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General Dynamics v. Superior Court: One Giant Step Forward for In-House Counsel or One Small Step Back to the Status Quo?

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NOTE, GENERAL DYNAMICS V. SUPERIOR COURT: ONE GIANT STEP FORWARD FOR IN-HOUSE COUNSEL OR ONE SMALL STEP BACK TO THE STATUS QUO?

INTRODUCTION

A high ranking corporate officer responsible for environmental planning and control is asked by the corporation's president to shred documents evidencing an illegal release of highly toxic chemicals into the groundwater. He is aware that the corporation intends to hide the release. The corporate officer refuses to engage in such unlawful behavior and decides to report the conduct in the interest of public safety. The corporation promptly dismisses the officer for refusing to comply with the corporation's instructions. Under current law, the corporate officer can sue his employer for wrongful termination and obtain compensation while he searches for another job.[1]

However, in jurisdictions other than California, a corporate in-house counsel placed in the same situation would have no recourse whatsoever.[2] He or she could be terminated without recourse for refusing to perform an act that would ultimately endanger the public welfare.[3] Until recently, this question had not been addressed in California. In *General Dynamics v. Superior Court*,[4] however, the California Supreme Court fashioned a limited right for in-house counsel to sue their employers for wrongful termination.

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1. *See, e.g.*, Petermann v. Teamsters Local 396, 344 P.2d 25 (Cal. Ct. App. 1959) (employee allowed to bring wrongful termination suit after being fired for refusing to commit perjury); Palmateer v. Int'l Harvester Co., 421 N.E.2d 876 (Ill. 1981) (public policy claim allowed for employee who investigated and reported criminal activity of his employer); Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973) (employee cannot be fired for exercising a statutorily conferred right to file a Workers Compensation suit); O'Sullivan v. Mallon, 390 A.2d 149 (N.J. Super. Ct. Law Div. 1978) (employee may bring wrongful termination suit for refusing to perform a medical procedure for which she was not licensed to perform).

2. *See* Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd on other grounds*, 855 F.2d 1160 (5th Cir. 1988); Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991) (refusing to allow in-house counsel the right to sue after being terminated for objecting to the sale of defective medical equipment); Herbster v. North American Co. for Life and Health Ins., 501 N.E.2d 343, 346-348 (Ill. App. Ct. 1990) (refusing to allow in house counsel the right to sue after being terminated for refusing to destroy certain discovery documents). *See also* Michael L. Closen & Mark E. Wojcik, *Lawyers Out in the Cold*, 73 A.B.A. J. 94 (1987). *But see* Mourad v. Automobile Club Ins. Assoc., 465 N.W. 2d 395, 399, 402 (Mich. Ct. App. 1991) and Nordling v. Northern States Power Co., 478 N.W.2d 498, 503 (Minn. 1991) (holding that in-house counsel have the right to sue for wrongful termination based on contract principles, but not public policy). *Compare with* Parker v. M & T Chem., Inc., 566 A.2d 215, 222 (N.J. Super. Ct. App. Div. 1989) (holding that in-house counsel have the right to sue for wrongful termination based on a specific whistleblower statute, but failing to address whether a professional standard of ethics could serve as sufficient public policy).

3. For a comprehensive survey of recent case law regarding this subject, see Damian E. Okasinski, Annotation, *In-House Counsel's Right to Maintain Action for Wrongful Discharge*, 16 A.L.R. 5th 239 (1993).

4. 876 P.2d 487 (Cal. 1994).

Why it took so long for the California courts to recognize that just as non-attorney employees need protection from wrongful termination, so do attorneys who are similarly situated, is unclear. In essence, the previous standard enunciated by the courts was that because one chose to be a lawyer and therefore was required to follow certain mandated professional standards, she did not have the right to be treated fairly in their employment.[5] On its face, this proposition raises some clear inequities.

In-house counsel share one overriding common characteristic with their non-attorney corporate counterparts: they are dependent on one company for their livelihood. Therefore, they should be entitled to substantially the same rights afforded their colleagues. Unfortunately, rigid rules applicable to attorneys, shaped and molded from centuries-old predicates of common law, dictate otherwise. These rules conflict with the evolving role of attorneys in society and with the evolving economic structure of society. Earlier case law has struggled with this concept. Prior to *General Dynamics*, courts recognized the inherent unfairness that follows from the attorney-client relationship as applied in the corporate setting. These courts, however, have not been bold enough to confront these issues. The *General Dynamics* court finally made such an attempt and did resolve some of the problems inherent in the in-house counsel employment setting.

This Note will analyze this recent decision of the California Supreme Court and will examine its impact on in-house counsel in California. Part I will briefly discuss the tort of wrongful discharge and the public policy exception. Part II will discuss wrongful termination as it relates to attorneys. Part III will analyze the court's opinion in the *General Dynamics* case. Part IV will examine the impact and effect of *General Dynamics* on in-house counsel in California. Part V will further discuss whether the case was correctly decided and, if not, what further steps need to be taken, specifically concentrating on the confidentiality rules in California. Part VI will propose an alternate dispute resolution system as a possible solution to the confidentiality problem associated with attorney suits against their clients.[6] This Note

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5. *See supra* note 2 and accompanying text.

6. This Note will focus exclusively on wrongful termination based on public policy. It will not address wrongful terminations based on contract theories. The *General Dynamics* Court noted that, "because so-called 'just cause' contractual claims are unlikely to implicate values central to the attorney-client relationship, there is no valid reason why an in-house attorney should not be permitted to pursue such a contract claim in the same way as the non-attorney employee." General Dynamics v. Superior Court, 876 P.2d at 490. A "just cause" claim is a limitation on an employer's historical power to terminate an employee at-will, which differs from a public policy claim. It arises out of the conduct of the parties in the employment relationship and not from some type of public good. *Id.* at 495, 497. For example, a "course of conduct" could include certain oral representations that a person will not be fired except for good cause, glowing recommendations from superiors and promotions. Foley v. Interactive Data, 765 P.2d 373, 384 (Cal. 1988). A court can determine that, based upon a certain "course of conduct," an implied-in-fact contract not to fire except for good cause has been established. If an implied-in-fact contract not to fire except for good cause arises then the employer cannot fire the employee at will.

Indeed, some jurisdictions that do not allow in-house counsel to sue on public policy

will conclude that while the California Supreme Court did indeed take a bold step in recognizing that in-house counsel require some protection against wrongful termination, because of the current state of the law in California, it will be difficult, if not impossible, to accomplish the laudable goals set forth in the *General Dynamics* decision.

I. WRONGFUL DISCHARGE: A BRIEF OVERVIEW

A. The History of Employment-at-Will

The tort of retaliatory discharge arose as a means to counter the harsh results that followed from the employment-at-will doctrine.[7] The employment-at-will doctrine is a court-developed doctrine drawn from a nineteenth century treatise on master-servant law.[8] The doctrine was that an at-will employee was terminable by the employer for any reason.[9] Courts generally felt that rules precluding an employer's right to terminate their employees would force those employers to associate with their employees in a non-consensual relationship.[10]

Because of changing social structures and mores, certain public policy concerns began to compete with the at-will doctrine, causing conflict and rendering it increasingly outmoded.[11] Out of this conflict between the

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grounds, specifically allow contract claims. *See* Rand v. CF Industries, Inc., 797 F. Supp. 643 (N.D. Ill. 1992) (applying Illinois law); *see also* Mourad v. Automobile Club Ins. Assoc., 465 N.W.2d 395 (Mich. Ct. App. 1991), Nordling v. Northern State Power Co., 478 N.W.2d 498 (Minn. 1991). *But see* Balla v. Gambro, 584 N.E.2d 104, 108 (Ill. 1991), and Herbster v. North American Co. for Life and Health Ins., 501 N.E.2d 343, 348 (Ill. App. Ct. 1990).

7. Elliot M. Abramson, *Why Not Retaliatory Discharge for Attorneys: A Polemic*, 58 TENN. L. REV. 271, 272 (1991).

8. *Id.* at 271 (quoting H. WOOD, MASTER AND SERVANT 134 (2d ed. 1886)).

9. *Id.*

10. *Id.*

11. *Id.* at 271-72. Professor Abramson also explains that the employment-at-will doctrine was further tempered by the common law principle that parties may not incorporate terms into a contract that are clearly injurious to the public welfare (citing People *ex rel.* Peabody v. Chicago Gas Trust Co., 22 N.E. 798, 803 (Ill. 1889)). *See generally* Raymis H.C. Kim, Comment, *In-House Counsel's Wrongful Discharge Under the Public Policy Exception and Retaliatory Discharge*, 67 WASH. L. REV. 893 (1992); Patricia O'Dell, *Retaliatory Discharge: Corporate Counsel in a Catch-22*, 44 ALA. L. REV. 573 (1993) (summarizing the history of the employment-at-will doctrine). O'Dell notes that the survival of American industry no longer requires subversion of employee rights. In other words, when the American economy was rapidly industrializing, there was more of a need for employers to be free to hire and fire workers as they saw fit. *Id.* at 575-76. In today's post-industrialized economy there is less need for employers to have the right to terminate employees at-will. *Id.* Furthermore:

> The at-will rule has since suffered substantial erosion. First, and perhaps, most importantly, unionization has increased job security. Collective bargaining agreements protect approximately twenty-five percent of the nonagricultural United States labor force by forbidding the firing of unionized employees except for "cause" or "just cause." Second, approximately nineteen percent of the United States work force are federal, state, or local government employees, of whom the majority are protected from arbitrary dismissal by civil service rules. A third form of protection

employers' rights to conduct business without judicial interference and the rights of the employee not to be terminated for improper reasons arose the tort of wrongful discharge. Courts recognized this tort so that employers could not coerce employees to forgo their rights at the expense of their jobs.[12] Employers had employees in the precarious position of being dependant on their employers for their livelihood. Employers, however, were not dependant on single employees because there were always others to replace fired employees. Unfortunately, there were not always new jobs for the fired employee. This situation has been likened to "that of a helpless prisoner, caught between the employer's demand for active participation in criminal or illegal actions and his own job security."[13]

In order to prove a wrongful termination claim, two elements must be satisfied. First, a plaintiff must show that he was discharged in retaliation for his activities on the job.[14] Second, a plaintiff must show that the discharge was in contravention of a clearly mandated public policy.[15] For in-house counsel, however, the rules of confidentiality and various rules of professional responsibility sometimes make these elements difficult or impossible to prove. The interplay between these two elements and in-house counsel's professional duties are addressed throughout this Note.

B. The Public Policy Exception to Employment-at-Will

The public policy exception to the employment-at-will doctrine permits in-house counsel to allege they were terminated for a reason that is contrary to public policy. Essentially, counsel are claiming they were asked to do something injurious to the public welfare or prohibited from doing something that public policy has already determined is proper; for example, filing a workers compensation claim. "Public policy wrongful termination claims are pure creatures of law."[16] The theoretical reason for labeling a discharge wrongful in certain cases is not based on the terms and conditions of the employment contract. Rather, it is based on a "duty implied in law on the part of the employer to conduct its affairs in compliance with public

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has come from a variety of statutes, beginning with the National Labor Relations Act of 1935 that have established that employees may not be fired because of their membership in particular protected classes.

Id. at 576 n.22 (quoting Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1934 (1983)).

12. Abramson, *supra* note 7, at 272. *See also* O'Dell, *supra* note 11, at 577.

13. Seymour Moskowitz, *Employment-At-Will & Codes of Ethics: The Professional's Dilemma*, 23 VAL. U. L. REV. 33, 51 (1988).

14. Dianna Smith, Comment, *The Effect of Rule 1.6 on the Professional Situation of In-House Counsel*, 18 J. LEGAL PROF. 299, 314 (1993).

15. *Id.*

16. General Dynamics v. Superior Court, 876 P.2d 487, 497 (Cal. 1994).

policy."[17] The tort of wrongful termination reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes.[18]

A precise definition of public policy has never been set forth. However, the California Court of Appeal, in *Petermann v. International Brotherhood of Teamsters, Local 396*[19] offered the following explanation:

> By "public policy," is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. It is a principles under which freedom of contract or private dealing is restricted by law for the good of the community.[20]

The public policy exception to the employment-at-will doctrine is an evolving aspect of wrongful termination. Indeed, what constitutes public policy often determines the success of a wrongful termination claim.[21] This determination of what constitutes public policy is at the heart of the *General*

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17. Foley v. Interactive Data Corp., 765 P.2d 373, 376-77 (Cal. 1988).

18. Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1335 (Cal. 1980). According to a recent count, 43 jurisdictions have adopted the so-called retaliatory discharge cause of action as a restraint on the employer's historic at-will power of termination. *General Dynamics,* 876 P.2d at 497 (citing Sara Corello, Note, *In House Counsel's Right to Sue for Retaliatory Discharge*, 92 COL. L. REV. 389, 394 (1992)). As an example of jurisdictions that do not accept the public policy exception to the terminable-at-will status of employees, see Waldermeyer v. ITT Consumer Fin. Corp., 767 F. Supp. 989 (E.D. Mo. 1991); Grant v. Butler, 590 So. 2d 254 (Ala. 1991); Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977); Demarco v. Publix Super Markets, Inc., 384 So. 2d 1253 (Fla. S. Ct. 1980); Troy v. Interfinancial, Inc., 320 S.E.2d 872 (Ga. Ct. App. 1984); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Murphy v. American Home Products Corp., 448 N.E.2d 86 (N.Y. 1983). Nina G. Stillman, *Wrongful Discharge: Contract, Public Policy and Tort Claims*, *in* ANNUAL INSTITUTE OF EMPLOYMENT LAW at 827 (PLI Litig. & Admin. Practice Course Handbook Series No. 476, 1993).

19. 344 P.2d 25 (Cal. Ct. App. 1959).

20. *Id.* at 27. *See also* Palmateer v. Int'l Harvester Co., 421 N.E.2d 876 (Ill. 1981) finding:

> When a discharge contravenes public policy in any way the employer has committed a legal wrong. . . . But what constitutes clearly mandated public policy? . . . It can be said that public policy concerns what is right and just and what affects the citizens of the state collectively. It is to be found in the state's constitution and statutes and, when they are silent, in its judicial decisions. . . . The matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed.

Id. at 878-89.

21. *See, e.g.*, Merkel v. Scovill, Inc., 570 F. Supp. 133 (S.D. Ohio 1983) (discharge for a refusal to commit perjury at employer's request is a violation of public policy); Gantt v. Sentry Ins., 824 P.2d 680 (Cal. 1992) (discharge violated public policy where employer coerced employee to lie during governmental investigation); Nees v. Hocks, 536 P.2d 512 (Or. 1975) (employee discharged because she served on a jury stated a cause for wrongful discharge); Ludwick v. This Minute, Inc., 337 S.E.2d 213 (S.C. 1985) (employee discharged for honoring a subpoena stated a claim for wrongful discharge). Other examples include filing suit against an employer and refusal to commit or participate in an unlawful act or crime. Stillman, *supra* note 18, at 834.

Dynamics decision.

III. WRONGFUL TERMINATION AND LAWYERS

A. Cases Denying In-House Counsel the Right to Sue

Although the tort of wrongful discharge of non-attorney employees has been accepted in most jurisdictions, when attorney employees such as in-house counsel are involved, several jurisdictions have refused to allow them to recover under a wrongful discharge theory.[22] These jurisdictions have deferred blindly to the attorney-client relationship in prohibiting in-house counsel from going forward with their wrongful termination claims. In most cases, they have done so without analyzing or addressing the impact this has on both in-house counsel and the legal profession. Before undertaking a discussion of these cases, it is helpful to break down attorney claims into two categories; refusal and reporting cases. Refusal cases involve instances in which the in-house counsel is fired for refusing to break a law or violate an ethical mandate.[23] Reporting cases involve instances in which corporate in-house counsel is fired for internally reporting illegal or fraudulent activity.[24] Regardless of whether or not the in-house counsel reports or refuses to participate in certain conduct, many problems and pitfalls await.

The leading case with respect to the rights of in-house counsel is *Balla v. Gambro*.[25] In *Balla*, Gambro, Inc. was a distributor of kidney dialysis machines manufactured by Gambro Germany.[26] Balla was corporate in-house counsel for Gambro, Inc., "responsible for all legal matters within the company."[27] Gambro Germany informed Gambro, Inc. that a shipment of dialyzers was forthcoming. By letter they also advised Gambro, Inc. that the dialyzers may not be effective for acute patients.[28] Gambro, Inc. accepted these shipments, stating they would "sell them to a unit that is not currently our customer but who buys only on price."

Balla, after learning about the dialyzer shipments, informed the president of Gambro, Inc. that he would do whatever was necessary to stop the sale of

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22. *See, e.g.*, cases cited *supra* note 2 and accompanying text.

23. Daniel S. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO. J. LEGAL ETHICS 553, 559-62; 576-79 (1988).

24. *Id. See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13. Rule 1.13 requires internal reporting action by the lawyer who discovers illegality meeting certain predicates of seriousness. The Rule suggests an exhaustion of internal remedies approach, advocating passing the information up the corporate ladder to the "highest authority that can act in behalf of the organization as determined by applicable law." *Id.*

25. 584 N.E.2d 104 (Ill. App. Ct. 1991).

26. *Id.* at 105. The sale and manufacture of dialyzers is regulated by the United States Food and Drug Administration. *Id.*

27. *Id.*

28. *Id.* at 106. Appellee informed the president of Gambro, Inc. to reject the shipments because they did not comply with FDA regulations. *Id.*

the dialyzers.[29] Approximately one month later, Balla was discharged from Gambro, Inc.[30] He then filed a retaliatory discharge claim seeking damages of $22 million.[31]

At the outset, the Illinois Supreme Court found that Balla was discharged "in contravention of a clearly mandated public policy."[32] However, the court refused to grant in-house counsel the right to sue for wrongful termination.[33] The court focused on the special relationship between attorneys and clients and the requirement that attorneys adhere to certain rules of ethical conduct.[34] The court first noted that because of the professional ethics rules attorneys are bound to follow, the public policy of protecting the lives and property of citizens is adequately safeguarded without extending the tort of retaliatory discharge to in-house counsel.[35]

The Illinois Supreme Court first noted that Rule 1.6(b) of the Illinois Rules of Professional Conduct states that attorneys must reveal information about a client if necessary to prevent death or serious bodily injury.[36] Therefore, because selling ineffective dialyzers could cause death or serious injury, an in-house counsel would be required to report the "misbranded and/or adulterated" dialyzers.[37] Because the attorney is required to report such information, the court reasoned that in-house counsel do not have a choice between following their ethical obligations as attorneys licensed to practice law, or following the illegal and unethical demands of their clients.[38] The court concluded that the public policy is already protected by the attorney's ethical mandates—thus, making the tort of wrongful discharge available is unnecessary.[39]

Furthermore, the court found that extending the tort of retaliatory discharge to in-house counsel would impair the attorney-client relationship

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29. *Id.*

30. *Id.* After he was terminated, appellee reported the shipment of the dialyzers to the FDA. The FDA seized the shipment and determined that the dialyzers were adulterated within the meaning of the Federal Food, Drug, and Cosmetic Act. *Id.*

31. *Id.*

32. *Id.* at 107-08. ("There is no public policy more important or fundamental than the one favoring the effective protection of the lives and property of citizens." (quoting Palmateer v. Int'l Harvester, 421 N.E.2d 876, 879 (Ill. 1981))).

33. *Id.* at 108.

34. *Id. See also* Herbster v. North American Co. for Health and Life Ins., 501 N.E.2d 343 (Ill. App. Ct. 1990), discussed *infra.*

35. *Id.* at 108-09.

36. *Id.* at 109. ILL. RULES PROF. CONDUCT Rule 1.6(b) reads: "A lawyer *shall* reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily injury."

37. *Balla,* 584 N.E.2d at 109. Note that the Illinois statute substitutes the word *shall* for *may* which is how it appears in the Model Rules. ILL. RULES PROF. CONDUCT Rule 1.6(b). California does not have a corresponding provision in its professional rules.

Illinois adopted the Code of Professional Responsibility. The numbers of the Illinois statutes correspond with the "Code" numbers.

38. 584 N.E.2d at 108-09.

39. *Id.* at 190.

that exists between in-house counsel and their employer.[40] This relationship allows a client to discharge an attorney at any time, without cause.[41] Such a proposition "recognizes that the relationship between an attorney and client is based on trust and that the client must have confidence in his attorney to ensure that the relationship will function properly."[42] The court held that if in-house counsel are given the right to sue their employers (clients), employers might be less willing to be forthright and candid with their in-house counsel.[43]

The court further noted that under the Illinois Rules of Professional Conduct, Balla was required to withdraw from representing Gambro if his continued representation would result in a violation of the Rules of Professional Conduct.[44] Additionally, the court noted that it would be unfair and inappropriate for the employer/client to bear the economic costs and burdens of their in-house counsel's adherence to their ethical obligations.[45] Based on the foregoing reasons, the Illinois Supreme Court refused to grant in-house counsel the right to sue for wrongful termination.[46]

The *Balla* court relied heavily on *Herbster v. North American Company for Life and Health Insurance*[47] to reach its decision. In *Herbster*, the plaintiff was employed as chief legal officer and vice president in charge of the legal department for North American under an oral terminable-at-will contract. He was fired for refusing to destroy or remove documents from North America's files which had been requested in pending lawsuits against North America in Federal District Court in Alabama.[48] These documents tended to support allegations of fraud against North American.[49] Plaintiff claimed that if he complied with the request to destroy the documents, he would have been in violation of Rules 1-102(5) and 7-109(a) of the Code of Professional Responsibility.[50]

Although the court agreed that there were clearly matters of public

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40. *Id.*

41. *See* Fracasse v. Brent, 494 P.2d 9, 13 (Cal. 1972); Martin v. Camp, 114 N.E. 46, 47-48 (N.Y. 1916).

42. 584 N.E.2d at 108-09.

43. *Id.*

44. *Id.* at 110 (citing ILL. RULES PROF. CONDUCT Rules 1.16(a)(2) & (a)(4)).

45. 584 N.E.2d at 110.

46. *Id.* at 113. "We agree with the conclusion reached in Herbster that, generally, in-house counsel do not have a claim under the tort of retaliatory discharge. However, we base our decision as much on the nature and purpose of the tort of retaliatory discharge, as on the effect on the attorney-client relationship that extending the tort would have." *Id.* at 108.

47. 501 N.E.2d 343 (Ill. App. Ct. 1986).

48. *Id.* at 344.

49. *Id.*

50. *Id.* (citing ILL. RULES PROF. CONDUCT Rule 1-102(5)) (providing that a lawyer shall not engage in conduct that is prejudicial to the administration of justice. Rule 7-109(a) provides that a lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce).

policy involved,[51] it focused exclusively on the attorney-client relationship. The court found that the policies surrounding the attorney's loyalty to the client, the ability of the client to terminate the relationship at will and the privileged and confidential nature of the attorney-client relationship all militated against granting in-house counsel the right to sue for wrongful termination.[52]

Another case which focused exclusively on an attorney's ethical mandates without considering the ramifications of adhering to those mandates is *Willy v. Coastal Corporation*.[53] In *Willy*, the plaintiff claimed he was terminated for attempts to cause his employer to comply with, or his refusal to violate, state federal environmental and securities laws. The court found that withdrawal from employment, as required under the Texas Code of Professional Ethics,[54] was a sufficient remedy for an attorney who did not wish to violate the law.[55] The court failed to provide any relevant discussion or analysis on the issue.

These cases are correct in that they recognize the attorney-client relationship as an important consideration in wrongful termination claims and that attorneys perform an important function in society. These cases fail to recognize, however, the unsatisfactory consequences that follow from a blind reliance on the attorney-client relationship as the sole remedy. Accordingly, these cases have been roundly criticized by numerous commentators and ultimately, the California Supreme Court in *General Dynamics*.

B. Cases Granting a Limited Right to Sue

Certain other jurisdictions allow in-house counsel a limited right to bring wrongful termination suits. Generally, these suits are based on contract theories, not public policy mandates. None of these cases explicitly hold that in-house counsel can maintain a suit for wrongful termination based on purely public policy grounds. Some, however, do provide the necessary insight and analysis to build upon in the future.

In *Mourad v. Automobile Club Insurance Association*,[56] the plaintiff was in-house counsel for the Automobile Club. He supervised the legal department for three years before being demoted to an executive attorney position.[57] Plaintiff eventually resigned and filed a retaliatory discharge suit

51. *Id.*
52. *Id.* at 346-48.
53. 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd on other grounds*, 855 F.2d 1160 (5th Cir. 1988).
54. *See id.* at 118 (citing TEX. RULES PROF. CONDUCT DR 2-110(C)(1)(c)).
55. *Id.*
56. 465 N.W.2d 395 (Mich. Ct. App. 1991).
57. *Id.* at 397.

against his employer.[58] He claimed that he was constructively discharged[59] because of his refusal to comply with alleged unethical and illegal orders from individual defendants who were not attorneys. He further claimed that if he had complied, he would have violated the Code of Professional Responsibility.[60]

The court based its decision to allow the plaintiff in-house counsel to sue on the existence of an implied just-cause contract.[61] In its discussion, the court distinguished cases which dealt with the question of whether a state will recognize a public policy exception to the typical employment-at-will contract.[62] The court then expressly declined to address whether or not a defendant could maintain a cause of action for wrongful discharge against an employer for refusing to violate the attorney's code of professional conduct.[63]

In *Nordling v. Northern States Power Company*,[64] the plaintiff began working for Northern States Power as an engineer. He also attended law school with the company's help. After being admitted to the bar, he worked for the defendant as in-house counsel.[65] During the course of his employment, the plaintiff learned of a plan to investigate the personal lifestyles of power company employees at a new facility. The plan consisted of surveillance of employees at home and on the site of the plant.[66] After informing his superiors about this plan, the plaintiff was discharged.[67]

The *Nordling* court held that in-house counsel should not be precluded from maintaining an action for breach of a contractual provision in an employee handbook, provided that the essentials of the attorney-client relationship are not compromised.[68] The court noted that the in-house counsel is an employee, much like any other corporate employee at the executive level. "His employer controls the hours he works, the salary and benefits he receives, and the work to which he is assigned."[69] Therefore,

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58. The plaintiff's suit also included a cause of action based on breach of a just-cause contract among other claims. Although this Note is not concerned with actions based on contractual grounds, this case is instructive for what it specifically does not address: the right to sue based on public policy grounds. *Id.* at 399.

