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Limitations Imposed by the Attorney-Client Privilege on In-House and Outside Counsel as "Whistleblowers"

Christine N. Kearns and Daniel P. Westman

This article examines a developing and significant Sarbanes-Oxley issue relevant both to employers that employee in-house counsel or that retain outside counsel and to those counsel themselves: the limitations imposed by the attorney-client privilege on attorneys who intend to claim retaliation as whistleblowers in violation of Section 806 of the Sarbanes-Oxley Act.

Following the enactment of the Corporate and Criminal Fraud Accountability Act of 2002, otherwise known as the Sarbanes-Oxley Act,[1] there have been numerous claims filed with the Department of Labor (DOL) by employees, consultants and contractors as purported "whistleblowers," claiming retaliation under Section 806 of that statute. There have also been many articles about the litigation risks posed by this new statute and the procedures and penalties it imposes on both public and private companies.

This article examines a developing and significant Sarbanes-Oxley issue relevant both to employers that employee in-house counsel or that retain outside counsel and to those counsel themselves: the limitations imposed by the attorney-client privilege on attorneys who intend to claim retaliation as whistleblowers in violation of Section 806. In an environment in which whistleblowing claims are encouraged and, therefore, on the rise, employers do retain a fundamental and established right to prevent the disclosure of privileged information by their counsel. Likewise, in-house and outside counsel, who may feel a conflict between their professional, ethical objections and a good faith responsibility to identify

Christine N. Kearns is a partner in Pillsbury Winthrop Shaw Pittman LLP's employment and litigation groups where she concentrates in the area of sophisticated and complex employment disputes. Resident in the firm's office in Washington, DC, she may be reached at *christine.kearns@pillsburylaw.com*. Daniel P. Westman, a partner in the firm's office in McLean, VA, focuses on labor and employment issues, including defending employers in whistleblower, wrongful termination, sexual harassment and discrimination litigation, counseling employers regarding prevention of disputes, and trade secret and non-competition disputes. He may be reached at *dan.westman@pillsburylaw.com*.

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and report wrongdoing, can find guidance in certain bedrock principles of the attorney-client privilege.

While there have been no specific Sarbanes-Oxley cases on this issue—yet—court and administrative decisions on related or analogous claims are instructive. For example, the DOL's Administrative Review Board, which is charged with reviewing Administrative Law Judge decisions in Sarbanes-Oxley cases, recently held that an in-house lawyer could not use attorney-client privilege material in an offensive manner to claim retaliation under another federal whistleblower statute. The inability to use that evidence proved fatal to the former employee's claim, which was dismissed. In addition, several courts that have considered the claims of in-house and outside counsel in the context of other whistleblower statutes, have reached the same conclusion. Finally, several courts have limited the ability of in-house counsel to bring claims of retaliatory termination for raising public policy concerns at all, due to the limitations of the attorney-client privilege. Most recent judicial decisions, however, are loosening that prohibition. While there is a split among the courts in different jurisdictions on whether such a claim is even available, it is clear that in-house counsel making such a claim may not divulge privileged information, except in the rarest circumstances.

This article, therefore, describes the whistleblower provisions of Sarbanes-Oxley; provides a clear statement of the attorney-client privilege; and gives practical guidance to in-house and outside counsel on their own rights and responsibilities as "whistleblowers" based upon current legal authority.

SARBANES-OXLEY'S "WHISTLEBLOWER" PROTECTION

The Sarbanes-Oxley Act contains broad and substantive protections for corporate whistleblowers. Specifically, Section 806 creates a federal civil claim on behalf of "any officer, employee, contractor, subcontractor or agent"[2] of a publicly-traded company or the "contractors, subcontractors, or agents" of publicly-traded companies, who believes he has been retaliated against for reporting corporate fraud or accounting abuses. Similarly, Section 1106 allows for the imposition of criminal penalties on any individual or any publicly-traded or privately held company who retaliates against whistleblowers for providing truthful information relating to the commission of (or possible commission of) any federal offense to a law enforcement officer.

Whistleblowers under Sarbanes-Oxley must first file a complaint with the Secretary of Labor, who has delegated responsibility for investigation of complaints to the Occupational Safety and Health Administration. The DOL's Office of Administrative Law Judges (ALJ) is responsible for conducting evidentiary hearings. The ALJ decisions may be appealed to the Administrative Review Board of the DOL. However, if the administrative process is not completed in 180 days, the whistleblowers may file an action in federal court.

