laboratories International, Inc*., although the court was faced with the obstacle of an ethics rule that did not contain a "claim or defense" exception to the obligation of confidentiality.[92] Plaintiff Crews, in-house counsel for Buckman, learned that Buckman's general counsel was not licensed to practice law in the State of Tennessee and discussed her concern with a member of the Buckman board of directors.[93] Through a request for an ethics opinion to Tennessee's Board of Professional Responsibility, Buckman learned that a person must have a Tennessee law license to act as general counsel in Tennessee and that failure to have such license constitutes the unauthorized practice of law.[94] Thereafter, Buckman's general counsel took and passed the Tennessee bar exam, but did not become licensed because she did not take the Multi-State Professional Responsibility exam. Again, Crews approached Buckman officials about the general counsel's continuing licensure problem. In response, the general counsel yelled at Crews, suggested that she should leave the company, and later gave her a below-average raise despite being told earlier that she was doing a good job in the position.[95] In August 1999, after seeking legal advice concerning her ethical obligations, Crews reported the general counsel to the Board of Law Examiners. When the Board of Law Examiners issued a show cause order, the general counsel approached Crews and demanded to know what was in the Board's file. Shortly after this confrontation, the general counsel scheduled Crews' performance review.[96] At this time, Crews approached other company leaders about the situation and agreed with them that Crews should be transferred and that she should leave the company within six to nine months. Immediately thereafter, the general counsel discharged Crews, claiming that Crews had resigned.[97]

Crews filed suit, alleging common law retaliatory discharge in violation of public policy.[98] The trial court granted Buckman's motion to dismiss for failure to state a claim.[99] The court of appeals affirmed that the decision[100] and the Tennessee Supreme Court granted Crews' request for permission to appeal.[101] The court reviewed the history of courts' treatment of attorney claims for retaliatory discharge, considering *Balla's* prohibition of a cause of action and *General Dynamics*, *GTE*, and *Burkhar*t's allowance of a cause of action.[102]

The *Crews* court ultimately concluded that it agreed with the approaches of *General Dynamics*, *GTE*, and *Burkhart*.[103] The court reasoned that it seems anomalous to protect the non-lawyer who protects the public interest, but not the lawyer.[104] The *Crews* court rejected *Balla's* rationale that recognition of a retaliatory discharge cause of action is unnecessary to protect the public because the public is protected by the attorney's obligation to follow the ethics rules.[105] The court disagreed that the public is adequately protected by the ethics rules, explaining that lawyers often violate even mandatory ethical duties and that there is economic temptation to do so for in-house counsel who are dependent upon only one client for their livelihood.[106] The *Crews* court reasoned that attorney-client trust is not impacted by allowing a cause of action for retaliatory discharge, reasoning that trust is only impacted if we assume that the client wishes to act contrary to the public interest and expects the attorney to assist in violation of professional duties; the court said that it will instead presume that employers seek legal advice intending to comply with the law.[107] The court also reasoned that employers should be aware that attorneys may ethically reveal client confidences in many circumstances, thus, clients should not be less likely to seek counsel's advice based on a remote possibility of a retaliatory discharge suit.[108]

In considering the role of confidential information on in-house counsel's ability to prove its cause of action for retaliatory discharge, the Tennessee Supreme Court noted that the approach of some courts has been to prohibit the use of confidential information.[109] The court cited exceptions to an attorney's confidentiality obligation under Tennessee's ethics rules, including an exception allowing confidential information to be used offensively in a fee dispute.[110] Despite the limitations of the Tennessee ethics rule, the *Crews* court disagreed with allowing a cause of action for retaliatory discharge but prohibiting the use of confidential information.[111] The court quoted the Model Rule 1.6 provision allowing confidential information to be used to establish a "claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. . . ." and noted that other states have recognized that similar rules allow offensive use of confidential information in a wrongful discharge case.[112] Pursuant to its authority to regulate the practice of law in Tennessee, the *Crews* court adopted a new provision in its disciplinary rule, paralleling the language of Model Rule 1.6's "claim or defense" provision.[113] The court cautioned that lawyers should avoid unnecessary disclosure, limiting disclosure only to those who need to know and obtaining protective orders and making arrangements to minimize the risk of disclosure.[114]

c. Continuing Trend of Allowing the Use of Confidential Information by Former In-House Counsel

The trend of allowing the use of confidential information in retaliatory discharge cases brought by in-house counsel continued in 2003 and 2004. In cases filed in Utah and Florida, state courts agreed that the plain meaning of their ethics rules and public policy supported in-house counsel's use of confidential information to prove a claim against a former employer. While these cases did not concern the availability of a retaliatory discharge cause of action, they both dealt with the issue of how confidential information may be utilized by former in-house counsel.

In the 2003 decision of the Utah Supreme Court, *Spratley v. State Farm Mutual Automobile Ins. Co.*, the court considered whether in-house counsel could use confidential information in prosecuting a wrongful termination claim.[115] Spratley and Pearce had worked as in-house "claims litigation counsel" for State Farm.[116] They resigned in June 2000, concluding that they could not uphold their ethical duties as attorneys and comply with the unethical and illegal demands put on them by State Farm.[117] Spratley and Pearce sued for, among other things, retaliation and termination in violation of public policy.[118] When Spratley and Pearce left State Farm, they took a number of confidential documents with them.[119] State Farm filed a motion for a preliminary injunction and a protective order, to prevent disclosure of confidential information and to require the confidential documents to be returned to State Farm.[120] The Utah Supreme Court allowed interlocutory review of the trial court's order granting State Farm's motions. [121]

The *Spratley* court noted that under Utah disciplinary rules, confidential information may be disclosed "to the extent the lawyer reasonably believes necessary . . . [such as] . . . [t]o establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."[122] The court concluded that the plain language of the rule and the policy considerations outlined by courts such as *Crews* and *Burkhart* favor allowing disclosure of confidential information in a suit for wrongful discharge.[123] Like other courts, the *Spratley* court cautioned that in-house counsel and trial courts must exercise "great care" in disclosing confidences in such cases.[124]

A Florida appellate court considered whether in-house counsel had violated confidentiality and privilege in revealing confidential information to her attorney in *Alexander v. Tandem Staffing Solutions, Inc.*[125] While the issue in the case was not the availability of a retaliatory discharge cause of action, but rather disqualification of counsel, the case nonetheless answers the question of how Florida courts will apply confidentiality and privilege rules when former in-house counsel utilizes such information in developing a wrongful discharge claim.[126] Alexander was general counsel to Tandem.[127] In July 2002, Alexander reported to company officials that a company officer had accessed sex-related websites on the internet.[128] Fearing retaliation for initiating an investigation of the officer and reporting the violation within the company, Alexander consulted with attorney Rosenfeldt.[129] Rosenfeldt assisted Alexander in drafting a letter that is a requirement of complying with the Florida Whistleblower Act.[130]

When Alexander was subsequently terminated, she filed suit under the Florida Whistleblower Act.[131] Tandem moved to disqualify Alexander's counsel on the ground that Alexander had revealed "Tandem's attorney-client privileged information" to him.[132] The trial court granted the motion.[133] Alexander filed a petition for a *writ of certiorari* which was granted by the appellate court.[134] The court cited the relevant confidentiality rule, Florida Rule of Professional Conduct 4-1.6, which provides that a lawyer may reveal confidential information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client."[135] The court noted the related privilege rule allows disclosure of otherwise protected communications when the communication is relevant to an issue of breach of duty by the client to the lawyer.[136] Relying upon the confidentiality ethics rule and the privilege evidence rule, the court concluded that Alexander's disclosure was permitted.[137] The court reasoned that Alexander's whistleblower claim "was a 'controversy between the lawyer and client' within the meaning of the disciplinary rule and an 'issue of breach of duty . . . by the client to the lawyer' under the evidence rule[138] For these reasons, the court concluded that there was no basis to disqualify Alexander's counsel.[139]

C. Conclusions Regarding In-House Counsel Retaliatory Discharge Cases Decided to Date

Attorney-client confidentiality was central to the decision in each of the foregoing cases – whether the court subscribed to the view that in-house attorneys should have no cause of action for retaliatory discharge, a cause of action in limited circumstances with limited ability to use confidential information, or a cause of action with the ability to use confidential information to the extent necessary to prove the claim.[140] Some courts have been and will continue to be influenced by *Balla's* analysis that the special, confidential nature of the attorney-client relationship is such that a cause of action for retaliatory discharge should not be allowed. Other courts will be persuaded by *General Dynamics*, *Burkhart*, and other cases that have held that the existence of an attorney-client relationship does not prohibit in-house attorneys from stating a claim for retaliatory discharge. In states with confidentiality rules that allow attorneys to use confidential information to assert a claim in a controversy with a client, courts will be faced with the same issue considered by the *Burkhart*, *Spratley*, and *Alexander* courts, namely, whether that exception is broad enough to encompass the use of confidential information to prove a retaliatory discharge claim.[141]