59. Constructive discharge occurs when an employer makes work conditions so intolerable or reduces an employee's responsibility to such a level that the employee is forced to quit. *See, e.g.*, Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071, 1077 (5th Cir. 1981).

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

61. *Id.* at 400. *See supra* note 6.

62. *Id.* at 399. The court was distinguishing the *Willy, Herbster,* and *Parker* decisions. *See infra* notes 75-78 and accompanying text.

63. *Id.* at 401, 403.

64. 478 N.W.2d 498 (Minn. 1991).

65. *Id.* at 499.

66. *Id.* at 500.

67. *Id.*

68. *Id.* at 502. "Obviously an in-house attorney is not excused from keeping privileged communications confidential just because he is in-house." *Id.* at 503.

69. *Id.* at 501.

the court concluded, "there is no reason to deny the job security aspects of the employer-employee relationship" if this can be done without destroying the attorney-client relationship.[70]

With respect to a right to sue for wrongful termination based on public policy grounds, the court stated: "We do not have a *Balla*-type situation here and we do not think it prudent to speculate on how we might rule in a case not before us."[71] However, the court in dicta gave some indication of how they might rule on such a *"Balla*-type" issue. It found that a wrongful discharge claim is more likely to implicate the attorney-client relationship than a contract-based claim. Specifically, wrongful discharge claims may involve revelation of client confidences that relate to client wrongdoing.[72] Conversely, the court noted that the plaintiff had failed to identify any federal or state law or rule which his employer violated.[73] Thus, if the plaintiff could have identified a specific violation of law, then the Minnesota Supreme Court might have upheld a retaliatory discharge claim based on public policy.

In *Parker v. M & T Chemicals, Inc.*,[74] the in-house counsel plaintiff was constructively discharged after refusing to copy documents surreptitiously obtained from a competitor pertaining to a competitor's trade secret. The documents were under the protective order of a district court judge.[75] The plaintiff claimed he was engaging in conduct protected by the Conscientious Employee Protection Act ("Whistle Blowers' Act").[76] The court held that an attorney has a claim under the Whistle Blowers' Act even though this act

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70. *Id.* at 502.

71. *Id.* at 503.

72. *Id.*

73. *Id.* The statute cited by the plaintiff is generally known as a whistleblower statute. It reads, in pertinent part, that an employer shall not discharge an employee because "the employee . . . in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official." Minn. Stat. § 181.932, subd. 1(a) (1990). The court found that the idea of surveillance seems distasteful and may be ill-advised, but that does not mean it is illegal.

74. 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989).

75. *Id.* at 217.

76. *Id.* at 218. The "Whistle Blowers' Act", N.J.S.A. 34:19-1 subsections 3(a) and (c) prohibit retaliatory action against an employee who:

> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law,
> . . . .
> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> > (1) is in violation of a law, or a rule or regulation promulgated pursuant to law;
> > (2) is fraudulent or criminal; or
> > (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare.

Id.

was passed by the legislature and was not an ethical stricture promulgated by the Supreme Court of New Jersey.[77] However, the court did not rule on whether ethical mandates, promulgated by the supreme court of a state, could constitute a public policy, thereby justifying an action by in-house counsel for retaliatory discharge.

None of these courts went as far as *General Dynamics* in recognizing a common law right for in house-counsel to sue their employers. Some of the courts expressly prohibited such suits.[78] The *General Dynamics* court examined both the flaws and the strengths of the preceding cases, fashioning a limited common law right for in-house counsel to sue their employers for wrongful termination in violation of public policy.[79]

IV. *GENERAL DYNAMICS V. SUPERIOR COURT*

Andrew Rose began working in General Dynamics' legal department as a contract administrator in 1978.[80] After fourteen years in the organization during which he earned repeated commendations, Rose was abruptly fired for what General Dynamics claimed was Rose's inability to represent the corporation's interests vigorously.[81] Rose alleged that he was fired for reasons that violated fundamental public policies. First, Rose alleged that he was terminated because he spearheaded an investigation into employee drug use, which led to the dismissal of more than sixty employees.[82] Second, he alleged that he was terminated because he protested the company's failure to

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77. *Parker*, 566 A.2d at 222.

78. *See, e.g.*, cases cited *supra* note 2 and accompanying text.

79. For an interesting view with respect to wrongful termination claims brought by in-house counsel, see Rodney M. Confer, *Professional Tenure as a Means to Promote Ethical Compliance in the Civil Discovery Process*, 59 NEB. L. REV. 35 (1980). Mr. Confer's general proposition is that even if a wrongful discharge action were available to attorneys, in-house counsel would not act any differently and would still disobey the law. He further asserts that the organizational employer may be the motivating force behind the termination in the first place. *Id.* at 40. He notes that even if a lawyer was pressured into unethical behavior, that lawyer would lack the courage and conviction to resist the organization in a lawsuit. *Id.* He further assumes that in-house counsel would resist pressure placed upon them by an organizational client, whether or not they can pursue a wrongful discharge action. *Id.* Finally, Mr. Confer cavalierly comments:

> [A] certain number of suits brought by discharged attorneys would undoubtedly lack merit. In these instances, the incompetents, crackpots and other undesireables of the bar would be in the public spotlight, since these lawyers are the most likely to be discharged, and probably the least likely to understand when they had been fired for good reason. . . . With attorneys on either side trying to discredit the attorney on the other side, the worst aspects of law practice and the worst elements of the bar would be the most visible to the public. . . . Before we air our dirtiest laundry in public view, we should carefully weigh whether the benefits which might accrue would make this price worth paying.

Id. at 39.

80. General Dynamics v. Superior Court, 876 P.2d 487, 490 (Cal. 1994).

81. *Id.*

82. *Id.*

investigate the bugging of the chief security officer's office.[83] Third, he alleged he was terminated because of General Dynamics' displeasure regarding Rose's advice that the company's salary policy might be in violation of the Fair Labor Standards Act, possibly exposing the firm to several hundred million dollars in backpay claims.[84]

In a unanimous decision, the California Supreme Court held that in-house counsel can bring a common law tort claim for retaliatory discharge if they are forced to contravene their mandatory ethical obligations.[85] Further, if the attorney's conduct is merely ethically permissible, but not required by statute or ethical code, then the attorney may bring a wrongful termination so long as a non-attorney employee could maintain such an action.[86] However, the attorney must point to a statute or ethical provision that allows her to depart from the rules of confidentiality.[87]

This decision extends the rights of in-house counsel beyond that of any state in the nation; even states which have extended some modicum of protection such as Michigan, Minnesota, New Jersey, and Pennsylvania.[88] Instead of clarifying the law of wrongful termination as it relates to in-house counsel, however, this decision raises questions and uncertainties. For example, can in-house counsel reveal the information necessary to establish a wrongful termination claim under existing law? If not, are there alternative methods to allow in-house counsel to reveal the necessary information?

A. In-House Counsel vs. Independent Attorney

The California Supreme Court described the rise in the number of corporate in-house counsel in society today. The court noted large corporations increasingly have turned inward for the acquisition of legal services. Reasons for this rise include cost incentives, the increasing complexity of the regulatory environment, and the programmatic nature of

83. The court noted that this was allegedly a criminal offense because it involved a major defense contractor and constituted a serious breach of national security. *Id.*

84. *Id.* at 491. The case was remanded to the trial court. Therefore, there was no decision on the merits of this suit regarding whether the claims, as pleaded, rose to the level of a cognizable public policy. For an interesting debate between Myron Klarfeld, Rose's attorney and Norman Krivosha, chairman of the American Corporate Counsel Association and a former chief justice of the Nebraska Supreme Court, see Nina Schuyler, *Identity Crisis: Should Employment Law Protect In-House Counsel from the Managers Who Hire Them*, 14 CAL. LAW. 45, June 1994.

85. *General Dynamics*, 876 P.2d at 490.

86. *Id.*

87. *Id.* "In those instances where attorney-employee's retaliatory discharge claim is incapable of complete resolution without breaching the attorney-client privilege, the suit may not proceed." *Id.*

88. *See supra* note 2 and accompanying text.

such organizations.[89] The court then went on to note a crucial distinction between in-house counsel and independent lawyers.[90]

> Unlike the law firm partner, who typically possesses a significant measure of economic independence and professional distance derived from a multiple client base, the economic fate of the in-house counsel is tied directly to a single employer, at whose sufferance they serve. Thus, from an economic standpoint, the dependence of in-house counsel is indistinguishable from that of other corporate managers or senior executives who also owe their livelihoods and career goals and satisfaction to a single organizational employer.[91]

The court reasoned that because of the unique circumstances of in-house counsel, they should be entitled to a greater degree of protection than that afforded to independent counsel.

The general rule with respect to the attorney-client relationship in California, as set forth in *Fracasse v. Brent*,[92] has been that "the client's power to discharge an attorney, with or without cause, is absolute. . . ."[93] The court in *General Dynamics* took care to note that the specific facts of *Fracasse* dealt with a lawyer seeking compensation for being fired by his client. The relationship was based on a contingent fee agreement.[94] The court described this relationship as one of the most common of the traditional forms of the lawyer-client relationship. The court described it as a potential claimant who seeks redress by hiring an independent professional to prosecute her claim for personal injuries.[95] The court then noted that while *Fracasse* grants a personal injury client the absolute right to unilaterally discharge his attorney, it does not follow that all clients under all circumstances have the absolute right to unilaterally terminate the attorney-client

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89. *Id.* at 491. The court also referred to a study conducted in the early 1980's, finding that fifty-thousand lawyers were on corporate payrolls, a figure double that of fifteen years earlier. A more recent survey indicates that more than 10 percent of all lawyers in the United States are employed in-house by corporations. *See also* Nordling v. Northern States Power Co., 478 N.W.2d 498, 502 n.3 (Minn 1991) (In-house counsel comprise about 10 percent of the bar and their presence seems to be increasingly felt). For a discussion of how many organizations have high-powered in house legal departments that rival elite law firms in size, qualifications, and expertise of attorneys, and compensation, see Grace M. Giesel, *The Ethics or Employment Dilemma of In-house Counsel*, 5 GEO. J. LEGAL ETHICS 535, 541-44 (1992); and Mary C. Daly, *Ethical Challenges for Law Departments in the Twenty-First Century*, *in* SEVENTH ANNUAL INSTITUTE OF CORPORATE LAW DEPARTMENT MANAGEMENT: CONTROLLING AND REDUCING COSTS 227 (PLI Corp. Law & Practice Course Handbook Series No. 833, 1993).

90. The term "independent" in this context connotes independence from a particular corporation, including associates and partners within a law firm, as well as sole practitioners.

91. General Dynamics v. Superior Court, 876 P.2d at 491.

92. Fracasse v. Brent, 494 P.2d 9 (Cal. 1972). For a continuing validation of this general principle *see* Santa Clara County Counsel Attys. Assn. v. Woodside, 869 P.2d 1142, 1159 (Cal. 1994).

93. *Fracasse*, 494 P.2d at 13.

94. *General Dynamics*, 876 P.2d at 492.

95. *Id.*

relationship.[96] The distinct roles played by in-house counsel and independent counsel and the related limitation on the unfettered right of a client to discharge his attorney at will, which arises from the differing roles played by in-house counsel, forms the backbone of the court's decision to grant in-house counsel a limited right to sue for wrongful termination.

The California Supreme Court, in *General Dynamics*, went on to discuss three criteria that must be met in order to bring a wrongful termination claim. First, "the public policy at issue must be not only fundamental, but clearly established in the Constitution and the positive law of the state." Judge-made law or other sources are not included.[97] Second, "even if the requirement is established by positive law, the policy subserved by the employee's conduct must be a truly public one, that is, affect[ing] a duty which inures to the benefit of the public at large rather than to a particular employer or employee."[98] Third, decisions recognizing a tort action for discharge in violation of public policy must "seek to protect the public, by protecting the employee who refuses to commit a crime . . . , who reports criminal activity to proper authorities, or who discloses other illegal, unethical, or unsafe practices."[99] Thus, because in-house counsel's role is intrinsically different than that of independent counsel, in-house counsel should be allowed to maintain a cause of action for wrongful discharge as long as the three criteria discussed above are satisfied.