The Sarbanes-Oxley Act imposes a heightened burden of proof on the employers in those proceedings. Section 806 requires employers to demonstrate by "clear and convincing evidence" that adverse actions taken against whistleblowers were not retaliatory. In one of the earliest Sarbanes-Oxley cases, the ALJ noted that "[a]lthough there is no precise definition of 'clear and convincing' the Secretary and the courts recognized that this evidentiary standard is a higher burden than a preponderance of the evidence and less than beyond a reasonable doubt."[3] It is clear, therefore, that the employer's burden in Sarbanes-Oxley cases exceeds that imposed in other civil retaliation cases.

Given this heightened burden, employers would be even more vulnerable if counsel could use privileged information to make a claim. While there are no decisions to date on the issue of whether an in-house or outside attorney is protected by the Sarbanes-Oxley Act, its broad language, including "contractors" and "agents" as potential whistleblowers, is hard to interpret any other way. Congress did not however, create an exception in the statute to permit an attorney to violate the attorney privilege to bring such claims. The critical issue, therefore, is whether an attorney may use information to be received in that capacity--presumably provided by the client with the understanding that the information is subject to the attorney-client privilege--to pursue a Sarbanes-Oxley claim.

THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law,"[4] and is recognized in the federal rules of evidence and those in every jurisdiction the United States.[5] The privilege exists to facilitate effective client service.[6] The privilege encourages candor, openness and trust between the client and attorney, which results in fulsome sharing of client information. The attorney-client privilege establishes the client's right to prevent his attorney from disclosing any information that the client revealed to the attorney in the process of obtaining legal advice.[7] In general, a client is defined as a person or an entity receiving legal services from an attorney.[8] This means that when an attorney represents a corporation, the corporation is the client for the purpose of the evidentiary privilege.[9] For the purpose of the evidentiary privilege, an attorney is someone who has been admitted to a bar association that is affiliated with a governmental entity.[10]

The attorney-client privilege applies to situations in which the client is providing information to its counsel to obtain legal advice, but does not apply when the client is seeking pure business advice.[11] The attorney-client privilege also includes the Work Product Doctrine, which arises in connection with litigation or anticipated litigation. It provides a privilege for "[a]ll documents which are called into existence for the purpose—but not necessarily the sole purpose—of assisting the [client] or his legal advisors in any actual or anticipated litigation."[12]

There are certain established exceptions to the sanctity of the attorney-client privilege. First, the attorney-client privilege does not extend to protect information about "continuing and future client crimes and other wrongs."[13] That exception is narrow, however, and applies only if the client is acting in bad faith to harm the legally protected interests of another party or attempts to obtain legal advice to achieve an unlawful purpose.[14] Moreover, this exception to the attorney-client privilege does not automatically enable a lawyer to reveal confidential information. Rather, the party seeking disclosure has the burden of making a so-called *prima facie* showing that the communication occurred in the course of a consultation about a continuing or future crime or fraud.[15] Therefore, for this exception to apply, the burden of removing the information from the shelter of the attorney-client privilege lies with the party seeking disclosure. It should be noted that in some states, such as California, the Rules of Evidence have an even broader exception and expressly provide that the attorney-client privilege does not exist where the attorney "reasonably believes that disclosure of any confidential information is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."[16] The burden of establishing this exception, however, remains on the party seeking disclosure.

Second, the attorney-client privilege can be waived by the client, both explicitly or implicitly.[17] Courts will consider the privilege to have been implicitly waived when the client or the attorney (as the client's authorized agent) has voluntarily revealed information about the communication to a third party.[18] A court will consider an attorney to have waived the attorney-client privilege where "the lawyer's disclosure is within the course of the lawyer's work."[19] However, "[t]hat a lawyer's disclosure was improvident and not in a client's best interests should not, of course, lead a court to conclude that the disclosure was not within the scope of a lawyer's authority."[20] Thus, a client's privilege may be destroyed by the inadvertent action of its counsel who is acting in that capacity. Pursuing a claim as a whistleblower, does not, however, fall within the scope of counsel's authority as counsel. This exception provides little support, therefore, for the attorney as whistleblower.