Also as evidenced by the cases discussed above, the definition of confidentiality provided by state ethics rules can have multiple impacts on the determination of whether and how attorneys in that state will be allowed to pursue a claim for

retaliatory discharge. Because the confidentiality rule in *Balla* required the attorney to reveal confidential information to protect third parties from death or serious bodily injury, the court found that the ethics rules adequately protected the public and that a cause of action for retaliatory discharge was not needed.[142] If Illinois had instead adopted the pre-2003 version of Model Rule 1.6, there would have been no requirement that such information be revealed and the Illinois Supreme Court might have reached a different conclusion about the necessity of the cause of action to protect the public.[143] Confidentiality rules also set the tone for what is expected in the attorney-client relationship. As noted by the Tennessee Supreme Court, employer/clients should be aware that attorneys may ethically reveal client confidences in circumstances outlined in ethics rule.[144] Allowing a retaliatory discharge action is no more damaging to the attorney-client relationship than other exceptions to confidentiality, and should not cause undue harm to the attorney-client relationship. Further, rules may also evolve and change because of a court's view that an attorney should be allowed to prove a retaliatory discharge cause of action, even though current rules would not allow him or her to do so. This was the situation confronted by the *Crews* court when it used its authority to amend the confidentiality ethics rules to allow attorneys to use confidential information offensively to prove a claim in a dispute with an employer.[145]

A significant confidentiality issue that has not yet arisen, but which is contemplated by the *General Dynamics* case, is an attorney's discharge for disclosing confidential information that protects the public interest, but which disclosure is in violation of the ethical obligation of confidentiality to the client.[146] *General Dynamics* would prohibit the attorney from stating a claim for retaliatory discharge in these circumstances.[147] This is not an issue of proof – true, *General Dynamics* also prohibits confidential information from being used to prove the claim – but it is an issue of the existence of a cause of action. *General Dynamics* specifically states that in order for there to be a cause of action when an attorney is fired for taking action other than that mandated by an ethics rule, it is necessary that (1) a non-attorney would have a cause of action in the same circumstances and (2) "some statute or ethical rule, such as the statutory exceptions to the attorney-client privilege . . . specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer and engage in the 'nonfiduciary' *conduct for which he was terminated*."[148] Cases like *Burkhart* and *Crews* do not explicitly address this concern.[149] When and if the situation arises that an attorney reveals client information to protect the public but in violation of an ethical obligation to keep that information confidential, courts that currently broadly define an attorney's retaliatory discharge cause of action will have to decide if an attorney should have a claim for retaliatory discharge in those circumstances.

Finally, none of the foregoing cases considered the impact of the 2003 American Bar Association (hereinafter, "ABA") and Securities and Exchange Commission (hereinafter, "SEC") attorney ethics rules governing confidentiality.[150] For states that adopt the amended Model Rules 1.6 and 1.13, and for cases in which the SEC rule applies, the new rules will impact several confidentiality issues considered in determining if a retaliatory discharge cause of action should be allowed for in-house counsel. Using the issues that were significant in retaliatory discharge cases decided to date as a guide, the next section of this article consider what the new rules mean to in-house counsel's future claim for retaliatory discharge.[151]

II. New Confidentiality Rules and Their Likely Impact on In-House Counsel's Claim of Retaliatory Discharge

A. 2003 SEC Rules and ABA Rules Governing Confidentiality

In 2003, the SEC and the ABA both adopted ethics rules allowing attorneys to disclose confidential information regarding defined illegal client actions to prevent or rectify substantial financial harm to third parties (and in an appropriate case, to the client itself).[152] These ethics rules followed - and attempted to address issues raised by - corporate scandals such as Enron, WorldCom, and Global Crossing that devastated investor confidence in publicly traded companies.[153]

1. SEC Attorney Ethics Rules

The immediate precursor to the new ethics rules was Congress's enactment of the Sarbanes-Oxley Act of 2002.[154] Section 307 of the Sarbanes-Oxley Act required the SEC to issue rules setting forth minimum standards of professional conduct for attorneys appearing and practicing before the SEC in the representation of issuers.[155] The SEC adopted Part 205, "Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in Representation of an Issuer," codified as 17 C.F.R. § 205.[156] Section 205.3(b) and (c) address an attorney's duty to report material violations of the "issuer"[157] client within the organization – commonly referred to as "reporting up."[158] A "material violation" is broadly defined as "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."[159] Subsection (b) provides that an attorney must report evidence of a material violation to the issuer's chief legal officer, and if no appropriate and timely response is received, then the attorney must report the evidence to the audit committee, or a committee of disinterested directors, or if there is no such committee, to the board of directors.[160] Subsection (c) provides that evidence of a material violation may alternatively be reported to a qualified legal compliance committee if one is established by the issuer.[161]

Confidentiality concerns are addressed in 17 C.F.R. § 205.3(d). Subsection (1) of that rule provides that a report made by an attorney under part 205 may be used by the attorney in an investigation or litigation in which the attorney's compliance with the SEC rule is at issue.[162] The ability to disclose confidential information to protect third parties or the client is addressed in 17 C.F.R. § 205.3(d)(2) which provides:

> An attorney appearing and practicing before the [SEC] in the representation of an issuer may reveal to the [SEC], without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:
> (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 [an SEC] investigation or administrative proceeding from committing perjury . . ., suborning perjury . . ., or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the [SEC]; 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.[163]

The SEC specifically provides that its ethics rules supplement the ethics rules of the states.[164] Thus, even in the case of attorneys representing publicly traded companies, their conduct is also governed by state ethics rules. Because states often adopt or pattern their rules after the ABA Model Rules, the 2003 amendments to ABA Model Rules 1.6 and 1.13 are relevant to the issue of in-house counsel's future cause of action for retaliatory discharge.

2. 2003 Amendments to ABA Model Rules 1.6 and 1.13

In August 2003, the ABA House of Delegates voted to accept changes to the Model Rules as proposed by the ABA Presidential Task Force on Corporate Responsibility (hereinafter, "Task Force").[165] Model Rule 1.6 was amended to provide additional circumstances for permissive disclosure of client information. Like the prior version of the rule, paragraph a of the amended rule still provides that an attorney "shall not reveal information relating to the representation of a client" unless the client consents or the disclosure is impliedly authorized, or the disclosure is permitted by paragraph b. Paragraph b of the amended rule provides two new exceptions to an attorney's confidentiality obligation found in subsections (2) and (3).[166] The entire list of exceptions states:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> (6) to comply with other law or a court order.[167]

Model Rule 1.13, the rule setting out the ethics requirements in an attorney's representation of an organizational client, was also amended in 2003.[168] The amended Model Rule 1.13 contains new provisions regarding a lawyer's ability to reveal confidential information to third parties to protect the organizational client from the actions of the organization's constituents.[169] As background to understanding the confidentiality provisions, it is necessary to understand the other provisions of the rule. The amended Model Rule 1.13 recognizes that a lawyer employed by an organization "represents the organization acting through its duly authorized constituents."[170] Subsection (b) directs the lawyer that when faced with activity of a constituent that "is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization" the lawyer "shall proceed as is reasonably necessary in the best interest of the organization."[171]

Like the SEC rule, Model Rule 1.13 also contains a "reporting up" provision, requiring evidence of violations of law by constituents to be reported to others within the organization.[172] The rule provides, "Unless the lawyer reasonably believes

that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law."[173]

Subsection (c) of the amended Model Rule 1.13 addresses the issue of confidentiality and provides:

> Except as provided in paragraph (d), if
> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act that is clearly a violation of law, and
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization. [174]

As discussed in Section C, below, SEC Part 205.3(d)(2), Model Rule 1.6, and Model Rule 1.13 will have an impact on counsel's ability to pursue a claim for retaliatory discharge under state law. But first, the following section considers in-house counsel's ability to bring a cause of action under the Sarbanes-Oxley Act's provisions allowing a "whistleblower" cause of action.