B. Public Policy as It Relates to In-House Counsel

The *General Dynamics* court reasoned that the doctrine of public policy is especially relevant with regard to attorneys, specifically with regard to in-house counsel.[100] The legal profession requires an attorney to recognize a dual allegiance.[101] On the one hand, an attorney's highest duty is to the welfare and interests of the client. This obligation, however, is constrained by specific professional qualifications. In other words, attorneys are bound

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96. *Id.* at 493. In fact, an unqualified immunity from any liability for terminating in house counsel is inconsistent with laws pertaining to anti-discrimination and statutory rights to public collective bargaining. Golightly-Howell v. Oil, Chem. & Atomic Workers, 806 F. Supp. 921, 924 (D. Colo. 1992) ("[B]ecause Title VII prohibits discrimination based on race or sex, it prohibits such discrimination against one employed as in house counsel."); *Santa Clara County Counsel Attys. Assn.*, 869 P.2d at 1160 (the Meyers-Milias-Brown Act creates an exception to the general rule that a client may discharge an attorney at will).

97. *Id.* at 497 (citing Gantt v. Sentry Ins., 824 P.2d 680, 687-88 (Cal. 1992)). *But see* Palmateer v. Int'l Harvester, 421 N.E.2d 876, 878-79 (Ill. 1981) (reasoning that when the state constitution and statutes are silent, it is permissible to look to judicial decisions).

98. *General Dynamics,* 876 P.2d at 497 (citing Foley v. Interactive Data Corp., 765 P.2d 373, 379 (Cal. 1988)).

99. *Id.* (quoting *Foley*, 765 P.2d at 380). The *General Dynamics* court noted that the doctrinal foundation of the public policy tort claim is not so much the plaintiff's continued interest in employment as the preservation of the public interest as expressed in multiple forms in the Constitution and statutory law. *Id.*

100. *See supra* section I.B.

101. *General Dynamics,* 876 P.2d at 498.

to adhere to a handful of professional ethical norms that distinguish their work from that of the non-attorney.[102]

Some of these professional norms incorporate important public values that may affect the public interest at large.[103] This dual-allegiance dilemma is particularly relevant in the context of a large, commercially-driven corporation whose essential objectives are defined by profit maximization.[104] In such a business culture, in-house counsel may be trapped between the desire to further the goals of the client-employer, and restrictions on conduct imposed by ethical norms prescribed by the Rules of Professional Conduct.[105] In-house counsel, unlike outside counsel, do not have the amount of professional distance and economic independence that could serve to lessen pressure to circumvent professional norms.[106]

Thus, from the foregoing discussion it becomes clear that in-house counsel, perhaps even more clear than regular corporate employees, require shielding from retaliation by employers who either insist that they violate their mandatory ethical norms or terminate them for refusing to violate those norms.[107] Because of the public interest inherent in the legal profession, in-house counsel are even more vulnerable liable to conflicts between corporate goals and professional norms than their non-attorney colleagues.[108] Therefore, in-house counsel, forced to choose between the demands of the employer and the requirements of a professional code of ethics have, if anything, an even more powerful claim to judicial protection than their non-attorney colleagues.[109]

C. Elements of a Retaliatory Discharge Claim

With the recognition that in-house counsel are generally entitled to the same rights as other corporate employees, the California Supreme Court carved out a limited right for in-house counsel to sue their client/employer

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102. *Id.* These minimal ethical standards that define the lawyer as a professional are embodied in the California Rules of Professional Conduct. The court expressly declined to adopt either the Model Rules of Professional Conduct or the Model Code of Professional Responsibility as a predicate for retaliatory discharge claims. These rules have "ho legal force of their own" and have never been adopted by the California Supreme Court. *Id.* at 503 n.6.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* This distinguishing feature, a recurrent theme, is the complete dependence on the good will and confidence of a single employer to provide livelihood and career success. *See also* Daly, *supra* note 89 (suggesting prophylactic measures designed to promote a culture of high ethical standards within corporate law departments and minimize ethical transgressions).

107. *General Dynamics,* 876 P.2d at 498.

108. *Id.*

109. *Id. See also* Joseph J. Fleischman et al., *The Organizational Sentencing Guidelines and the Employment At-Will Rule as Applied to In-House Counsel,* 48 BUS. LAW 611, 613 (1993) (noting that "the government has signaled to lawyers that it is simply not enough to advise clients against certain actions; the government now expects lawyers to be proactive in meeting their reporting and disclosing obligations").

for wrongful termination, based on public policy grounds. The court held that in-house counsel can bring a wrongful termination suit against their employer when they are discharged for following a mandatory ethical obligation prescribed by a professional rule or statute.[110] If that is the case, then "under most circumstances, the attorney would have a retaliatory discharge cause of action against the employer."[111] If a court determines that the conduct in which the employer has engaged is merely ethically permissible, but not required by statute or ethical code, the court must then determine two additional criteria. First, whether the employer's conduct would give rise to a retaliatory discharge action by a non-attorney employee under *Gantt v. Sentry Insurance*.[112] Second, a court must determine whether some statute or ethical rule specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer.[113] The court took care to emphasize the limited scope of their decision, expressly holding that the tort remedy available to attorneys is by no means coextensive with the right available to non-attorney employees.[114] Furthermore, the court made clear that the scope of the confidentiality privilege will not be diluted in the context of in-house counsel. Thus, where the elements of a wrongful discharge in violation of public policy claim cannot be established without breaching the attorney-client privilege, the suit must be dismissed.[115]

V. THE IMPACT AND EFFECT OF *GENERAL DYNAMICS*

In *General Dynamics*, the California Supreme Court took a momentous

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110. *General Dynamics*, 876 P.2d at 502. For example, being asked to directly contravene a rule under the Rules of Professional Conduct or being asked to commit a crime that would subject the in-house counsel to disbarment under statute. The court used BUS. PROF. CODE § 6101 (providing for disbarment on conviction of a felony or a misdemeanor involving moral turpitude) and § 6106 (providing for disbarment for the "commission of any act involving moral turpitude, dishonesty or corruption.").

111. *General Dynamics*, 876 P.2d at 503.

112. Gantt v. Sentry Ins., 824 P.2d 680, 684 (Cal. 1992) (the public policy at issue must be one that is not only fundamental, but is also clearly established in the constitution and positive law of the state). *General Dynamics*, 876 P.2d at 503.

Note that by equating the attorney's conduct to a non-attorney employee, the *General Dynamics* court is enunciating a common law standard upon which attorneys can sue their employer for wrongful termination.

113. *General Dynamics*, 876 P.2d at 503. *See also* CAL. EVID. CODE §§ 956-958 (West Supp. 1994).

114. *General Dynamics,* 876 P.2d at 503.

115. *Id.* at 503-04. The court briefly noted three further restrictions on an in-house counsel's right to sue. First, the plaintiff bears the burden of establishing the requirements of the ethical norm at issue and that the employer's conduct was motivated by impermissible considerations under a "but for" standard of causation (disagreements over policy are not actionable). Second, the ethical norm at issue must be intended for the protection of the public at large, not solely for the benefit of the attorney or the client. Third, an attorney who unsuccessfully brings a retaliatory discharge claim and discloses client confidences, may be subject to State Bar disciplinary proceedings. *Id.* at 504.

step forward in extending the common law tort of retaliatory discharge to in-house counsel. The court went even further by allowing in-house counsel to bring a retaliatory discharge claim for the same reasons that a non-attorney could bring such a claim. In so doing, the court recognized the relatively equal economic positions enjoyed by corporate in-house counsel and regular corporate employees.[116] The court addressed many of the flaws inherent in the prior case law regarding wrongful discharge of in-house counsel. The court, however, created uncertainties in the process, and did not expand the rights of in-house counsel as far as it would first appear.

A. Hobson's Choice: Report or Withdraw Without Remedy

There are two major flaws common throughout the cases restricting in-house counsel's right to sue for wrongful termination. First is the assumption that because ethical rules require in-house counsel to report an employer's illegal conduct or to withdraw from representation, they should not be entitled to reasonable compensation for being wrongfully terminated. Second is the hollow, conclusory reliance on the sanctity of the attorney-client relationship as an impenetrable barrier to bringing an action for retaliatory discharge.[117]

The California Supreme Court, in *General Dynamics*, adequately addressed these two flaws. The court recognized that it is patently unfair to leave only one option to an attorney who has taken the "high road" of refusing to violate his ethical duty.[118] That option is to withdraw.[119] They further recognized that it is unfair to leave an attorney without a remedy simply because he is required by his ethical duties to report a violation.[120] Indeed, *Mourad*[121] implicitly recognized this policy. In

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116. *Id.* at 490.

117. *See, e.g.*, X Corp. v. John Doe, 816 F. Supp. 1086 (E.D. Va. 1993). In fact, these assumptions are explicitly set forth in the *Balla* decision. Interestingly, the Illinois Court of Appeals reached a contrary decision which extended the rights of in-house counsel to sue for wrongful termination, but did not sweep as broadly as *General Dynamics*. The appellate court found that the sanctity of the attorney-client privilege is not an absolute bar to disclosure of client confidences. Disclosure is mandated by certain rules in the Illinois Code of Professional Responsibility. After balancing the competing public policies of the attorney-client privilege versus protecting individuals from serious bodily harm, the court found clear support in favor of disclosing information when the attorney reasonably believes it is necessary to prevent serious bodily harm or death. Balla v. Gambro, Inc., 560 N.E.2d 1043 (Ill. App. Ct. 1990). *See also* Abramson, *supra* note 7, at 281.

118. *General Dynamics*, 876 P.2d at 502.

119. *Id.* (referring to Willy v. Coastal Corp., 647 F. Supp. 116, 118 (S.D. Tex. 1986)); *see also* Herbster v. North American Co. Life and Health Ins., 501 N.E.2d 343, 348 (Ill. App. Ct. 1990).

120. *Balla*, 584 N.E.2d at 109. Note that the California Supreme Court characterized the previous court's pronouncements of the "choice" of voluntary withdraw as bland announcements that do not take the extraordinarily high cost of resignation into account. *General Dynamics*, 876 P.2d at 502.

121. 465 N.W.2d 395 (Mich. Ct. App. 1991).

discussing in-house counsel's right to sue for breach of an implied-in-fact contract claim, the Michigan Court of Appeals held that "by hiring plaintiff as an attorney, defendants knew or should have known that plaintiff was bound by the code of professional conduct and incorporated this fact in creating a just-cause employment contract."[122] This analysis applies equally in a wrongful discharge public policy claim. The employer hires in-house counsel knowing full well that the counsel are bound by the rules of professional conduct. Therefore, in requiring their in-house counsel to act contrary to those rules, and terminating counsel if they refuse or report the employer's actions to the proper authorities, the employer must be made to compensate the employee.

Furthermore, in granting in-house counsel the right to sue for wrongful termination, the court correctly took into consideration the economic situation of in-house counsel. By definition, in-house counsel serve at the direction of one client/employer.[123] They do not possess the independence derived from a multiple-client base. Therefore, their economic plight is indistinguishable from that of other corporate managers or executives.[124]

This economic situation has even more force in the present economy where replacement attorneys are readily available. More and more attorneys are finding it difficult to secure employment after leaving law school. At the same time, established lawyers who are being dismissed or laid off are seeking the same jobs. This glut of eligible employees and the limited number of employers leads to the inescapable conclusion, properly recognized by the California Supreme Court, that in-house counsel deserve reasonable compensation if wrongfully terminated.[125]

Another, more insidious, by-product of the rigid rule requiring withdrawal or mandatory reporting without remedy, is that instead of reporting a violation or withdrawing, an in-house counsel may find silence the better part of valor. In house-counsel, aware of the harsh results of withdrawal, will choose to be silent in order to retain their position. This reality is an unfortunate outgrowth of the present economic situation, the role

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122. *Id.* at 400. *See also supra* notes 2, 6, 56-79 and accompanying text.

123. *General Dynamics*, 876 P.2d at 490-91 ("[T]he economic fate of in-house attorneys is tied directly to a single employer, at whose sufferance they serve.").

124. *Id.*

125. *See also* Abramson, *supra* note 7, at 279; Stephen Gillers, *Protecting Lawyers Who Just Say No*, 5 GEO. ST. UNIV. L. REV. 1, 26 (1988):

> Both *Herbster* and *Willy* emphasized the lawyer's ability or duty to withdraw. I find that emphasis the most disturbing part of their rationales. It is disturbing because the ability to leave the employment is equally true of all other retaliatory discharge plaintiffs and because it cavalierly ignores the plaintiff's argument, which is that withdraw for a single-client lawyer, especially one in mid-career, may be tantamount to professional banishment.