In addition to the well-settled attorney-client privilege found in the law of evidence, attorney-client confidentiality is protected through the rules of professional conduct that govern attorney behavior in each jurisdiction. An attorney's ethical obligations have been summarized in the Model Rules of Professional Conduct, created by the American Bar Association. Most states have adopted the Model Rules or "relied heavily" on the Model Rules in creating their own state rules of professional conduct.[21]

The Model Rules provide even broader protection for attorney-client confidentiality than the attorney-client privilege. Model Rule 1.6 requires that "[a] lawyer shall not reveal information relating to representation of a client."[22] This broad protection is not subject to the requirement found in the rule of evidence that the information come from a communication from the client for the purpose of obtaining legal advice.[23] However, the attorney's obligation of confidentiality is not infinite. Rather, "M[odel] R[ule] 1.6 should be read to prohibit those needless revelations of client information that incur some risk of harm to the client."[24]

There are two principal exceptions to the attorney's ethical and professional obligation to maintain client confidentiality. First, an attorney may disclose confidential client information to prevent the client from causing death or substantial bodily harm. Model Rule 1.6(b)(1) states that "[a] lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[25] On its face, this exception is narrower than the exception to the continuing "and future crimes and other wrongs" to the attorney-client privilege stated above. However, in some states, such as Pennsylvania, an attorney is allowed to disclose confidential information to prevent not only death or substantial bodily harm to third parties, but also "substantial injury to the financial interests or property of another."[26] Likewise, the Restatement of the Law Governing Lawyers states that disclosure of confidential information is permissible in order to prevent a client from causing death or substantial bodily harm to a third party as well as to prevent, rectify, or mitigate substantial financial loss to a third party.[27] This expansion of the exception based upon potential "financial" injury provides a toehold for attorney whistleblowers. It is, however, only available in limited jurisdictions and is accompanied by a burden on the lawyer to establish that the requisite circumstances exist.

This exception to the attorney's ethical obligation to maintain confidential information is also discretionary, rather than absolute. In most jurisdictions, the attorney has the discretion to disclose client information under these circumstances, but is not obligated to. The commentary to Rule 1.6 states that "[t]he lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's

relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question."[28] Most states have adopted this permissive approach, including Massachusetts, Texas, and Montana.[29] There are, however, some states, such as Illinois and New Jersey, that have adopted a mandatory approach to this question and have determined that attorneys must disclose confidential client information when it is necessary to prevent death or substantial physical injury to another person.[30] California takes a different approach. The California Rules of Evidence state that "[t]here is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client information is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."[31]

Regardless of whether the right to disclose is permissive or mandatory, it is generally accepted that if an attorney does decide to exercise his or her right to disclose confidential information, "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose."[32] The variance between jurisdictions on the permissive versus mandatory nature of this public-policy based exception clearly affects the ability of a lawyer to use such information on his own behalf in whistleblower claim. Obviously, where disclosure is mandatory, the lawyer's ability to do so is enhanced.

The second exception to the attorney's obligation of confidentiality relates to claims for legal fees or defenses to claims of malpractice. Model Rule 1.6(b)(2), states that "[a] lawyer may reveal such information to the extent 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 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 a client."[33] This exception has been recognized in lawsuits brought by clients alleging that the attorney engaged in malpractice, or in motions by the client to set aside criminal verdicts because of ineffective assistance of counsel.[34] The exception allows the lawyer to respond fairly and fully to the client's charges. The lawyer, however, is authorized only to breach the privilege defensively.[35]

The Model Rules and 13 states specifically limit the use of this exception to attorneys involved in fee dispute or malpractice action. However, 37 other states permit the use of the exception more broadly. Certain legal writers have also suggested that this provision should be interpreted on the basis of its plain language, such that it can be expanded to include claims by in-house counsel of retaliatory discharge.[36] Moreover, as described below, several courts have expressly expanded this exception to allow an in-house counsel to disclose confidential client information in order to bring a claim of retaliatory discharge.[37]

The Model Rules also specifically address the responsibilities of an in-house counsel who believes others in the organization are committing a wrong, which could be imputed to the corporation. Model Rule 1.13(b) provides that an in-house attorney who identifies corporate malfeasance shall "proceed as is reasonably necessary in the best interest of the organization."[38] The in-house attorney must act in a way that is "designed to minimize disruption to the organization and his risk of revealing information relating to representation to persons outside the organization."[39] Under these circumstances, the in-house attorney's options do not include revealing client confidences or waiving the attorney-client privilege. His recourse is limited to:

1. Requesting reconstruction and a separate legal opinion;
2. Requesting action by a higher authority in the organization; or
3. Resigning his position.

Under the Model Rules, whistle blowing is not an option. Using privileged information to do so or to later claim retaliation, is, therefore, not sanctioned.