B. The Sarbanes-Oxley Act's Whistleblower Cause of Action

Prior to considering the impact of the 2003 ethics rules on in-house counsel's common law cause of action for retaliatory discharge, it should be noted that section 806 of the Sarbanes-Oxley Act creates a civil cause of action for whistleblowers employed by publicly traded companies.[175] The Act provides that publicly traded companies may not discharge an employee because of "any lawful act done by the employee" to (1) assist in the investigation of or (2) assist in a proceeding filed against the employer/publicly traded company related to a violation of [provisions of the Sarbanes-Oxley Act],[176] or violation of an SEC rule or regulation, or violation of any Federal law relating to fraud against shareholders.[177] Assisting in such an investigation includes providing information to or otherwise assisting a federal regulatory or law enforcement agency, a member of Congress or Congressional Committee, or a person with supervisory control over the employee or other person within the organization with authority to investigate, discover or terminate the misconduct.[178] Assisting in a proceeding, includes filing a proceeding, testifying, participating in, or otherwise assisting in a proceeding against the employer.[179] The statute provides a cause of action not only for discharge, but also for demotion, suspension, threats, harassment, or other discrimination against the employee.[180] The remedies provided for in the statute are reinstatement, back pay, and compensation for any special damages sustained (including litigation costs, expert fees, and reasonable attorneys fees).[181] Section 806 does not differentiate between in-house counsel and other employees of the client – it simply states that the cause of action belongs to "an employee."[182]

Even though the Sarbanes-Oxley Act provides a whistleblower cause of action, it is still necessary to consider the impact of the SEC confidentiality rules on the common law claim for retaliatory discharge. The Sarbanes-Oxley Act specifically provides that the section does not "diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement."[183] Accordingly, by the terms of the Act, an employee may file a claim under the Sarbanes-Oxley Act and a claim for common law retaliatory discharge. Furthermore, the Sarbanes-Oxley Act does not provide a cause of action in all circumstances of retaliatory discharge, but only for attorneys covered by the Act and in those circumstances delineated in the whistleblower provisions of the Act.[184] For these reasons, it is also necessary to consider the impact of the 2003 SEC ethics rules on the common law cause of action for retaliatory discharge.

C. The Future of In-House Counsel's Common Law Cause of Action for Retaliatory Discharge in Light of the Confidentiality Provisions in the New Ethics Rules

The new confidentiality rules reflect a new attitude. When clients or the officers, directors and/or other agents of organizational clients act illegally, counsel is no longer required to silently protect their confidences. When clients take specified actions that violate law, the new SEC and ABA ethics rules allow attorneys to protect third parties (and at times, the organizational client itself) by disclosing confidential information to the extent necessary to prevent or rectify substantial financial injury.[185] Whether the confidentiality provisions[186] of these new rules will also protect the discharged in-house attorneys who chose to protect the public will be considered in the following sections.

1. New Confidentiality Rules and the Special Relationship of Trust and Confidence between Attorney and Client

The special relationship of trust and confidence between attorney and client has been important in courts' determination of whether in-house counsel will be allowed a cause of action for retaliatory discharge.[187] For example, in *Balla*, the Illinois Supreme Court concluded that the special relationship of trust and confidence between attorney and client is one reason why the tort of retaliatory discharge should not be allowed for in-house counsel.[188] The court noted that the relationship is such that attorneys receive client secrets that would not be revealed to "intimate friends." The court reasoned that if employers thought they could be sued by in-house counsel for retaliatory discharge, they might be less candid in their communications with counsel.[189] Other courts have reached the opposite result, based on their understanding of the attorney-client relationship. For example, the *Crews* court concluded that attorney-client trust is not impacted by allowing a cause of action for retaliatory discharge, reasoning that trust is only impacted if we assume that the client wishes to act contrary to the public interest and expects the attorney to assist in violation of professional duties.[190] The *Crews* court also reasoned that employers should be aware that attorneys may ethically reveal client confidences in many circumstances, thus, clients should not be less likely to seek counsel's advice based on a remote possibility of a retaliatory discharge suit.[191]

For states that adopt the new ABA Model Rules, as well as in cases in which the SEC rules govern the attorney's conduct, courts must now consider the impact of the new rules on the attorney-client relationship in determining if a retaliatory discharge cause of action should be permitted. Courts that at one time might have been persuaded that the cause of action would damage the special relationship of attorney and client, may now reach a different conclusion in light of the new rules and the commentary supporting those rules.

Under the new rules, the attorney-client relationship is still a special, fiduciary one, but it is now a relationship in which the client should have a lesser expectation of confidentiality. If clients ever had the view that *all* of their attorney-client communications would be kept confidential, that view has even less validity today with the increasing number of exceptions to confidentiality.[192] Clients who could once expect their attorneys would not reveal their confidences in any but the most extreme circumstances (such as when the client's actions threatened a life),[193] now should recognize that their attorneys are allowed to reveal their confidences to protect the financial interests of third parties who the client might injure by its illegal conduct.[194] Constituents of an organizational client should also be aware that the attorney is required to act in the best interest of the client, and not the constituents of the client.[195] As a result, it may be necessary for the attorney to exercise the right to disclose confidential information to protect the true client – the organization -- from the constituents who plan to take some illegal action that will substantially injure the organization.[196] Further, the comments to the Model Rules recognize that a client waives the right to expect confidentiality when the client plans to commit a crime or fraud that will result in substantial injury to the financial interests of another. Comment 7 to Model Rule 1.6 now provides that "such a serious abuse of the client-lawyer relationship [as described in 1.6(b)(2)] by the client forfeits the protection of this Rule."[197] The comments specifically provide that one factor that the lawyer should consider in determining whether to make a disclosure permitted by the rule is "those who might be injured by the client."[198] If a client knows that confidences can be revealed in all of these circumstances, the client should not be less likely to communicate with counsel simply because counsel has the ability to bring a claim for retaliatory discharge.

Like the concerns a court faces in determining whether a retaliatory discharge cause of action will adversely impact the attorney-client relationship, the ABA Task Force on Corporate Responsibility also had to consider whether creating new exceptions to confidentiality would adversely impact the attorney-client relationship. In its Final Report recommending changes to Model Rules 1.13 and 1.6, the Task Force noted that the attorney-client relationship is "one of trust and confidence, dependent upon strong recognition of the lawyer's general duty to maintain the confidence of client information."[199] The Task Force explained that there have always been exceptions to confidentiality, however, and that while such exceptions may detract from the relationship of trust, they are necessary to serve "important policy purposes, including the protection of the ultimate client or third parties, and the protection of the professional integrity of the lawyer."[200] The Task Force concluded that the balance struck by the prior rules was out of step with public opinion demanding that lawyers play a greater role in promoting corporate responsibility.[201]

The same analysis employed by the Task Force is equally applicable to the question of whether a retaliatory discharge claim has too great of an adverse impact on the attorney-client relationship. Exceptions to the rule of confidentiality that would allow an attorney to pursue a cause of action for retaliatory discharge do, perhaps, take something away from the relationship of trust between attorney and client. However, there is also value in allowing an attorney to pursue a claim for retaliatory discharge when the attorney has been discharged in contravention of public policy.[202] With increased interest in corporate responsibility, and in lawyers fostering corporate responsibility, many courts will be inclined to find that the trade off of encouraging lawyers to protect public policy (by providing a cause of action for retaliatory discharge) is worth some sacrifice of trust between attorney and client.

Finally, and perhaps most significantly, a court determining if the special nature of the attorney-client relationship should bar in-house counsel's retaliatory discharge cause of action should consider the text of Model Rule 1.6(b)(5). As discussed more fully below, Model Rule 1.6(b)(5) specifically recognizes that an attorney may reveal confidential information to the extent necessary to establish a claim in a controversy with the client.[203] While this exception is sometimes

thought of in terms of a fee dispute between attorney and client, the text of the rule and cases interpreting the rule support the conclusion that the rule allows disclosure in the context of a retaliatory discharge case.[204] In states that adopt Model Rule 1.6, it seems likely that courts will find that by adopting the rule the state has already determined that concerns about the special relationship of attorney and client are outweighed by the interest attorneys have in using confidential information in controversies against their clients.

The confidentiality rules not only impact the relationship of trust and confidence between client and attorney, but they also demonstrate public policy. An attorney is now permitted to reveal confidential information to protect the financial interests of third parties and the interests of the client from disloyal constituents. The following section explores the issues of permissive disclosure to protect third parties and clients and the rules' likely impact on in-house counsel's cause of action for retaliatory discharge.

2. Availability of a Retaliatory Discharge Cause of Action when In-House Counsel's Discloses Confidential Information As Permitted by SEC and ABA Rules

The ethics rules adopted by the SEC and ABA in 2003 permit – but do not require - counsel to disclose confidential information to protect third parties and organizational clients from financial harm caused by clients' illegal actions.[205] In determining whether discharged in-house counsel has a cause of action for complying with these rules, it will be necessary to consider whether public policy is advanced by the actions taken under these rules. The permissive nature of the confidentiality rules is likely to be considered in courts' decisions about whether to allow the cause of action.

The cases discussed in Section I reveal that courts have been deeply divided on the issue of whether in-house counsel should have a cause of action for retaliatory discharge when he or she is discharged for complying with the *mandatory* provision of an attorney ethics rule. In *Balla*, the Illinois Supreme Court stressed that the tort of retaliatory discharge is not needed to promote public policy when the public is adequately safeguarded by the attorney's duty to comply with applicable ethics rules.[206] This view has been criticized by courts and commentators that argue that barring a cause of action for retaliatory discharge puts the attorney in the difficult position of choosing between complying with a mandatory ethics duty but losing employment, or protecting his or her employment while violating a mandatory ethics duty.[207]

But when an attorney is discharged for taking an action that is only *permitted* by an attorney ethics rule, this analysis does not adequately address the issue of whether in-house counsel should have a retaliatory discharge cause of action. Assuming that the permissive disclosure rules are consistent with public policy (whether they are is discussed more fully below), it would seem that the *Balla* opinion would actually *support* a cause of action for retaliatory discharge: because the attorney is not required by ethics rules to disclose information to protect the public, a cause of action for retaliatory discharge would give an attorney the appropriate incentive to protect the public. In contrast, if the reason for allowing an attorney a cause of action for retaliatory discharge is that the attorney should not have to choose between livelihood and complying with a mandatory ethics rule, then that same reasoning might suggest that an attorney who can act ethically in either disclosing or not disclosing confidential information does not need the protection of tort law. He may act ethically while not disclosing confidential information and keep his job.