The California Supreme Court addressed this issue by extending the right of in house counsel to sue for wrongful termination to instances in which non-attorney employees could. *General Dynamics*, 876 P.2d at 490.

of in-house counsel in the legal profession, and the rules that govern attorney conduct.[126] In a footnote, the *General Dynamics* court noted that despite the fact that no more than a handful of wrongful termination cases have been reported nationally, scholarly comment on the issues raised in retaliatory discharge tort claims by in-house counsel is disproportionally large.[127] Perhaps this is an implicit recognition and acceptance of the fact that in-house counsel may choose to remain silent in order to maintain their economic footing. By providing the employee with a remedy in tort damages for resisting socially-damaging organizational conduct, courts can mitigate the otherwise considerable economic and cultural pressures on the individual to silently conform.[128] Attorney withdrawal in this situation is not an unavoidable circumstance that an employer encounters, such as is a conflict of interest. The withdrawal is the direct result of the attorney's sole employer requiring that attorney to violate his ethical mandates or, similarly, putting him in a position in which he is forced to choose between breaching an ethical mandate or continued employment. In the end, the California Supreme Court recognized that just as nonlawyer employees are not required to quietly surrender their jobs rather than "go along" with an employer's unlawful demands, lawyers should also not be forced.[129]

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126. Indeed, the California Supreme Court noted that: "Even the most dedicated professionals, their economic and professional fate allied with that of the business organizations they serve, may be irresistibly tempted to cut corners by bending the ethical norms that regulate an attorney's professional conduct." *General Dynamics*, 876 P.2d at 492. *See also* Giesel, *supra* note 89, at 536-37. Professor Giesel observed that:

> Exalted statements that most in-house counsel possess such high ethical standards that economic pressure cannot sway them, no matter how great, are, unfortunately, suspect. . . . The perspective [of this author] is not that mankind and womankind are inherently evil, but neither is it that all are inherently good. My position is one which recognizes that economic pressures can tempt individuals. . . . The economic pressure on in-house attorneys as a class, however, does create an atmosphere in which those attorneys may subordinate standards of responsibility more often.

Geisel, *supra* note 89, at 536-37. *See also* Balla v. Gambro, 584 N.E.2d 104, 113 (Ill. 1991) (Freeman, J., dissenting):

> [T]o say that the categorical nature of ethical obligations is sufficient to ensure that the ethical obligations will be satisfied simply ignores reality. Specifically, it ignores that, as unfortunate for society as it may be, attorneys are no less human than nonattorneys and, thus, no less given to the temptation to either ignore or rationalize away their ethical obligations when complying therewith may render them unable to feed and support their families.

Id.

127. *General Dynamics*, 876 P.2d at 500 n.5.

128. *Id.* at 501.

129. *Id. See also* Robert B. Fitzpatrick & Kathleen H. Kim, *The Duty of Confidentiality: May an Attorney Sue His or Her Former Employer and Divulge Client Confidences Obtained During the Course of His or Her Employment?*, 932 A.L.I. CURRENT DEVS. EMPLOYMENT LAW 333, 336 (1994) (citing *Job Rights Issue Splits Corporate Counsel Group*, LEGAL TIMES, May 16, 1994, at 16)) (noting that the American Corporate Council Association took a stand on the

B. *The Sanctity of the Attorney-Client Relationship*

The attorney-client relationship, which is based on trust and loyalty, should not act as a complete bar to a wrongful termination suit brought by in-house counsel. This is precisely the position adopted by the courts in *Balla*,[130] *Herbster*,[131] and *Willy*.[132] The California Supreme Court noted that the bar to wrongful termination suits is based on the common law rule that a client can terminate the relationship with his attorney at any time for any reason.[133] The court further correctly recognized that this rule, which is predicated on the relationship of an independent lawyer with a multiple client base does not equally apply to in-house counsel who have but a single client. Because of the separate and distinct roles of in-house counsel, blind adherence to this proposition would act to unfairly prejudice in-house counsel.

Some argue that permitting wrongful termination suits by in-house counsel would have an undesirable effect on the attorney-client relationship because employers might be less forthright and candid with their in-house-counsel. Further, clients may be hesitant to turn to them for advice regarding potentially questionable conduct. This argument is illogical when analyzed in the context of the attorney's professional mandates. For example, if in-house counsel is required to withdraw from representation,[134] or is required by the Rules of Professional Conduct to report certain employer conduct,[135] then the employer will similarly be more reluctant to confide in their in house-counsel. An employer is presumably aware that in-house counsel are required, under their ethical mandates, to thwart the employer's unquestionably illegal goals. On the other hand, most

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topic of wrongful termination claims by in-house counsel in 1991. The policy adopted recognizes a right to sue for breach of contract actions, but the policy also says lawyers cannot sue if the firing arose from a violation of the Code of Professional Responsibility or if bringing suit would require privileged information to be introduced into evidence.).

130. 584 N.E.2d 104 (Ill. 1991).

131. 501 N.E.2d 343 (Ill. App. Ct. 1990).

132. 647 F. Supp. 116 (S.D. Tex. 1986). For a criticism of this proposition see Abramson, *supra* note 7, at 276. Professor Abramson notes that the court in *Herbster* focused on the trust and confidence the client reposes in the attorney, noting the evils arising from client distrust. This trust and confidence, however, does not refer to some blind willingness to engage in any conduct the client wishes. *Id.*

133. *See supra* note 41 and accompanying text. *See also* Nordling v. Northern States Power Co., 478 N.W.2d 498, 501 (Minn. 1991) ("If the attorney-client relationship is to work, the client must confide in the attorney, trusting that he will keep confidences and ably perform. If the client loses this confidence, whether justifiably or not, the client must be able, without penalty, to end the relationship."); Parker v. M & T Chem., Inc., 566 A.2d 215, 218 (N.J. Super. Ct. App. Div. 1989) (finding that in New Jersey, "we are deeply committed to the principle that an employer's right to discharge an employee carries a correlative duty to protect his freedom to perform an act that would constitute a violation of a clear mandate of public policy.") (citations omitted).

134. *See* Willy v. Coastal Corp., 647 F. Supp. at 118.

135. *See* Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991); Herbster v. North American, 501 N.E. 2d 343 (Ill. App. Ct. 1990).

employers who seek advice from in-house counsel do so to assure themselves they are complying with the law, not to disobey the law. Thus, those companies that seek to obey the law will be just as open and forthright with in-house counsel whether or not they have a right to sue for wrongful discharge.[136] The attorney-client relationship is only impaired with the company or employer who condones unlawful acts.[137]

Therefore, the parameters of the relationship between the organization and the in-house counsel are or should be fully understood by the employer.[138] If the employer chooses to use its inside counsel as a pawn to further or conceal illegal conduct, knowing that the employee is required to report or refuse to undertake such conduct, the employer should be made to compensate that employee.[139]

Commentators have recognized that inside counsel have a responsibility to promote the long-term interests of the corporation and to "forestall the company offending public opinion through acts that indicate social indifference or social irresponsibility."[140] Similarly, "in-house counsel has a greater ability to alter their client's behavior and thus a corresponding duty to use that ability to promote constructive behavior."[141] Furthermore, it

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136. *See* Smith, *supra* note 14 and accompanying text.

137. *Id.*

138. *See generally* Kenneth J. Wilbur, *Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility*, 92 DICK. L. REV. 777 (1988).

139. *Balla* is a perfect example. In-house counsel for Gambro advised against accepting a shipment of dialyzers because the shipment was in violation of the law. The in-house counsel was terminated for reporting the contaminated shipment. Under the applicable Professional Rules in Illinois, counsel was required to report this conduct. ILL. RULES PROF. CONDUCT, Rule 1.6(b). Balla v. Gambro, 584 N.E.2d at 106, 109. Presumably, an employer knows that in house counsel are governed by certain ethical mandates. Therefore, there is no difference with respect to the employer being willing and forthright to discuss questionable conduct with their counsel if they know the lawyer is required to disclose such information than if the employer knows their counsel can bring a suit for wrongful termination. In both instances, counsel will come forward and reveal the client's illegal conduct. There should be no discernible impact on the attorney-client relationship, unless the employer expects his counsel to blindly follow his mandates in contravention of the lawyer's ethical duty.

Furthermore, as Professor Abramson notes, "once a retaliatory discharge has occurred [the relationship between the client and the in-house counsel] has been severed and the practical question . . . becomes who shall bear the cost." Abramson, *supra* note 7, at 276-77.

140. Corello, *supra* note 18, at 409 (citing Brian D. Forrow, *The Corporate Law Department Lawyer: Counsel to the Entity*, *in* MANAGEMENT FOR IN-HOUSE COUNSEL 43, 56 (J. David Silvers et al. eds., 1985)).

141. *Id.* Note that there are some problems in this regard. For example:

> A lawyer 'employed or retained by an organization represents the organization acting through its duly authorized constituents'. . . . [T]his fact may 'put the corporate lawyer in the untenable position of representing a client to whom the lawyer cannot speak, while speaking only to people who cannot be clients.' Accordingly, in-house lawyers may confront the tensions between their zealous representation of the corporation and their desire to please the corporate officers with whom they work and who, in many cases, may be in positions to influence the lawyer's compensation or continued employment. This tension is most aggravated when a lawyer learns that corporate officers or employees (to whom the lawyer may report) intend to pursue, or have already engaged in, a course of conduct that may result in criminal liability for the organization. In that case, lawyers may

should be a corporation's goal to maximize its profits within the bounds of the law and without harming the public. In order to achieve this, the organization needs to obtain and follow honest and forthright advice from its in-house counsel.[142] These corresponding goals and responsibilities should act to enhance the relationship between an organization and its in-house counsel, not inhibit trust or confidence.[143] "The cost to a company of preventing in-house counsel from doing their job and allowing inadvertent violations is very high, given the increasing number of regulations controlling corporate behavior."[144]

One commentator noted that the contention that an attorney should not have the action of retaliatory discharge available because of public policy intangibles such as trust and confidence respecting the attorney-client relationship is really "just knee-jerk formalism. It amounts to spurious glorification and romanticization of the actual roles and positions of corporate attorneys by fellow lawyers, i.e. judges."[145] The California Supreme Court transforms this "glorification and romanticism" into reality by recognizing that there are limitations to the attorney-client relationship. Should employers continue to use this relationship as a sword against the employee-counsel, then in California, in-house counsel will now have the same right to use such relationship as a shield against employers, protecting

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find their advice in conflict with the personal objectives of managers.

Fleischman et. al., *supra* note 109, at 616-17.

142. The court in *Nordling* recognized that "[a] client retains a lawyer to give sound advice even when that advice may not be what the client wants to hear. The knowledgeable client understands and, it is hoped, values in house counsel's independence. . . ." Nordling v. Northern States Power Co., 478 N.W.2d 498, 501 (Minn. 1991). This is an implicit recognition that it is in the organization's best interest to adhere to advice that in most instances will benefit it in the long run as opposed to discounting that advice, injuring itself in some way and in the process, terminating a valuable employee who was simply acting for the betterment of the organization. For an example of a situation in which it is advantageous to follow in-house counsel's advice see Fleischman et al., *supra* note 109, at 621. In the context of organizational sentencing guidelines for corporate misconduct, self-reporting by the organization is encouraged. By self-reporting, a company may avoid prosecution, may affect the number and types of counts filed against the corporation, and, if prosecuted, may receive leniency. *Id.*

143. Once again, the *Nordling* court implicitly recognized that the attorney-client relationship should not act as a complete bar to a wrongful termination suit. They stated that the in house attorney is also a company employee. "[W]e see no reason to deny the job security aspects of the employer-employee relationship if this can be done without violence to the integrity of the attorney-client relationship." *Id.* at 502. Obviously, the court envisioned circumstances in which this can be done.

144. Fleischman et. al., *supra* note 109, at 615-16. *See also* Reynolds, *supra* note 23, at 580; Larry Smith, *In-House Counsel: New Target for Malpractice Actions,* 12 NO. 3 PRENT. HALL OF COUNSEL 5 (1993) (noting that recently the Securities and Exchange Commission ("SEC") blamed an in-house counsel for Salomon Inc., for not ordering an investigation into certain criminal bidding activities. The SEC report stated the in-house counsel should have gone to the authorities or, if necessary, resigned. One enforcement director of the SEC said, "we made a strong statement and companies might expect some action against in-house counsel in the future." The director denied that the SEC is "trying to redefine in-house counsel as whistleblowers." *Id.*).

145. Abramson, *supra* note 7, at 278.

themselves from wrongful termination.