Finally, the American Corporate Counsel Association (ACCA) has clearly stated to in-house counsel that they are not permitted to use attorney-client privileged information to blow the whistle on internal illegal activities.[40] In its Policy Statement on Wrongful Discharge suits filed by in-house counsel adopted on November 6, 1991, the ACCA Board stated that,

A former in-house counsel *may not maintain* a [wrongful discharge suit against a former employer for retaliatory discharge] if (a) the action is taken by the former in-house counsel which gave rise to the termination of employment constituted a violation of the code of professional responsibility of the applicable jurisdiction or (b) in order to maintain such cause of action, the former in-house counsel must introduce in evidence information which is privileged.[41]

JUDICIAL VIEWS ON ATTORNEYS AS WHISTLEBLOWERS

As describe above, the rules of evidence and professional conduct, among other sources, strictly limit an attorney's use of confidential client information. Attorneys have, however, attempted to pursue claims of retaliation as whistleblowers or wrongful termination using confidential client information to further that effort. For the most part, they have met with failure.

The Department of Labor has only decided one "whistleblower" case brought by an attorney.[42] In *Willy v. Coastal Corp.*, an in-house attorney claimed that he was fired from his job with a natural gas production company for writing a report critical of a subsidiary's compliance with environmental law.[43] Mr. Willy then attempted to bring a wrongful discharge suit pursuant to the whistleblowing provision of the Energy Reorganization Act.

Ultimately, the ARB prohibited Mr. Willy from introducing the report into evidence and found that the use of such information was barred by the doctrine of attorney-client privilege.[44] The ARB further held that because Congress did not create an exception to the attorney-client privilege rule for environmental whistleblowers, it would consider the common law exceptions found in the Model Rules to determine if the report can be used as evidence in violation of the privilege.[45]

The ARB ultimately decided that the report did not fall under one of the limited exceptions to the attorney-client privilege discussed above. Specifically, the ARB found that the "self-defense" exception was inapplicable because the attorney was attempting to use the privilege offensively to bring a claim, as opposed to using it in his defense of a claim brought against him. The ARB followed other decisions and treatises in finding that the legal defense exception could not be used as a "sword" but instead only as a "shield" for legal self-defense.[46] Furthermore, the ARB also concluded that the information was outside the "future harm" exception because the attorney did not claim ongoing crime or fraud, or that his advice had been used to further a crime or fraud.[47] Thus, the future crime exception to the privilege did not apply.[48] Without the report there was no evidence to support the attorney's claim, and the case was dismissed.[49]

An attorney who brought a retaliation claim under a state whistleblower statute met the same result. In *Crandon v. State*, the in-house counsel for the Kansas State Banking Commission reported a purported act of improper conduct by a bank examiner directly to the FDIC without raising it internally.[50] Following her termination, she filed a lawsuit under the state whistleblower statute. The claim was dismissed by the court, which held "a person receives no statutory protection when he or she makes a disclosure with a reckless disregard for the truth or falsity of the disclosure made. . . . An attorney, and especially the chief counsel, is held to a higher standard."[51]

There is also substantial legal authority for the proposition that the attorney-client privilege prohibits in-house counsel from claiming retaliatory discharge at all after being fired for raising a client-employer's illegal acts.[52] In *Balla v. Gambro, Inc.,* the in-house counsel for Gambro, Inc., a distributor of kidney dialysis equipment that was manufactured by Gambro Germany, claimed retaliatory discharge.[53] Specifically, after three years of employment as Gambro's in-house counsel, Balla rejected a shipment of dialyzers that did not conform to the FDA regulations. One week later, Balla learned that against his direction, Gambro had in fact decided to accept the shipment and would sell the machines on the open market.[54] Balla then spoke directly to Gambro's president and stated that "he would do whatever necessary to stop the sale of the dialyzers."[55] Balla was fired the next week, and shortly thereafter, he reported the shipment to the FDA. The FDA subsequently seized the shipment and determined that the product was "adulterated within the meaning of section 501(h) of the Federal Act."[56] Six months later, Balla sued Gambro for retaliatory discharge, claiming that his termination was illegal because it was in retaliation for blowing the whistle on Gambro's non-complying equipment.[57]

In *Balla*, the Illinois Supreme Court first recognized that Balla had no choice but to report the defective dialyzers to the FDA because the Rules of Professional Responsibility required Balla to disclose this information and to withdraw from continued representation of Gambro.[58] The court noted that the Illinois state bar required such a disclosure and Balla did not face the Hobson's choice of either complying with the client-employer's wishes and possibly losing his license to practice or refusing to comply with the client-employer's wishes and thereby risking the loss of his job.[59]