The *General Dynamics* court specifically addressed the issue of an ethics rule allowing (but not requiring) disclosure of confidential information and in-house counsel's cause of action for retaliatory discharge. When an attorney is fired for an activity that is not required by a mandatory ethics rule, the *General Dynamics* court would consider two issues in determining if the attorney has a cause of action for retaliatory discharge: (1) whether a non-attorney could state a claim under applicable law; and (2) "whether some statute or ethical rule, such as the statutory exceptions to the attorney-client privilege . . . specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer and engage in the 'nonfiduciary' conduct for which he was terminated."[208]

An attorney's actions taken under an ethics rule permitting but not requiring disclosure were at issue in the *Crews* case.[209] There, the Tennessee Supreme Court considered whether in-house counsel should have a claim for retaliatory discharge when she exercised a permissive, but not mandatory, right to disclose confidential information about general counsel's unauthorized practice of law.[210] Under Tennessee law, a retaliatory discharge claim must state a "clear public policy which is evidenced by an unambiguous constitutional, statutory, or regulatory provision."[211] The Crews court found such a statement of public policy in the attorney disciplinary rules prohibiting an attorney from assisting in the unauthorized practice of law.[212] The *Crews* court explained, however, that Crews was not under a "mandatory ethical duty" to report the general counsel's unauthorized practice of law.[213] She only had the "permissive duty" to do so under Ethical Consideration 1-3 which provided, "[a]though lawyers should not become self-appointed investigators or judges of applicants for admission, they should report to proper officials all unfavorable information they possess relating to the character or other qualifications of applicants."[214] Taking together the "permissive duty" to report the unauthorized practice of law and the clear statement of public policy in the disciplinary rules against the unauthorized practice of law, the *Crews* court found that the complaint had adequately alleged the "public policy" element.[215]

Neither *General Dynamics* nor *Crews* was concerned that the permissive nature of the attorney ethics rules allowing disclosure of confidential information should be cause to prohibit a cause of action for retaliatory discharge. Applying this analysis to a case arising under the new SEC or ABA rules, both *General Dynamics* and *Crews* would require a court to

determine whether the disclosure made (for which in-house counsel was fired) advanced public policy.[216] In considering the text of the rules, it is apparent that they are aimed at protecting the financial health of the public from illegal acts of clients. When a lawyer's services were used in furtherance of a crime or fraud, Rule 1.6(b)(2) allows the lawyer to disclose otherwise confidential information to prevent the client from committing a crime or fraud that is "reasonably certain to result in substantial injury to the financial interests or property of another," while Model Rule 1.6(b)(3) permits the lawyer to disclose information to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud.[217] Focusing on the protection of the client itself, Model Rule 1.13 permits disclosure of confidential information to third parties to prevent substantial injury to an organizational client caused by actions of the organization's constituents.[218] The rule allows such disclosure when the lawyer has not been successful in attempts to persuade the organization's highest authority to appropriately address an act that is "clearly a violation of law" and the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization.[219] Finally, the SEC rule permits disclosure to the SEC (1) to prevent the issuer from committing a violation of a federal or state securities law, a material breach of fiduciary duty arising under federal or state law, or a similar material violation of any federal or state law that is likely to cause substantial injury to the financial interest or property of the issuer or investors or (2) 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.[220]

In summary, in the case of the ABA rules, disclosure protects the public from financial loss caused by client fraud and crime. Under the SEC rules, the public is protected from financial injury resulting from violations of federal or state securities laws, material breach of fiduciary duty, or a similar material violation of any federal or state law. Because fraud, crime, securities law violations, breaches of fiduciary duty, and other violations of law are against public policy by virtue of statutes and case law prohibiting such conduct, the "public policy" test under most if not all state definitions' of public policy will be satisfied.[221]

The Final Report of the ABA Task Force on Corporate Responsibility, which explains the reasons for the amendments to the ABA rules, lends further support to the argument that the rules are intended to protect the public interest. The Task Force emphasized that the attorney's duty is not to executives of the client, and that the new rules must enhance the lawyer's ability to "promote corporate responsibility without undermining the constructive and collaborative relationship" of attorney and client.[222] In making recommendations regarding expanded exceptions to confidentiality, the Task Force expressed a concern with corporate officers and employees who reject legal advice or do not get legal advice, and choose to take a course that involves the corporation in a material violation of law. The Task Force concluded that in order to address such illegal actions, Model Rule 1.13 and 1.6 should be revised to "promote legal compliance."[223] The Task Force also reasoned that the interest of society in assuring that attorney services are not used to further a crime or fraud weighs in favor of permitting exceptions to the duty of confidentiality.[224] Commentators have supported permissive disclosure ethics rules as promoting public policy.[225]

Client/employers may nonetheless argue that the permissive nature of the rules reflects that the rules do not serve to protect an important, well-established public policy.[226] Clients may concede that a mandatory ethics rules can state public policy,[227] but will urge that a permissive rule cannot: if the rule stated an important public policy then the rule would impose a requirement on counsel. Some states define a public policy as one that is "mandated."[228] Clients will argue there is no mandate if the action under the ethics rule is not required. Accordingly, clients may reason, when an in-house attorney chooses to take action under these rules, he is not serving an important public policy. Further, clients will argue, counsel should know that if she discloses confidential information when she has the ability to maintain its confidentiality she jeopardizes her job because she has shown lack of loyalty to her employer.

Even if courts were to focus on the permissive nature of the ethics rule, it is likely that they would still conclude that the rules promote public policy. The argument that attorneys who disclose confidential information under the circumstances of these rules are disloyal is misplaced given the reason for the rules. The Task Force concluded that using attorney services for improper ends is an abuse of the attorney-client relationship, which results in "forfeiting the client's absolute entitlement to the protection of Model Rule 1.6."[229] The Task Force also explained that the amended Model Rules are permissive rather than mandatory because the Task Force feared that mandatory rules would result in attorneys making disclosures prematurely without taking the time to try to dissuade clients of illegal action.[230] The rules are not permissive because they do not advance important public interests. The "clearly mandated public policy" at issue in theses cases is that employers should not act illegally, not that employees/attorneys must stop them from acting illegally. The permissive nature of the rules does not mean that a mandated public policy is not at issue.[231]

In sum, the 2003 ethics rules adopted by the SEC and ABA are aimed at public protection. While the permissive nature of the rules may give employer/clients reason to argue that the rules do not state an important public policy the protection of which gives rise to a tort cause of action, cases decided to date do not focus on the permissive language of the rules and instead focus on the public policy advanced. Attorney protection of financial interests of the public from illegal actions of clients will likely qualify as an important public policy in most jurisdictions.

3. Model Rule 1.6's "Claim or Defense" Exception to Confidentiality and Proof of the Retaliatory Discharge Claim

In states that determine in-house counsel should be allowed to prosecute a claim for retaliatory discharge, the issue still remains whether counsel can use confidential client information to prove their case. As discussed above, a number of states have concluded that their attorney ethics rules allow confidential information to be utilized by in-house counsel to the extent necessary to make a claim for retaliatory discharge.[232] This section considers what impact the amended version of Model Rule 1.6 will have on an attorney's cause of action for retaliatory discharge.

The 2003 amendments to Model Rule 1.6 added significant new exceptions to an attorney's duty of confidentiality, but the "claim or defense" provision remained unchanged. Both old and new versions of Model Rule 1.6 provide that an attorney may disclose confidential information to the extent necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. . . ."[233]

Because the "claim or defense" exception was not changed between the old and the new version of the rule, some might believe that the 2003 revision of Rule 1.6 will not alter in-house counsel's ability to state a claim for retaliatory discharge. The amendment of the rule is significant, however, because the old rule was not widely adopted by the states. As previously discussed, forty-three states rejected the old version of Model Rule 1.6. As a result, some of those states' confidentiality rules did not contain any provision that would allow offensive disclosure of confidential information other than to make a claim for a fee in a dispute with a client.[234] For example, at the time of the *Balla* decision, Illinois's attorney ethics rule provided that confidential information could be disclosed "to establish or collect the lawyer's fee or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct."[235] Similarly when the *GTE* case was decided, the Massachusetts ethics rule only allowed offensive disclosure of confidential information by an attorney to "collect his fee"; however, the state was considering adopting a modified version of Model Rule 1.6 which would include the "claim or defense" language contained in the current rule.[236] Likewise, at the time of the *Crews* decision, Tennessee's attorney disciplinary rule only allowed the offensive use of confidential information in a fee collection dispute.[237] The adoption of the amended ABA Model Rule 1.6, which is now more consistent with states' views of other permissive disclosure provisions, will also result in the adoption of the new "claim or defense" provision.