C. *Public Policy: An Extension*

Commentators and courts alike have argued that rules of professional conduct do contain mandates of public policy.[146] One argument in favor of this view is that the nature of the professional's work, and society's interest in such ethical conduct, provides a basis for a public policy exception to the employee-at-will rule.[147] Another argument is that, as professionals, lawyers are impressed with the public trust; charged by state licensing procedures and their own professional codes with using their particular expertise for the greater good of the general public.[148] In extending the tort of retaliatory discharge to in-house counsel, the *General Dynamics* court adopted the approach of recognizing ethical codes as public policy. In California, this public policy is found in "explicit and unequivocal ethical norms embodied in the [California] Rules of Professional Responsibility and certain provisions of the Business and Professions Code."[149]

While the recognition of ethical codes as a public policy exception to the employment-at-will doctrine is an important step, the *General Dynamics* court went one step further and did something that only one court to date has done with respect to public policy as it relates to in-house counsel. The court extended the right of in-house counsel to sue for wrongful termination based on claims which are maintainable by the non-attorney employee, that is, claims delineated in constitutional or statutory provisions of the laws of California.[150]

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146. *See* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980). *See also* Giesel, *supra* note 89, at 570-74; Moskowitz, *supra* note 13, at 34. *But c.f.* McGonagle v. Union Fidelity Corp., 556 A.2d 878, 884-85 (Pa. Super. 1989) (refusing to recognize a public policy, noting that several cases had examined various codes of ethics as potential public policy sources and had determined that the various plaintiffs pointed to no sufficiently clear expression of public policy). *See also* Weider v. Skala, 544 N.Y.S.2d 971, 972 (N.Y. App. Div. 1989), *aff'd*, 562 N.Y.S.2d 930 (N.Y. App. Div. 1990) (declining to recognize a public policy in professional ethics codes, finding that New York law requires a constitutional provision or statute).

147. Moskowitz, *supra* note 13, at 56-57.

148. Alfred G. Feliu, *Discharge of Professional Employees: Protecting Against Dismissal for Acts Within a Professional Code of Ethics*, 11 COLUM. HUM. RTS. L. REV. 149, 165 (1979-80).

149. General Dynamics v. Superior Court, 876 P.2d 487, 503 n.6 (Cal. 1994). For a general discussion on ethical codes and public policy see Reynolds, *supra* note 23, at 567-68 nn.83-85 (citing Charles Wolfram, MODERN LEGAL ETHICS, §§ 2.2.3, 2.6, and 2.6.1 (1986)); Charles Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 636-39 (1978).

150. *General Dynamics*, 876 P.2d at 503. *See also* Gantt v. Sentry Insurance, 824 P.2d 680, 687-88 (Cal. 1992). Note that once the in-house counsel-employee establishes such a claim, he must next point to a specific statute or ethical rule that specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer. *General Dynamics*, 876 P.2d at 490.

The *Nordling*,[151] *Mourad*,[152] and *Parker*[153] courts did not specifically hold that ethical mandates constitute public policy.[154] In *McGonagle*,[155] the court found that ethical codes did not constitute public policy.[156] Therefore, in recognizing a claim based on public policy found in ethical codes, constitutional provisions, and statutory provisions, the court gave in-house counsel in California the broadest range of protection afforded any in-house counsel in this nation.

While the court took great strides in extending several different public policy grounds on which in-house counsel could base wrongful termination claims, they could have gone further. For example, the court could also extend the notion of public policy to encompass judge-made law.[157] The common law is particularly relevant in ascertaining issues of public policy not yet explicitly contained in a statute or constitutional provision.[158] One commentator, Professor Moskowitz, in an article on attorney codes of ethics has endorsed the notion that public policy should not be restricted to statutory formulation.[159] By allowing the maximum number of avenues for in-house counsel to protect their rights, we encourage attorneys to obey the law, and in the process of protecting the lawyer, in acting ethically, the public welfare is promoted.

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

152. Mourad v. Automobile Club Ins. Assoc., 465 N.W.2d 395 (Mich. Ct. App. 1991).

153. Parker v. M&T Chem., Inc., 566 A.2d 215 (N.J. Super Ct. App. Div. 1989).

154. See discussion, *supra* part III.

155. McGonagle v. Union Fidelity Corp., 556 A.2d 878 (Pa. Super. Ct. 1989).

156. *Id.* at 884. *But see* Parker v. M & T Chem., Inc., 566 A.2d 215, 220 (N.J. Super. Ct. App. Div. 1989) (finding that a public policy claim did lie in a state whistleblowers statute). Note further that the *Balla* and *Herbster* courts found clear expressions of public policy involved but declined to allow in house counsel to assert such public policy claims. Balla v. Gambro, 584 N.E.2d 104, 107-08 (Ill. 1991); Herbster v. North American Co. for Life and Health Ins., 501 N.E.2d 343, 344 (Ill. App. Ct. 1990).

157. *See supra* notes 98, 113. In California, judge-made law is not considered in making a public policy determination. Gantt v. Sentry Inc., 824 P.2d 680, 687-88 (Cal. 1992). *But see* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 ((N.J. 1980) ("The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions.").

158. Giesel, *supra* note 89, at 568. Professor Giesel noted several examples. The United States Court of Appeals for the Eighth Circuit held that an employee discharged for refusing to engage in sexual conduct with her supervisor stated a claim for wrongful discharge because her discharge contravened public policy. Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1205 (8th Cir. 1984). The court looked to "the shared moral values of the people of Arkansas and the considerable clues to be found in the positive law," which included a criminal statute against prostitution, to find public policy. *Id. See also* Delaney v. Taco Time Int'l, Inc., 681 P.2d 114, 116 (Or. 1984) (Employee claimed he was fired for refusing to sign a defamatory report about a subordinate employee. The Oregon Supreme Court referred to sections of the Oregon Constitution prohibiting defamation, then stated that the employee was discharged wrongly for "fulfilling a societal obligation."); Novosel v. Nationwide Ins. Co., 721 F.2d 894, 896 (3d Cir. 1983) (employee claimed he was terminated for refusing to participate in a lobbying effort. The court referred to case law protecting First Amendment freedoms to find a public policy).

159. Moskowitz, *supra* note 13, at 53.

VI. CONFIDENTIALITY IN CALIFORNIA

In granting in-house counsel the common law right to sue for wrongful termination, the California Supreme Court failed to take into consideration California's already restrictive confidentiality laws. In *General Dynamics*, the court expressly declined to adopt the Model Rules of Professional Conduct or the Model Code of Professional Responsibility as a predicate for a retaliatory discharge suit.[160] Instead, the court bound in-house counsel in California to the ethical prescriptions embodied in the state's Rules of Professional Conduct and certain provisions of the Business and Professions Code.[161] These rules, which encompass confidentiality and the attorney-client privilege, are far less comprehensive than the Model Rules or Model Code and provide little or no protection to an attorney forced to reveal information to prevent from being wrongfully terminated. The court then found that "where the elements of a wrongful termination in violation of fundamental public policy 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."[162]

In so doing, the court strictly limited in-house counsel's chances of successfully bringing a retaliatory discharge suit, perhaps making *General Dynamics* a hollow victory for in-house counsel by actually prohibiting in-house counsel from bringing suit. This is so because the rules pertaining to confidentiality in California are far less inclusive than those under the Model Code and Model Rules. Thus, even though the supreme court has held that in-house counsel may reveal certain kinds of privileged information, realistically they are severely limited by the current state of the confidentiality laws in California.

According to the California Business and Professions Code, an attorney is prohibited from revealing client confidences in almost every conceivable circumstance.[163] This contrasts with the Model Code of Professional

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160. *General Dynamics*, 876 P.2d at 487, 503 n.6.

161. *Id.* Furthermore, in-house counsel can bring claims which non-attorney employees could bring, subject to the strict confidentiality rules of California. *Id.* at 503.

162. *Id.* at 503-04. While the court also noted that trial court's can and should apply an array of ad hoc measures to permit the attorney to make the necessary proof while protecting the attorney-client privilege. *Id.* at 504, the discussion in this section is limited to the problems with respect to the confidentiality rules in California. A discussion of the "ad hoc" measures referred to by the court will be undertaken in the next section.

163. CAL. BUS. PROF. CODE § 6068(e) (West 1994). This section simply states that it is the duty of the attorney "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her clients." *Id.* This language can be interpreted such that an attorney must keep secret: the client's intention to commit any crime; the client's intention to commit a crime likely to result in death or bodily injury; the client's intention to commit a criminal fraud likely to result in injury to the financial interest or property of another party; the client's intention to commit a non-criminal fraud likely to result in injury to the financial interest or property of another party; the client's prior commission of a crime or fraud, using the lawyer's services, resulting in injury to the financial interest or property of another party; the client's prior or contemporaneous commission of perjury or other fraud on a tribunal;

Conduct and Rules of Professional Conduct effective in other states which allow disclosure of confidential information in certain circumstances. Thus, attorneys in California are not afforded the same rights or opportunities to disclose confidential information as their counterparts in other jurisdictions.

A. Imminent Death or Substantial Bodily Harm Exception

Rule 1.6 (b)(1) of the ABA Model Rules of Professional Conduct provides that a lawyer may reveal confidential disclosures of his client "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." In California, section 956.5 of the Evidence Code provides substantially the same language.[164] In light of this, the California Supreme Court found:

> [m]any of the cases in which in-house counsel is faced with an ethical dilemma will lie outside the scope of the statutory privilege. Matters involving the commission of a crime or a fraud, or circumstances in which the attorney reasonably believes that disclosure is necessary to prevent the commission of a criminal act likely to result in death or substantial bodily harm, are statutory and well-recognized exceptions to the attorney-client privilege.[165]

The court failed to realize however, that no such corresponding rule in the Rules of Professional Conduct exists. A rule similar to Rule 1.6 (b)(1) was proposed in California in 1992.[166] This rule was never promulgated

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and the client's contemporaneous misrepresentation or concealment of material fact amounting to a criminal or fraudulent act by the client. 1993 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY, 126 (Thomas D. Morgan & Ronald D. Rotunda eds., 1993). Morgan and Rotunda also note that the California Rules of Professional Conduct do not regulate client confidences. See also *id.* at 127-32 for a state-by-state breakdown of confidentiality rules. *But see* CAL. EVID. CODE § 956.5 (West 1994) (providing a limited exception to the confidentiality rule for disclosure of communications necessary to prevent the client from committing a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm); CAL. EVID. CODE § 958 (West 1994) (permitting disclosure with respect to a breach in the attorney-client relationship). However, this section has been interpreted very narrowly. As will be discussed below, these exceptions create more problems in California than they solve.

164. *See* CAL. EVID. CODE § 956.5 (West 1994).

165. *General Dynamics*, 876 P.2d at 504. The court was referring to CAL. EVID. CODE § 956 with respect to "matters involving the commission of a crime or fraud." This section deals specifically with cases in which the services of the attorney were obtained to commit the fraud or crime. This is generally not the case with in-house counsel. Most often they are employed to act as in-house counsel first, and then they are placed in an inappropriate situation. In-house counsel are very rarely hired primarily to aid or enable an employer to commit a crime or fraud.

166. Proposed Rule 3-100 would have read in relevant part:

> Duty To Maintain Client Confidence and Secrets Inviolate.
> (C) A member is not subject to discipline who reveals a confidence or secret:
> (1) With the consent of the client; or
> (2) To the extent the member reasonably believes necessary to prevent

by the California Supreme Court.[167] Presumably, this was a message that any such change would have to be made by the legislature.[168] There is, therefore, a serious dilemma if a lawyer decides that it is reasonably necessary to disclose such information in the corporate context and then uses such information in a suit against his former client. If the attorney discloses such information, he will be protected under Evidence Code section 956.5. The attorney, however, is still bound to follow the professional rules of conduct. Under those rules in California, the attorney has no such protection. Rule 3-100 was expressly rejected by the supreme court. Therefore, while an attorney may reveal corporate misconduct possibly resulting in death or bodily injury, the employer, in turn, may report the attorney for breach of professional ethics.[169] In other words, the attorney

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> the commission of a criminal act that the member believes is imminently likely to result in death or substantial bodily harm.

RICHARD C. WYDICK & REX R. PERSCHBACHER, CALIFORNIA LEGAL ETHICS 201 (1992).

167. *See* Michael J. Hall, *Court Rejects Lawyer-Client Privilege Shift*, L.A. DAILY J., June 4, 1993, at 1. The ruling was issued in an unsigned order that said only, "request denied." Request Re Rule 3-100, S029971. *Id.*

168. *Id.*

169. Rule 1-100 of the CAL. RULES OF PROFESSIONAL CONDUCT provides in pertinent part:

> (A) Purpose and Function. The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.
>
> For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.
>
> The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code § 6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered. *Id.* Furthermore, Cal. BUS. & PROF. CODE § 6103 provides:
>
> A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.