Even a state with a "claim or defense" exception in its confidentiality rule patterned after the former version of Model Rule 1.6, might not have interpreted the rule to allow in-house counsel to use confidential client information offensively in other than a fee dispute.[238] The only comment to former Model Rule 1.6 concerning offensive use of confidential information provided:

> A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.[239]

Reading the comment together with the rule, at least one court considering the issue has concluded that the "claim or defense" language of the rule would allow counsel to use confidential information to establish a claim for a fee, but not a claim of retaliatory discharge.[240] The comments to the newly amended Model Rule 1.6 do nothing to improve upon this impression that the rule's offensive application is limited to fee disputes. The comment under the new Model Rule is identical to the comment under the old rule.[241]

Despite the lack of explanation in the comments to the rule – old or new version – there is ample authority to support an interpretation that counsel can use confidential information offensively in contexts other than fee disputes. As a threshold issues, the comments to the Model Rules are not limiting. As the Montana Supreme Court explained, although the comments to Model Rule 1.6 do not state that a lawyer may reveal confidential information in claims other than a fee dispute, such a statement is not necessary because "the Comments merely state examples of situations in which Rule 1.6 may be applied."[242]

The Montana Supreme Court has also explained that a broad interpretation of the "claim or defense" provision is supported by the provisions of the predecessor to the Model Rules, the ABA's Model Code of Professional Conduct. The Model Code confidentiality rule provided that an attorney could reveal "[c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."[243] The *Burkhart* court concluded that a comparison of the language of the rules reveals that Model Rule 1.6 is substantially broader. The *Burkhart* court also relied upon the "Model Code Comparison" contained in the ABA Model Rules to explain that the Model Rule is allows disclosure in more circumstances than the predecessor provision in the Model Code. The Model Code Comparison notes that the claim or defense provision of the Model Rule "enlarges the exception to include disclosure of information relating to claims by the lawyer other than for the lawyer's fee- for example, recovery of property from the client."[244] The *Burkhart* court reasoned that if the ABA drafters had intended the Model Rule to be as narrow as only allowing disclosure in a fee dispute, then the drafters would have simply kept the language of the prior rule under the Model Code.[245]

When a state adopts Model Rule 1.6 today, courts in that stare are likely to follow the lead of recent courts and other authorities that have interpreted the plain meaning of the confidentiality rules. With courts in Tennessee, Utah, and Florida following the analysis of the *Burkhart* opinion,[246] there is ample authority to support a reading of Model Rule 1.6 as allowing offensive disclosure of confidential information in a retaliatory discharge case. Additionally, in a 2001 Formal Ethics Opinion, the ABA Standing Committee on Ethics and Professional Responsibility concluded that in-house counsel may use confidential information to establish a retaliatory discharge claim.[247] Likewise, an Oregon State Bar ethics opinion reached the same conclusion.[248]

The *General Dynamics* court warned that if a claim cannot be established without violating the "attorney-client privilege," the suit should be dismissed to preserve the privilege.[249] The *General Dynamics* court's warning raises an issue that must be considered in every retaliatory discharge case: after determining if the attorney is permitted by ethics rules to disclose the confidential information, the court then must determine if the evidence rules provide an exception to the attorney-client privilege that will allow the information to be introduced into evidence.[250] This two step analysis was utilized in *Tandem* to determine that the information at issue in that retaliatory discharge case was neither confidential nor privileged.[251] While ethics rules and evidence rules normally complement one another,[252] it is possible that privilege rule could be more restrictive than the confidentiality rule. Thus, it necessary to consider both evidence and ethics rules before determining if the claim can be established without violating confidentiality or privilege.

III. Conclusion

In an age of corporate scandals, attorney ethics rules are coming to reflect different expectations of the attorney-client relationship. While attorney and client still have a relationship of trust and confidence, the new SEC and ABA ethics rules have opened the door for counsel to disclose confidential information in more circumstances to protect the financial interests of the public from the illegal actions of clients. When such rules are utilized by in-house counsel to blow the whistle on a client/employer's illegal activities and counsel is fired, courts will be faced with deciding whether counsel should have a cause of action for retaliatory discharge.

Historically, courts considering in-house counsel's retaliatory discharge claim have been concerned with the issue of attorney-client confidentiality, and justifiably so. The decision of whether to allow the cause of action involves a delicate balance of the interests of protecting attorney-client confidentiality against the competing interests of protecting the public from harm at the hands of the client and the attorney's interest in maintaining employment. Some courts have concluded that the protection of confidentiality must prevail. There are a growing number of courts, however, that have concluded that in-house counsel should have a cause of action for retaliatory discharge when she or he is fired in violation of public policy, even when that means some damage to a client's expectation of confidentiality.

These cases are helpful in anticipating the future viability of in-house counsel's retaliatory discharge cause of action under new confidentiality ethics rules in states that will adopt the new ABA Model Rules and in cases in which the SEC ethics rules are applicable. If courts hope to encourage protection of the public that the rules were designed to promote, it is likely they will allow in-house counsel to pursue the retaliatory discharge cause of action. The new rules recognize a lesser degree of confidentiality in the attorney-client relationship, such that allowing a cause of action for retaliatory discharge will not substantially, adversely alter the attorney-client relationship. Moreover, the permissive nature of the rules should not signal to courts that the rules do not promote an important public policy. The reasoning behind the rules and the text of the rules support the conclusion that the rules are intended to allow attorneys to protect the public from a repeat of the corporate scandals of the past. Case precedent and the current rules foreshadow a future in which courts will permit in-house counsel to pursue the retaliatory discharge cause of action so that public policy will be furthered.

FOOTNOTES

* Assistant Professor of Business Law, Harmon College of Business Administration, Central Missouri State University.

[1] For purposes of this article, the phrase "in-house counsel" means an attorney hired as an employee of a company. The job duties of in-house counsel need not be restricted to providing legal advice, but may include performing non-legal functions as well. This definition is consistent with the fact that an attorney, even when working in a non-legal capacity, is subject to state ethics rules, including the obligation of confidentiality. *See, e.g.*, Herbster v. North Am. Co. for Life and Health Ins., 510 N.E.2d 343, 346 (Ill. App. Ct. 1986) ("[W]e cannot separate plaintiff's role as an employee from his profession. Unlike the average employee, plaintiff was a registered attorney subject not only to North American's review but also, like other attorneys, subject to disciplinary review and the Code of Professional Responsibility.").

[2] Willy v. Coastal Corp., 647 F. Supp. 116, 118 (S.D. Tex. 1986) (attorney does not have a cause of action for retaliatory discharge under Texas law), *rev'd on other grounds*, 855 F.2d 116 (5th Cir. 1988), *cert. granted*, 501 U.S.1216 (1991), *aff'd*, 504 U.S. 935 (1992); *Herbster*, 501 N.E.2d at 348 (attorney does not have a cause of action for retaliatory discharge).

[3] *See infra* notes 6-151 and accompanying text.

[4] See infra notes 156-174 and accompanying text.

[5] *See infra* notes 152-252 and accompanying text.
[6] *See e.g.*, Sullivan v. Baptist Mem'l Hosp., 995 S.W.2d 569, 574 (Tenn. 1999) (explaining that under the employment at will doctrine, employment can be terminated "for good cause, bad cause, or no cause."); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 734 (Tex. 1985) (employee may be terminated at will and without definite cause); NLRB v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956) (employees at will may be terminated for "good cause, or bad cause, or no cause at all.").
[7] *See, e.g.*, Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959) (providing a cause of action for an employee who refused to give false testimony). *See also* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1931-32 (1983) [hereinafter *Protecting Employees*].
[8] Palmateer v. Int'l Harvester Co., 876 P.2d 876, 878 (Ill. 1981).
[9] *Protecting Employees*, *supra* note 7, at 1936-37 (citing three general categories in which a cause of action arises under the public policy exception to employment at will: (1) employee's refusal to commit an unlawful act, (2) employee's performance of an important public obligation, or (3) employee's exercise of a statutory right or privilege).
[10] *See, e.g., infra* notes 11-15 and accompanying text. *See also*, Sally R. Weaver, *Client Confidences in Disputes Between In-House Attorneys and Their Employer-Clients: Much Ado About Nothing – Or Something?* 30 U.C. DAVIS L. REV. 483, 491 n.23(1997) ("Most states require plaintiffs suing for retaliatory discharge to show that the defendant's action threatens a clearly defined, well-established public policy, although the parameters of the public policy exception vary from state to state.")
[11] Stein v. Davidson Hotel, 945 S.W.2d 714, 716-17 (Tenn. 1997).
[12] *Palmateer*., 421 N.E.2d at 878.
[13] *Id.*
[14] *Sabine Pilot*, 687 S.W.2d at 735.
[15] General Dynamics Corp. v. Superior Court, 876 P.2d 487, 497 (Cal. 1994).
[16] Retaliatory discharge suits are not the only remedy available to terminated in-house counsel. Where supported by the facts, courts have allowed in-house attorneys to pursue claims under a theory that their firing breached an implied contract requring that the employee only may be terminated for just cause. *See, e.g.*, Mourad v. Automobile Club Ins. Ass'n, 465 N.W.2d 395 (1991); Golightly-Howell v. Oil, Chemical & Atomic Workers Int'l Union, 806 F.Supp. 921, 924 (D. Colo. 1992).
[17] *See infra* notes 18-20 and accompanying text.
[18] ABA MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003) [hereinafter MODEL RULES].
[19] MODEL RULES R. 1.6(a) (2002).
[20] MODEL RULES R. 1.6(b) (2002).
[21] The terms "attorney ethics rules" and "attorney disciplinary rules" are synonymous and are used interchangeably in this article to describe the rules governing attorney behavior adopted by the states.
[22] *See infra* notes 36-139 and accompanying text.
[23] Final Report, ABA Presidential Task Force on Corporate Responsibility (March 31, 2003), *available at* http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf, at 49-50, n.89 [hereinafter Final Report].
[24] Final Report, *supra* note 23, at 49-50, 51 ("The Model Rules' treatment of the lawyer's obligation of confidentiality is significantly out of step with the policy balance reflected in the rules of professional conduct in most of the states. . . .").
[25] *Id.* at 49-50, n.89.
[26] *See* Weaver, *supra* note 10, at 522 ("Although lawyers often refer interchangeably to the attorney-client privilege and the ethical obligation to maintain client confidences, courts and commentators are generally careful to distinguish these concepts. The attorney-client privilege derives from the law of evidence and is generally administered by the courts, while the obligation to maintain client confidences arises under lawyers' rules of professional conduct and is generally defined and articulated by lawyer organizations.").
[27] *Id.*
[28] *See* RESTATEMENT (SECOND) OF THE LAW GOVERNING LAWYERS, § 68 (2000) [hereinafter RESTATEMENT] ("Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided § 86 [which explains the ability to invoke the privilege when attempt is made to introduce evidence or seek discovery of privileged communications] with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.").
[29] *See* MODEL RULES R. 1.6(a), cmt. 3 (2003) ("The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.")
[30] *See supra* notes 26-29 and accompanying text.
[31] *Id.*
[32] *See, e.g.*, Lisa Overall, *Retaliatory Discharge and In-House Counsel – A Comparative Analysis of State Law in the Wake of the Tennessee Supreme Court's Decision in Crews v. Buckman Laboratories*, 33 U. OF MEM. L. REV. 629, 631 (2003). *See also* Brenda Marshall, *In Search of Clarity: When Should In-House Counsel Have the Right to Sue for Retaliatory Discharge*,

14 GEO. J. LEGAL ETHICS 871, 873-83 (2001) (explaining the "historic" approach of *Balla* prohibiting a cause of action, the creation of a cause of action in *General Dynamics*, and the (then-recent) decision in *Burkhart*) allowing the use of confidential information as provided in ethics rule).
[33] *See infra* notes 36-53 and accompanying text.
[34] *See infra* notes 54-79 and accompanying text.
[35] *See infra* notes 80-114 and accompanying text.
[36] Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991).
[37] *See, e.g., Herbster*, 501 N.E.2d at 344-48 (holding that in-house counsel who was allegedly fired for refusing to destroy discoverable information does not have a cause of action because of the confidential and fiduciary nature of the attorney-client relationship and the client's unfettered right to terminate the attorney-client relationship); *Willy*, 647 F. Supp. at 118-19; Nordling v. Northern States Power Co., 465 N.W.2d 81, 85 (Minn. Ct. App. 1991) (rejecting former in-house counsel's retaliatory discharge claim, relying upon *Herbster* and reasoning that the client must have the unfettered right to discharge counsel to prevent "friction or distrust" in the relationship.").
[38] *See, e.g.*, General Dynamics, 876 P.2d at 498 (describing *Balla* as the "leading opinion"); Todd Myers, *The In-House Attorney Employment Dilemma*, 6 KAN. J. L. & PUB. POL'Y 147, n.108 (1997).
[39] *Id*. at 105-06.
[40] *Id*. at 106.
[41] *Id*.
[42] *Id*., citing *Herbster*, 501 N.E.2d 343.
[43] *Id*. at 108.
[44] *Id*.
[45] *Id*. at 109.
[46] *Id*. In his dissenting opinion, Justice Freeman responded that the purpose of the attorney-client relationship is to seek legal advice and that most of the time the client will follow that advice. Denying the tort of retaliatory discharge to in-house counsel only protects those clients who choose to act contrary to advice that their conduct violates the law, thus giving "assistance and protection of the courts to scoundrels." *Id*. at 113-14 (Freeman, J., dissenting).
[47] *Id*. at 108.
[48] *Id*.
[49] *Id*. at 109.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id*. at 110. In 2004, the Illinois Court of Appeals was asked to reconsider the applicability of the *Balla* decision in *Ausman v. Arthur Andersen, L.L.P.*, 810 N.E.2d 566 (Ill. Ct. App. 2004). Ausman alleged that she was discharged from her position as in-house counsel by Arthur Anderson "in retaliation for her efforts to ensure compliance with SEC regulations through enforcement of Andersen's independence review, [and that her termination was] with malicious indifference to federal public policy." *Id*. at 568. After her claim for common law retaliatory discharge was dismissed by the trial court, Ausman argued in the appellate court that *Balla* does not prohibit her cause of action because she was fired not for upholding an ethics rule but for protecting the public interest by urging compliance with SEC auditor independence rules. *Id.* at 569. The court noted that it is "doubtful" that Ausman's alleged "disagreement" with Anderson about independence review "would rise to the level of a clearly mandated public policy." *Id.* at 572. The court concluded, however, that it was unnecessary to consider the issue because *Balla* clearly states that the tort of retaliatory discharge should not be extended to in-house counsel licensed to practice law in the state of Illinois.[53] *Id*. The court also rejected Ausman's request that the court overrule *Balla*, explaining that the court does not have authority to overrule a decision of the Illinois Supreme Court. *Id.*
[54] 876 P.2d 487 (Cal. 1994).
[55] *Id. at* 490-91.
[56] *Id. at* 491.
[57] *Id*.
[58] *Id*.
[59] *Id*. at 494-95.
[60] *Id*. at 500.
[61] *Id.* at 501.
[62] *Id*.
[63] *Id*. at 502.
[64] *Id*. at 503.
[65] *Id*. at 503, citing CAL. EVID. CODE, § 956.5.
[66] *Id*. at 503-04.
[67] *Id*. at 504.

[68] *Id*. at 505.
[69] GTE Products Corp. v. Stewart, 653 N.E.2d 161 (Mass. 1995).
[70] *Id*. at 163.
[71] *Id*. at 166-67.
[72] *Id*. at 167, n.10.
[73] *Id*. at 167.
[74] *Id*. at 167-68, n.12 (quoting the then-current rule which allows the attorney to disclose confidential information "to establish or collect his fee or to defend himself" in a claim against the client, while the proposed rule would allow disclosure in various circumstances including "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.").
[75] Willy v. Coastal States Mgmt. Co., 939 S.W.2d 193, 197 (Tex. App. 1996). This case is the appeal from the state trial court decision following reversal of the original federal court decision in Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd on other grounds*, 855 F.2d 116 (5th Cir. 1988), *cert. granted*, 501 U.S.1216 (1991), *aff'd*, 504 U.S. 935 (1992).
[76] *Id*. at 198-200.
[77] *Id*. at 200, citing TEX. CODE OF PROF'L RESPONSIBILITY, art 10, § 9, DR 4-101.
[78] *Id*. The court further explained in dicta that the *current* confidentiality rules allow an attorney to reveal confidential information "to the extent necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client," but stated that the comments to the rule "suggest that this provision applies in situations in which a lawyer is attempting to collect a fee." *Id*. at 200, citing Tex. Disciplinary R. Prof'l Conduct 1.05(c)(5).
[79] *Id*. at 200-01.
[80] *See infra* notes 81-124 and accompanying text.
[81] Burkhart v. Semitool, 5 P.3d 1031 (Mont. 2000).
[82] *Id*. at 1033.
[83] *Id*. The statute provides in pertinent part "A discharge is wrongful only if: (1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy. . . ." MONT. CODE ANN. § 39-2-904.
[84] *Id*. at 1036.
[85] *Id*. (internal citations omitted).
[86] *Id*. at 1038.
[87] *Id*. The court did not consider whether the limits on an attorney's cause of action for retaliatory discharge discussed in the *General Dynamics* case would apply to an attorney claim under the WDEA. *Id*. at 1036-38.
[88] *Id*. at 1040.
[89] *Id*. at 1041, citing MODEL CODE OF PROF'L CONDUCT, DR 4-101(C).
[90] *Id*. at 1041.
[91] *Id*.
[92] Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852 (Tenn. 2002).
[93] *Id*. at 855-56.
[94] *Id*.
[95] *Id*. at 856.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*. at 857.
[100] *Id*. The Tennessee Court of Appeals found no cause of action reasoning that (1) public policy is adequately served by the ethics rules; (2) recognition of the cause of action would impair the attorney-client relationship; and (3) allowing damages would shift to the employer the cost of counsel complying with ethical duties. *Id*.
[101] *Id*.
[102] *Id*. at 858-59.
[103] Id. at 860.
[104] *Id*.
[105] *Id*.
[106] *Id*. at 860-61.
[107] *Id*. at 861.
[108] *Id*. Like the *Burkhart* court, the *Crews* court did not consider whether it would apply any limitations like those discussed in *General Dynamics* on in-house counsel's ability to state a cause of action for retaliatory discharge. *Id.* at 858-61.
[109] *Id*. at 862-63. The court described the *General Dynamics* and *GTE* courts as "largely tak[ing] away with one hand what they appear to give with the other." *Id.* at 863.
[110] *Id*. at 862-63, citing TENN. DR 4-101(C).