CAL. BUS. & PROF. CODE § 6103 (Deering 1995).
Similarly, the Standards for Attorney Sanctions for Professional Misconduct, Standard 2.6 provides in pertinent part:

> Culpability of a member of a violation of any of the following provisions of the Business and Professions Code shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3:
> (a) Sections 6067 and 6068;

discloses such information at the risk of losing his or her license to practice law.[170] If in-house counsel in California disclosed such information, then they may succeed against their former client for wrongful termination, but they may be sanctioned or lose their license to practice law. In essence, in-house counsel are in the same or worse position than before *General Dynamics*. Counsel may disclose certain confidences under the Evidence Code, but instead of losing a job, they could now lose the profession that they spent years of time, money, and effort acquiring. Faced with these choices, silence may indeed be the better part of valor.[171]

An opinion by the Legal Ethics and Unlawful Practices Committee of the San Diego County Bar Association provides some insight into the extreme views taken by some in California, with respect to confidentiality issues.[172] In this opinion, the committee posed a hypothetical where a client displayed a handgun and disclosed to his attorney that he was going to kill his co-defendant, who had agreed to cooperate with the prosecution.[173] An attorney believed that his client intended to seriously injure or kill the informant.[174] The question presented was whether it was permissible for the attorney to disclose his client's intentions, or otherwise warn the authorities of the impending danger.[175]

The committee undertook a detailed analysis, discussing ABA Model

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(b) Sections 6103 through 6105. . . .

STANDARDS FOR ATTORNEY SANCTIONS FOR PROFESSIONAL MISCONDUCT. Standard 2.6 (Deering 1988).
Thus, if an in-house counsel violates BUS. & PROF. CODE § 6068(e) by disclosing a client's secrets or confidences he is subject to suspension or disbarment. For an excellent analysis of the interplay of these rules see In the Matter of Judson D. Lilley, A Member of the State Bar, 1991 WL 70703 (Cal. Bar Ct.).

170. *See* Gerald F. Uelman & Robert Peterson, *Attorney-Client Dilemma*, L.A. DAILY J., Feb. 3, 1994, at 6. (the duty of confidentiality is not defined by the attorney-client evidentiary privilege, but transcends it). *See also* Hall, *supra* note 167 (Rules of Professional Conduct, the violation of which can be punished by sanctions, including disbarment, are proposed by the State Bar).

171. It is unclear what the effect of a court order to reveal confidential information would have on the foregoing analysis. Perhaps a court would employ the "ad hoc" measures mentioned by the *General Dynamics* court such as sealing and protective orders and in camera proceedings. General Dynamics v. Superior Court, 876 P.2d 487, 504 (Cal. 1994). However, as will be discussed in section VI, the purpose of a court order in this case would be to reveal information to protect the public. The ad hoc measures discussed by the court are used to ensure confidential information is not revealed to the public. Thus, the problem becomes a vicious circle of how to accommodate the conflicting policy concerns of protecting the public and protecting the attorney-client relationship. Furthermore, while a court may order the revelation of confidential information, it may not arbitrarily decide that a lawyer should not be forced to comply with the Rules of Professional Conduct. Therefore, the lawyer is between a rock and a hard place.

172. San Diego County Bar Association Ethical Opinion, at 3, 1990 - April 1991.

173. *Id.* at 1.

174. *Id.*

175. *Id.*

Rule 1.6, proposed rule 3-100, the related psychotherapist-patient privilege,[176] and California case law, and determined that:

> Despite the obvious moral dilemma presented to the attorney in the foregoing scenario, California law (including section 6068(e) of the Business and Professions Code) forbids the attorney from disclosing any information obtained in confidence from the client. No implied common law duties or rules of professional conduct promulgated in other jurisdictions apply to allow even a limited disclosure.[177]

If the bar association is unwilling to recognize a limited exception in circumstances in which extreme violence is a real possibility, then it is not difficult to predict how they would view disclosing less extreme or damaging information in the corporate setting.

B. Controversy Between a Lawyer and Client

The conflict above deals strictly with the revelation of confidences with regard to death or serious bodily injury. Corporate counsel will likely encounter a far greater variety of circumstances in which it may become necessary to reveal confidential information. In those instances, a rule similar to Rule 1.6(b)(2) of the ABA Model Rules of Professional Conduct is necessary.

Rule 1.6(b)(2) permits disclosure of confidential information that the lawyer reasonably believes necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a claim or defense to a criminal charge or civil claim against the lawyer based upon conduct in which the lawyer was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."[178] A rule similar to this must be enacted by the State Bar in

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176. This exception to the psychotherapist-patient privilege was enunciated in Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976), and codified in CAL. EVID. CODE § 1024. The exception provides that where a psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another, and that disclosure of the communication is necessary to prevent the threat and danger, the psychotherapist may reveal such information.

177. San Diego County Bar Association Ethical Opinion 1990, at 1. Note that this opinion is advisory only. It is not binding on the State Bar, the Board of Governors, its agents or employees. *See supra* note 169, at 1.

178. ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2). Rule 1.6(b)(2) provides:

> (b) A lawyer may reveal such (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, 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.

California if in-house counsel are to truly have the opportunity to exercise their rights, as granted them by the California Supreme Court, in a suit against their employer for wrongful termination. Furthermore, the language, "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" must be interpreted broadly to allow the in-house counsel to go forward with her lawsuit. Wrongful termination certainly involves a "controversy" between the employer and the employee. A broad interpretation will give the employee in-house counsel a forum to resolve this controversy.

For example, under a broad interpretation of Rule 1.6(b)(2),[179] the in-house counsel in *Balla*, *Herbster*, *Parker*, *Willy*, *Mourad*, and *Nordling*[180] would be permitted to disclose confidential information reasonably necessary to establish their claim or defense in the controversy between them and their employer.[181] By doing so, the in-house counsel would be vindicating their rights not to be wrongfully terminated and vindicating important public policies. These policies include disclosing adulterated medical products into the market,[182] encouraging compliance with federal laws,[183] discouraging

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See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) which provides:

> (C) A lawyer may reveal:
> . . . (4) 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.

179. For example, construing this rule broadly, any time an in-house counsel is terminated for refusing to breach their ethical duties or reporting conduct that could cause bodily injury or harm, this would constitute a "controversy" within the meaning of Rule 1.6(b)(2). Similarly, such actions on the part of the in-house counsel would also constitute responding to allegations concerning the lawyer's representation of that client, within the meaning of Rule 1.6(b)(2). Thus a broad interpretation of Rule 1.6(b)(2) will not afford attorneys the opportunity to effectively resolve controversies arising from wrongful terminations.

180. *See supra* note 2 and accompanying text.

181. A recent opinion of the Oregon State Bar Legal Ethics Committee ("the Committee") adopted a broad interpretation of an Oregon ethical rule analogous to Rule 1.6(b)(2). The Committee discussed the case of the general manager of a company and a lawyer, who occasionally provided legal services to the company. While pursuing a product patent for the company, he learned that the product had been invented by the company's customer and not the company. To acquire a patent, the lawyer was required to make an oath on behalf of the company as applicant, naming them the "original and first inventor." The lawyer refused to make that representation and was fired as a result. If the lawyer made such a representation he could have been criminally prosecuted. The lawyer intended to pursue a wrongful discharge action in which it may have been necessary to disclose confidential information. 1994 WL 49747 (Or. St. B. Ass'n) at *1. The Committee first found that the information learned was either a secret or confidence of the client. *Id.* at 2. The Committee then found that under Or. Rule Prof. Conduct DR 4-101(c)(4), which mirrors the language of Role 1.6(b)(2), *disclosure was allowed to establish a wrongful discharge claim. Id.* at 2. Such a result would fit perfectly into the framework already established by *General Dynamics*. In fact, the Committee noted that Oregon does not provide in-house counsel with the right to sue for wrongful termination, although they noted that for purposes of discussion only, the Committee assume that such a claim can be stated. *Id.* Fitzpatrick & Kim, *supra* note 129, at 340-41. *See also* CAL. RULES PROF. CONDUCT Rule 1-100 ("Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.").

182. Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991).

the destruction of documents and obstruction of justice,[184] preventing fraud by refusing to violate a court order,[185] and preventing the invasion of privacy of citizens.[186] All of the above provide clear examples of public policy that the in-house attorneys were attempting to advance.[187] A broad interpretation of a rule similar to Rule 1.6(b)(2) would provide the vehicle for advancing those public policy concerns and assisting in-house counsel in vindicating their rights.[188] When in-house counsel are terminated for refusing to violate their ethical mandates or reporting corporate conduct that could endanger the public welfare, a sufficient controversy exists as to whether the in-house counsel must be able to defend themselves against corporate overreaching.

Even without a rule similar to Rule 1.6(b)(2) in California, there is still an argument to provide the protection afforded by that rule. The California State Bar Committee on Professional Responsibility and Conduct has found that while the ABA Code of Professional Responsibility has no direct effect on lawyers practicing in California, these rules may be looked to as collateral sources—particularly when no direct authority on an ethical issue exists. The Code can also be used as persuasive authority if it is not in conflict with the public policy of California.[189] Based on *General Dynamics*, the public policy of California is to provide in-house counsel with a forum to protect their right not to be wrongfully terminated.[190] As there is no authority in California to permit disclosure of confidential information necessary to bring a wrongful termination suit, California courts should look to Rule 1.6(b)(2) as persuasive authority and allow necessary reasonable disclosures in order to effectuate the policies enunciated in *General Dynamics*.

Furthermore, there are numerous other sources that allow or advocate

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183. Willy v. Coastal Corporation, 647 F.Supp. 116 (S.D. Tex. 1986).

184. Herbster v. North American Co. for Life and Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986).

185. Parker v. M & T Chem., Inc., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989).

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

187. *See also* CAL. BUS. AND PROF. CODE § 6103 (West 1994) (providing suspension for wilful disobedience of a court order); CAL. RULE PROF. CONDUCT, Rule 5-220 (prohibiting attorney from suppressing evidence that the lawyer has a legal obligation to produce); CAL. RULE PROF. CONDUCT, Rule 3-210 (member shall not advise the violation of any law, rule, or ruling of a tribunal unless member has a good faith belief the ruling is invalid).

188. *See also* Gillers, *supra* note 125, at 14-17. Professor Gillers advocates a broad interpretation of Rule 1.6(b)(2). *Id.*

189. 1983 WL 31672 (Cal. St. B. Comm. Prof. Resp.) (citing People v. Ballard, 164 Cal. Rptr. 81 (Ct. App. 1980)); Altschul v. Sayble, 147 Cal. Rptr. 716 (Ct. App. 1978).

190. The court enunciated this policy as follows:

> On balance, these considerations favor allowing a tort claim for discharges for reasons that contravene an attorney's mandatory ethical obligations or for which a non-attorney employee could maintain such a claim and a statute or ethical code or provision permits the attorney to depart from the usual rule that client matters remain confidential.

General Dynamics v. Superior Court, 876 P.2d 487, 490 (Cal. 1994).

the position that confidentiality rules should be relaxed with respect to lawyer-client disputes.[191] These sources support the position that by allowing in-house counsel to disclose confidential information in a reasonable manner, the attorney can safeguard important mandates of public policy and, at the same time, vindicate their rights not to be wrongfully terminated. It has further been noted that client confidences are always at risk when lawyers and clients part ways. For example,

> [i]f the lawyer was asked to act illegally or was terminated for questioning illegal acts, then the communication surrounding such acts should not be entitled to protection because they would not have been learned in a legitimate client-lawyer relationship.[192] Further, since the policy of the [attorney-client] privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme.[193]

Thus, the attorney-client relationship is an integral part of the profession and steps should be taken to ensure that confidences learned during the course of representation remain confidential. This is not an ironclad rule, however, and circumstances do exist where, in the interests of justice, revelation of confidential information is appropriate.

C. Model Statute to Effectuate the General Dynamics' *Policy Goals*

In order to give full effect to the *General Dynamics* decision, the state bar must promulgate and the supreme court must approve rules similar to Model Rules 1.6(b)(1), 1.6(b)(2) and proposed rule 3-100. Many other jurisdictions, including several with large populations such as California,

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191. *See* Parker v. M & T Chem., Inc., 566 A.2d 215, 222 (N.J. Super. Ct. App. Div. 1989) interpreting A.B.A./B.N.A. *Lawyer's Manual on Professional Conduct*, 55:701 (as permitting disclosure of otherwise confidential information which an attorney reasonably believes necessary to support a claim against a client); Restatement Third, *The Law Governing Lawyers* (Tentative draft #2) (1989) recommending exceptions to the privilege for "Client Crimes and Fraud," § 132 at 238 and for "Lawyer Self-Protection," § 133 at 252. *But cf.* Theodore I. Koskoff, *The American Lawyer's Code of Conduct, Commission on Professional Responsibility* (Revised Draft, May 1982), preface (rejecting the concept that lawyer's have a general duty to do good for society that often overrides their specific duty to serve their clients. Serving clients is the lawyer's basic reason for being a lawyer, and the exceptions to the fundamental rule of absolute loyalty to clients must be minimal, and must be strictly construed). Note, however, that even under this strict standard, the lawyer is permitted to reveal confidences to the extent necessary to defend the lawyer against charges of criminal, civil, or *professional misconduct* asserted by the client, or against formally instituted charges of such conduct in which the client is implicated. THE AMERICAN LAWYER'S CODE OF CONDUCT (The Roscoe Pound-American Trial Lawyer's Foundation, Commission on Professional Responsibility, Revised Draft, 1982), *reprinted in* Morgan & Rotunda, *supra* note 163, at 238-40.

192. Gillers, *supra* note 125, at 19.

193. Abramson, supra note 7, at 277 (quoting CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 95, at 229 (3d ed. 1984)).

have adopted similar rules and some have gone even further.[194] Furthermore, in these states, in-house counsel do not have the common law right to sue for wrongful termination that in-house counsel have in California.[195] For example, in New Jersey, a lawyer must reveal information to the proper authorities to prevent the client from committing an illegal "or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or *substantial injury to the financial interest or property of another.*"[196]

New Jersey's statute represents one of the broadest statutes in the nation regarding an attorney's right to reveal confidential information where the lawyer is used to further a client's illegal or unethical goals, or similarly, put in a position where they are forced to act either illegally or unethically or be fired. A statute identical to this New Jersey statute would give in-house counsel in California the full opportunity to exercise their rights as defined in *General Dynamics*. This statute addresses almost any circumstance with which an in-house counsel could be faced. If in-house counsel were terminated for internally reporting their client's release of toxic fumes in the air, they would be protected by this statute because this release could clearly result in death or bodily harm. If in-house counsel refused to shred discovery documents or copy files under a protective court order and was terminated, they would be protected because this would be perpetrating a

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194. *See, e.g.* MD. RULES PROF. CONDUCT Rules 1.6, 3.3, & 4.1; NEV. RULES PROF. CONDUCT Rules 156, 172, & 181; PA. RULES PROF. CONDUCT Rules 1.6, 3.3, & 4.1; OHIO RULES PROF. CONDUCT Rules DR 4-101 & DR 7-102; TEX. RULES PROF. CONDUCT Rules 1.05, 3.03, & 4.01; and FLA. RULES PROF. CONDUCT Rule 4-1.6(b)(1).

195. After *General Dynamics,* California is the only state to grant in-house counsel a common law right to sue for wrongful termination.

196. N.J. RULES PROF. CONDUCT Rule 1.6 (West 1994) (emphasis added). This rule reads in pertinent part:

> (b) A lawyer shall reveal such (confidential) information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary to prevent the client
>
> (1) from committing a criminal, illegal, or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interests or property of another;
>
> (2) from committing a criminal, illegal, or fraudulent act that the lawyer reasonably believes is likely perpetrate a fraud upon a tribunal.
>
> (c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to rectify the consequences of a client's criminal, illegal, or fraudulent act in furtherance of which the lawyer's services had been used;
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or
>
> (3) to comply with other law.

Id.

fraud upon a tribunal.

Further, a majority of work done by in-house counsel relates to financial matters. This includes drafting contracts, reviewing mergers and takeovers, negotiating with cities, municipalities, and state and federal governments, purchasing and selling real property, banking and finance issues, purchasing and selling stock, tax and bond issues, and innumerable other financial dealings. Because in-house counsel deal with financial matters on a daily basis, there is a strong possibility that they will encounter situations where they are forced to act unethically or illegally and cause financial injury to person or property, or perpetrate a fraud. This statute addresses financial harm to person and property. The language in the New Jersey statute directly tracks the policy considerations set forth in *General Dynamics*. Therefore, if California enacted a statute identical to that of New Jersey, in-house counsel would be afforded every protection envisioned by the supreme court in *General Dynamics*.

VII. MEASURES TO AVOID DISCLOSURE OF CONFIDENTIAL INFORMATION

As demonstrated above, the restrictive confidentiality rules in California may act to place in-house counsel in the same or possibly worse situation than before *General Dynamics*. In recognition of the anticipated problems regarding disclosure of client confidences, the California Supreme Court did propose certain "ad hoc measures" that trial courts can take to allow in-house counsel to go forward with their suits.[197] Some of these ad hoc measures include: Using sealing and protective orders, limiting admissibility of evidence, restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings. These are but a few of the measures that might be explored by the trial courts as circumstances warrant.[198] While these measures may be effective by inducing some in-house counsel to consider both the best interests of their employer and the best interests of the public welfare, a better solution is to avoid court altogether. This can be done in two ways: internal procedures established by the corporation itself, and private agreements between the employer and employee that require neutral arbitration of any disputes arising out of the employment relationship.

197. General Dynamics v. Superior Court, 876 P.2d 487, 504 (Cal. 1994).

198. *Id.* *See also* Doe v. A Corp., 709 F.2d 1043, 1045 n.1 (5th Cir. 1983). To prevent identification of the company and the possible disclosure of confidential information concerning its affairs, the district court granted the defendant corporation's motion to seal the record, require the suit to be prosecuted without revealing the name of either the lawyer or the corporation, and enjoin Doe and his co-counsel from pursuing any actions arising out of the facts on which his suits were based, communicating with other persons to induce them to bring a similar action, and disclosing or using any information Doe gained during his employment with the corporation. The appellate court affirmed this aspect of the district court's ruling. *Id.* at 1050-51.

A. Internal Dispute Mechanisms

One example of an internal dispute procedure comes from a preliminary draft of the Uniform Employment Termination Act.[199] The Act provides arbitration as a remedy to aggrieved in-house counsel followed by court review.[200] The Act limits this court review to procedural review with substantive review only for substantial errors of law.[201] Arbitration of conflicts has the effect of protecting the confidentiality of the proceedings.[202]

Another proposal has been to set up an Ethics Resolution Committee ("ERC").[203] This committee would be composed of other company lawyers not involved in the present conflict.[204] An ERC would review internally complaints made by in-house counsel. The ERC would work much the same as a jury, judge, or arbitrator; namely, as a fact finder. The facts, however, would not be disseminated to the public. The ERC would analyze the situation and determine whether the in-house counsel has a valid wrongful termination claim. This proposal does have its problems, however. If an in-house counsel is not satisfied with the decision of the committee he is entitled to bring a wrongful termination claim. If the lawyer does so, he is still in the position of having to reveal confidential information. Therefore, this proposal is somewhat circular and only temporarily solves the major stumbling block in disputes between in-house counsel and their employers; confidentiality. Ultimately, an in-house counsel will seek full vindication of his rights. If an ERC determines that the in-house counsel does not have a valid claim, the in-house counsel will almost certainly seek redress in the courts. Thus, the problem comes full circle because the in-house counsel may be forced to reveal client confidences in order to prove a claim.

There is much scholarly comment on internal investigations.[205] Many of the articles however, do not directly address suits by in-house counsel against their employer. They focus instead on general disputes brought to the attention of a corporation by certain regulatory bodies or non-attorney

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199. *See* Giesel, *supra* note 89, at 592 (citing Lab. L. Rep. (CCH) ¶ 49,559, 60,455 (Dec. 31, 1990 Draft)).

200. *Id.* at 593-94.

201. *Id.*

202. *Id.*

203. Gillers, *supra* note 125, at 25.

204. *Id.*

205. *See, e.g.*, Robert S. Bennett et. al., *The Role of Internal Investigations in Defending Against Charges of Corporate Misconduct, in* HOW TO HANDLE INTERNAL INVESTIGATIONS AND ESTABLISH SUCCESSFUL COMPLIANCE PROGRAMS at 31 (PLI Corp. Law & Practice Course Handbook Series No. 763, 1992); Charles S. Mishkind, *Alternative Dispute Resolution of Employment Disputes: A Pro-Active Alternative to the Armorplate/Litigation Approach to Employment Disputes, in* EMPLOYMENT LITIGATION 1989: A DEFENSE AND PLAINTIFFS PERSPECTIVE at 341 (PLI Litig. & Admin. Practice Course Handbook Series No. 372, 1989); Greg Gerard Guidry & Gerald J. Huffman, Jr., *Legal and Practical Aspects of Alternative Dispute Resolution in Non-Union Companies*, 6 A.B.A. SEC. LAB. LAW. 1 (1990).

corporate employees. However, certain problems addressed in these articles can be applied to the in-house counsel setting. For example, there are problems with respect to confidentiality in internal proceedings that are equally applicable in the in-house counsel setting.

One commentator has noted that maintaining the confidentiality of an internal corporate investigation is critical, yet sometimes proves difficult.[206] By undertaking an internal investigation, the corporation takes some risk that the investigative work product will be disclosed to the government, a current or prospective litigation adversary, or the public.[207] Thus, although internal investigations and internal dispute mechanisms may seem attractive at first, the problems that may arise regarding disclosure of confidential information require some other arrangement between in-house counsel and their employer.

B. Private Agreements

Perhaps the best solution to the problem of confidentiality is to have the employer insert into the employment agreement with the in-house counsel, a requirement that all disputes arising out of the employment be settled by an outside neutral arbitrator. The agreement should contain a separate clause pertaining solely to confidentiality and explicitly set forth guidelines to keep all information confidential.

There are many advantages to this type of private agreement. An employer can avoid the costs of litigation, including attorneys' fees and the possibility of large jury verdicts, as well as the loss of productivity and disruption that lawsuits impose. Further, if employees feel they have had an adequate opportunity to be heard, they may not sue.[208] Employees may also wish to avoid the time and expense involved in a lengthy trial.[209] Finally, private arbitration agreements, entered into at arms-length by both parties have generally been upheld.[210] Therefore, a private agreement mandating strict confidentiality could serve to alleviate some of the problems inherent in internal dispute mechanisms.

The position of commentators who advocate internal dispute resolutions or private agreements to arbitrate mandating confidentiality may, in certain circumstances, be squarely at odds with the spirit of the *General Dynamics*

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206. *See* Edward J. Yodowitz & Robert L. Meyers, *A Structural Approach to Conducting Internal Corporate Investigations and Maintaining Confidentiality*, *in* SECURITIES LITIGATION 1993: CURRENT STRATEGIES AND DEVELOPMENTS at 125 (PLI Litig. & Admin. Practice Course Handbook Series No. 479, 1993).

207. *Id.* Furthermore, "the investigation might actually build a case against the corporation. In addition, the discovery of additional wrongdoing might require the corporation to disclose information of such wrongdoing, pursuant to, for example, the federal securities laws." *Id.*

208. *See* Moskowitz, *supra* note 13, at 66-67.

209. *Id.* at 68.

210. *See, e.g.*, Shearson / American Express v. McMahon, 482 U.S. 220 (1987); Volt Information Sciences v. Board of Trustees, 489 U.S. 468 (1989).

decision. For example, the court found that the doctrinal foundation of the public policy tort claim is not so much the plaintiff's continued interest in employment as the preservation of the public interest as it is expressed in the constitution and statutory law.[211] If the in-house counsel is terminated for internally reporting information that may cause injury to the general public, the case would be privately arbitrated. Because the arbitration is confidential none of the information concerning the harm would be made public. Therefore, the only interest vindicated is that of the in-house counsel personally. Contradictions and inconsistencies such as this must be squared with the policies underlying wrongful termination suits in order to clearly justify private, confidential, internal or external dispute mechanisms.

CONCLUSION

It is clearly in the public interest for in-house counsel to have a right to sue for wrongful termination. In the end, society as a whole will benefit if in-house counsel may reveal improper corporate conduct. In order to do so, however, counsel must have an incentive; the ability to obtain just compensation from an employer who wrongfully terminates counsel for advancing public policy.

The California Supreme Court took a laudable step in granting in-house counsel such a right to sue for wrongful termination. *General Dynamics,* however, is only the first step. In order for *General Dynamics* to have any effect at all, the state legislature and the state supreme court must reexamine the professional rules of conduct as they relate to confidentiality. These rules must be expanded so that in-house counsel may exercise the rights granted them under *General Dynamics*. The rules should be expanded to reflect the laws of other jurisdictions discussed previously. The California Supreme Court has already recognized more than any other jurisdiction, that in-house counsel require special protection. They now must give in-house counsel the tools necessary to reap the benefits of such protection.

In-house counsel must be given the statutory protection to reveal otherwise confidential information, if such information will protect them from being wrongfully discharged, and also protect some greater public good. Further, all possible steps should be taken to make sure a corporation suffers minimal damage from any disclosure that may occur. This can be done by instituting private dispute mechanisms from within the corporation.

If this is not done, then the *General Dynamics* case will stand for nothing more than a realization that in-house counsel do indeed need protection. This

211. General Dynamics v. Superior Court, 876 P.2d 487, 497 (Cal. 1994).

realization however, cannot be given effect unless changes in the professional rules are made.

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