[111] *Id*. at 863 ("With little imagination, one could envision cases involving important issues of public concern being denied relief merely because the wrongdoer is protected by the lawyer's duty of confidentiality. Therefore, given that courts have recognized retaliatory discharge actions in order to protect the public interest, this potentially severe limitation strikes us as a curious, if not largely ineffective, measure to achieve that goal.").
[112] *Id*., citing *Burkhart*, 5 P.3d at 1041 and Oregon State Bar Legal Ethics Comm. Formal Op. 1994-136 (1994).
[113] *Id*. at 864.
[114] *Id*., citing MODEL RULES R. 1.6, cmt. 19.
[115] Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603 (Utah 2003).
[116] *Id*. at 605-06.
[117] *Id*. at 606.
[118] *Id*.
[119] *Id*.
[120] *Id*.
[121] *Id*.
[122] *Id*. at 608.
[123] *Id*. at 609.
[124] *Id*. at 609-10. The court noted that Spratley and Pearce could be required under ethics rules to return the original documents to State Farm, but that they could retain copies of the files at their own expense. *Id*. at 611.
[125] Alexander v. Tandem Staffing Solutions, Inc., 881 So.2d 607 (Fla. Dist. Ct. App. 2004).
[126] *Id*. at 608-09.
[127] Id. at 608.
[128] *Id*.
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] *Id*.
[133] *Id*.
[134] *Id*.
[135] *Id*. at 609.
[136] *Id*., citing FLA. STAT. § 90.502(4)(c) (2003).
[137] *Id*.
[138] *Id*.
[139] *Id*. The court noted that its decision was consistent with the "well-reasoned opinion" of the Utah Supreme Court in *Spratley*. *Id*. at 609-10. The *Alexander* court pointed out that the Florida and Utah ethics rules are almost identical and summarized the reasoning of the *Spratley* decision. *Id*.
[140] *See supra* notes 36-139 and accompanying text.
[141] *See supra* notes 81-139 and accompanying text.
[142] *See supra* notes 47-50 and accompanying text.
[143] MODEL RULES R. 1.6(b)(1) (2002) (permitting attorneys to reveal confidential client information to prevent reasonably certain death or substantial bodily harm).
[144] *See supra* note 108 and accompanying text.
[145] *See supra* notes 109-114 and accompanying text.
[146] *See supra* notes 63-65 and accompanying text.
[147] *See id*.
[148] *General Dynamics*, 876 P.2d at 503 (emphasis added).
[149] *See supra* notes 87, 108 and accompanying text.
[150] *See supra* notes 36-139 and accompanying text.
[151] *See infra* notes 152-252 and accompanying text.
[152] *See infra* notes 156-174 and accompanying text.
[153] *See* Susan P. Koniak, *Symposium: Regulating the Lawyer: Past Efforts and Future Possibilities: When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1236-38 (2003); E. Norman Veasey, *State-Federal Tension in Corporate Governance and the Professional Responsibilities of Advisors*, 28 IOWA J. CORP. L. 441, 442-43 (2003).
[154] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).
[155] 15 U.S.C. § 7245.
[156] 17 C.F. R. § 205 (2005). Section 205 was adopted on January 29, 2003, and was effective on August 5, 2003.
[157] As used in part 205, "Issuer means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78(c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 781), or that is required to file reports

under section 15(d) of that Act (15 U.S.C. 780(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq*.), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term 'issuer' includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of , or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer." 17 C.F.R. § 205.2(h)

[158] 17 C.F.R. § 205.3(b), (c).

[159] 17 C.F.R. § 205.2(i). Breach of fiduciary duty is defined as "any breach of fiduciary duty or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions." 17 C.F.R. § 205.2(d).

[160] 17 C.F.R. § 205.3(b)(3).

[161] 17 C.F.R. § 205.3(c).

[162] 17 C.F.R. § 205.3(d)(1).

[163] 17 C.F.R. § 205.3(d)(2).

[164] 17 C.F.R. § 205.1. When there is a conflict between the rule of a state and the SEC rule, the SEC rule governs. *Id*.

[165] MODEL RULES R. 1.6 and 1.13 (2003). *See also* Lawrence A. Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEGAL ETHICS 35, n.5 (2003).

[166] MODEL RULES R. 1.6(b) (2003).

[167] *Id.*

[168] MODEL RULES R. 1.13 (2003).

[169] MODEL RULES R. 1.13(c) (2003).

[170] MODEL RULES R. 1.13(a) (2003).

[171] MODEL RULES R. 1.13(b) (2003).

[172] *Id.*

[173] *Id.*

[174] MODEL RULES R. 1.13(c) (2003). Model Rule 1.13(d) provides, "Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law." MODEL RULES R. 1.13(d) (2003).

[175] Sarbanes-Oxley Act of 2002, § 806, Protection for Employees of Publicly Traded Companies who Provide Evidence of Fraud, modifying Chapter 73 of title 18, United States Code. "Publicly traded companies" are defined as companies with a class of securities registered under section 1 of the Securities Exchange Act of 1934 or a company that is required to file reports under section 15(d) of the Securities Exchange Act of 1934. 18 U.S.C. § 1514A(a).

[176] The cited provisions of the Sarbanes-Oxley Act are §§ 1341 ("Frauds and Swindles"); 1343 ("Fraud by Wire, Radio or Television"), 1344 ("Bank Fraud"), and 1348 ("Securities Fraud").

[177] 18 U.S.C. § 1514A(a)(1), (2).

[178] 18 U.S.C. § 1514A(a)(1).

[179] 18 U.S.C. § 1514A(a)(2).

[180] 18 U.S.C. § 1514A(a). In order to pursue a cause of action for discharge or discrimination under the statute, an employee must first file a complaint with the secretary of labor. If no final decision is made by the Secretary of Labor within 180 days, then the employee may bring an action in the appropriate federal district court. 18 U.S.C. § 1514A(b).

[181] 18 U.S.C. § 1514A(c).

[182] 18 U.S.C. §1514A(a). No reported case arising under the whistleblower provisions of the Sarbanes-Oxley Act has involved a claim by in-house counsel. *See* annotations, 18 U.S.C. A. § 1514A.

[183] 18 U.S.C. §1514A(d).

[184] 18 U.S.C. § 1514A.

[185] *See supra* notes 156-174 and accompanying text and *infra* notes 217-225 and accompanying text.

[186] The new ABA and SEC ethics rules also contain provisions related to an attorney's obligation to "report up" – the obligation to report information of illegal activity to higher levels within an organization. *See supra* notes 158 and 172 and accompanying text. Confidentiality concerns are not implicated by reporting up, because confidential information is not disclosed outside of the organization. *See generally*, Final Report, *supra* note 23, at 56. Although the subject is beyond the coverage of this article which is focused only on the confidentiality provisions of the new rules, it is likely that "reporting up" provisions will also result in termination of attorney employment and related lawsuits for retaliatory discharge.

[187] *See, e.g.*, *Herbster*, 501 N.E.2d at 348. *See also* Weaver, *supra* note 10, at 494 (stating that a major theme in cases denying a retaliatory discharge claim to in-house counsel is the fear that recognizing the tort will "significantly impair the special relationship of trust between attorneys and their clients.")

[188] *Balla*, 584 N.E.2d at 108.

[189] *Id*. at 109.

[190] *Crews*, 78 S.W.3d. at 861.
[191] *Id*.
[192] Attorneys may have an obligation to inform clients about the exceptions to confidentiality rules so that clients will understand the circumstances in which their confidences may be revealed. *See generally* Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441 (1990).
[193] This was the applicable rule in jurisdictions that adopted the pre-2003 version of Model Rule 1.6. *See* MODEL RULES R. 1.6(b) (2002).
[194] MODEL RULES R. 1.6(b)(2), (3) (2003), and 17 C.F.R. § 205.3(d)(2).
[195] MODEL RULES R. 1.13(c).
[196] MODEL RULES R. 1.13(c) and 17 C.F.R. § 205.3(d)(2).
[197] MODEL RULES R. 1.6, cmt. 8 (2003).
[198] MODEL RULES R. 1.6, cmt. 15 (2003).
[199] Final Report, *supra* note 23, at 47.
[200] Id. at 48-51.
[201] *Id*. at 51-52.
[202] *See* Weaver, *supra* note 10, at 502 ("Although the possibility that an in-house attorney might sue for retaliatory discharge may alter the attorney-client relationship, that alteration would, on balance, be beneficial rather than detrimental to the corporate entity, its in-house counsel, and the public interest.").
[203] MODEL RULES R. 1.6(b)(5) (2003).
[204] *See infra* notes 232-248 and accompanying text.
[205] *See supra* notes 156-174 and accompanying text.
[206] *Balla*, 584 N.E.2d at 109-10.
[207] *See, e.g., General Dynamics*, 876 P.2d 500-01 ("[I]n-house attorneys, more than other organizational employees, are imbued with ethical constraints on the direction their efforts may legitimately take. . . . [I]n-house lawyers ought to have access to a judicial remedy in those instances in which their employment is terminated for adhering to the requirements of . . . a mandatory professional duty. . . ."); Weaver, *supra* note 10, at 495-96 ("The [*Balla*] court allowed Balla's employer to punish him for adhering to a mandatory rule of professional conduct. Under the Illinois court's decision, Balla had two choices: comply with his ethical obligations and lose his job; or remain silent, keep his job, and face serious ethical sanctions."); H. Lowell Brown, *Ethical Professionalism and At-Will Employment: Remedies for Corporate Counsel When Corporate Objectives and Counsel's Ethical Duties Collide*, 10 GEO. J. LEGAL ETHICS 1, 29 (1996) ('[A] wrongful termination cause of action should be reserved for those cases in which counsel has no ethical choice, consistent with the explicit requirements of the standards of professional conduct, but to defy the employer's wishes."); Grace M. Giesel, *The Ethics or Employment Dilemma of In-House Counsel*, 5 GEO. J. LEGAL ETHICS 535, 535-36 ("In-house attorneys . . . face the dilemma of acting in accordance with the applicable rules of professional responsibility and perhaps losing their jobs. Alternatively, in-house attorneys can ignore the ethical mandates and subject themselves to an inferior professional stance and perhaps even professional discipline.").
[208] *General Dynamics*, 876 P.2d at 503. The *GTE* case also addressed the possibility that an attorney would be discharged for making a permissive disclosure, but only suggested that it might recognize a cause of action in such a case: "An attorney also has a right to reveal client confidences and secrets indicating that a client intends to commit a crime, and the information necessary to prevent commission of that crime. In view of the inherent ability of a legal practitioner to affect the resolution of controversies affecting private parties and the public good, an attorney's discharge for compliance with these precepts at least may, in appropriate circumstances, give rise to a claim for wrongful discharge." *GTE*, 653 N.E.2d at 167, n.10.
[209] *Crews*, 78 S.W.3d at 864-65.
[210] *Id*. at 864.
[211] *Id.*
[212] *Id.* at 864-65.
[213] *Id.* at 865.
[214] *Id.*
[215] *Id*.
[216] *See id.*
[217] MODEL RULES R. 1.6(b)(2), (3) (2003).
[218] MODEL RULES R. 1.13(c) (2003).
[219] *Id*.
[220] 17 C.F.R. § 205.3(d)(2)(i), (iii).
[221] *See supra* notes 10-15 and accompanying text.
[222] Id. at 24-25.
[223] *Id*. at 34-35.
[224] Id. at 52.

[225] *See, e.g.*, Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Up the Ladder and Beyond: The New Professional Standards for Lawyers Under the Sarbanes-Oxley Act*, 49 VILL. L. REV. 725, 781 (2004) ("Permissive disclosure reinforces the lawyer's duty to provide only lawful assistance and advice to clients. It also provides the lawyer with a last resort weapon and increased leverage in dealing with a difficult client or one embarked on an unlawful or fraudulent course of conduct."); Rutherford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9, 69 (2003) (arguing that the revised Model Rules should go even further to protect the interests of the corporate client and its shareholders, employees, and creditors).
[226] *See supra* notes 10-15 and accompanying text.
[227] Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (1980) ("Employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers . . . . In certain instances, a professional code of ethics may contain an expression of public policy.").
[228] *See, e.g., supra* note 12 and accompanying text.
[229] Final Report, *supra* note 23, at 54. One comment to Rule 1.6 also provides that "such a serious abuse of the client-lawyer relationship [as described in 1.6(b)(2)] by the client forfeits the protection of this Rule." MODEL RULES R. 1.6, cmt. 8 (2003).
[230] Final Report, *supra* note 23, at 53, n. 94.
[231] Further, cases involving permissive disclosure of confidential information often involve attorneys also acting as mandated by state ethics rules. For states that recognize a cause of action when an attorney follows a mandatory ethics rule, the additional actions required by ethics rules may help support the retaliatory discharge cause of action. For example, an attorney who discloses confidential information regarding illegal client activity may also be required to resign if his continuing representation will result in the violation of law. MODEL RULES R. 1.16(a). In such a case, the attorney's withdrawal was mandated, is consistent with public policy of prohibiting attorneys from assisting clients in illegal activities, and would support a claim for retaliatory discharge. Additionally, in-house attorneys who are fired for disclosing confidential information to protect the client "organization" under Model Rule 1.13 or the "issuer" client under 15 C.F.R. § 205.3(d)(2), have a strong argument that their actions were mandated by Model Rule 1.13(b) which requires attorneys to act in the "best interests" of the organization. MODEL RULES R. 1.13(b). In such a case, the attorney's disclosure was required to act in the best interest of the client, is consistent with public policy of attorneys protecting the client organization (including the investing public for issuers), and would support a claim for retaliatory discharge.
[232] *See supra* notes 81-124 and accompanying text. Though Florida did not directly address the issue of proving a cause of action for retaliatory discharge, the *Tandem* case generally supports the proposition that confidential information can be used in such circumstances. *See supra* notes 125-139 and accompanying text.
[233] MODEL RULES R. 1.6(b)(3) (2002); Model Rule 1.6(b)(5) (2003).
[234] *See* Weaver, *supra* note 10, at 536-37 (citing thirteen states in 1997 that did not have a "claim or defense" provision in their confidentiality ethics rule, nine of which follow the old Model Code language).
[235] IL. S. CT. R. OF PROF'L CONDUCT, R. 1.6 (1990).
[236] *GTE*, 653 N.E.2d at 168. The court noted that adopting the "claim or defense" language "might . . . affect the ability of in-house counsel to prove a claim of wrongful discharge."
[237] *Crews*, 78 S.W.3d at 863, citing TENN. SUP. CT. R. 8, DR 4-101(B)(1).
[238] *See* Weaver, *supra* note 10, at 536-37 (citing thirty-seven states in 1997 that had a "claim or defense" provision in their respective confidentiality ethics rules).
[239] MODEL RULES R. 1.6, cmt. 9 (2002).
[240] *Willy*, 939 S.W.2d at 200. The court stated that Texas' confidentiality rule (in affect at the time of the decision) allows an attorney to reveal confidential information "to the extent necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client," but reasoned that rule would not allow disclosure in a retaliatory discharge case because the comments to the rule "suggest that this provision applies in situations in which a lawyer is attempting to collect a fee." *Id*., citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(c)(5).
[241] MODEL RULES R. 1.6 cmt. 11 (2003).
[242] *Id*. at 1041.
[243] *Id*. at 1041, citing MODEL CODE OF PROF'L CONDUCT, R. 4-101(C).
[244] *Id*.
[245] *Id*.
[246] *See supra* notes 92-139 and accompanying text.
[247] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-424 (2001).
[248] Oregon State Bar Legal Ethics Committee, Formal Op. 1994-136 (1994).
[249] *General Dynamics*, 876 P.2d at 503-04.
[250] *See supra* notes 30-31 and accompanying text.
[251] *See supra* notes 135-139 and accompanying text.

[252] *See, e.g.*, RESTATEMENT, § 64 (allowing lawyer to disclose confidential information when necessary for the lawyer to defend against a charge that the lawyer acted wrongfully in the course of representing a client) and RESTATEMENT § 83 (providing that the attorney-client privilege does not apply to a communication relevant and reasonably necessary for the lawyer to use in a proceeding to defend the lawyer against a charge that the lawyer acted wrongfully during the course of representing the client).