The *Balla* court then refused to extend the retaliatory discharge claim to in-house counsel because such an action could damage the attorney-client relationship and limit the free-flow of information between the client-employer and its in-house attorney.[60] The *Balla* court stated,

We believe that if in-house counsel are granted the right to sue their employers for retaliatory discharge, employers might be less willing to be forthright and candid with their in-house counsel. Employers might be hesitant to turn to their in-house counsel for advice regarding potentially questionable corporate conduct knowing that their in-house counsel could use this information in a retaliatory discharge suit.[61]

After *Balla* a handful of state and federal courts have rejected the Illinois Supreme Court decision and instead permitted in-house counsels to file retaliatory discharge and wrongful discharge claims.[62] In each instance, however, these courts draw the line, holding that an attorney may not blithely violate the attorney-client privilege to bring the claim.

The California Supreme Court took the lead in recognizing an in-house attorney's right to claim retaliatory discharge.[63] In *General Dynamics*, the court recognized the inherent difficulty for counsel in adhering to the Rules of Professional Conduct while, at the same time, rejecting the employer's illegal demands.[64] In *General Dynamics,* the court permitted an in-house counsel to file a retaliatory discharge claim when he was abruptly fired after fourteen years of employment following his investigation of a company official's widespread drug use and bug-

ging of the company's security chief's office, and his warnings to the corporation of its violation of the federal Fair Labor Standards Act.[65] The court held, however, that the attorney's duty to protect its client's confidences was more important than his right to whistleblow. Therefore, the court limited the right of retaliatory discharge to rare circumstances and stated that in general "the in-house attorney who publicly exposes the client's secrets will usually find no sanctuary in the courts."[66] The court specifically stated, "[T]he contours of the statutory attorney-client privilege should continue to be strictly observed."[67] Furthermore, the *General Dynamics* court admonished all would-be whistleblowing in-house counsel that, "an attorney who unsuccessfully pursues a retaliatory discharge suit, and in doing so discloses privileged client confidences, may be subject to State Bar disciplinary proceedings."[68]

Finally, the *General Dynamics* court admonished that the attorney take this action in a manner that will be the least disruptive for the corporation.[69] The *General Dynamics* court proposed, for example, that any trial court that finds that such a disclosure does not violate the attorney-client privilege must take steps to protect the information by using sealing and protective orders, limiting admissibility of evidence, issuing orders restricting the use of testimony in successive proceedings and in camera proceedings.[70]

Other courts have permitted in-house attorneys to file retaliatory discharge claims.[71] Those courts have sought to balance the needs of the in-house attorneys to protect both the client and the public. For instance, in *GTE Products v. Stewart,* the Massachusetts Supreme Court affirmatively adopted the *General Dynamics* analysis, but limited the right to sue for retaliatory discharge to in-house attorneys and refused to hear a case that would specifically breach client confidences.[72]

Most recently, a federal court in Oregon summarized the "three divergent groups of cases" on the issue of whether an in-house counsel may bring a claim for wrongful termination. In *Meadows v. Kindercare Learning Centers*,[73] the court recognized a first group as those cases that impose "a total ban on wrongful discharge cases that raise attorney client concerns and allows for no exceptions." The "second group" allows a claim of wrongful termination by an in-house counsel "if the complaint is based on the in-house lawyer's adherence to obligations imposed by the Code of Professional Responsibility." The final group, which includes the *General Dynamics* case, prohibits a claim of wrongful termination of "whenever pursuit of the claim would result in the disclosure of client confidences or secrets." The court totally rejected the first group of cases. More significantly, it held, as in *General Dynamics,* that such cases will usually survive a motion to dismiss, and require some discovery, whether premised on an alleged obligations under the Code of Professional Responsibility or attorney client confidences.

Notably, the only state bar that has specifically stated that attorneys can use the "self-defense" exception offensively in a whistleblowing suit is Oregon. In a formal opinion, the Oregon State Bar found that the self-defense exception would allow a whistleblowing in-house attorney to disclose client confidences to the extent necessary to state a claim for retaliatory discharge.[74] Therefore, it its decision, the Oregon State Bar permitted disclosure of confidential information provided that the disclosure was reasonably necessary to establish the claim asserted and the information was revealed in the least public manner.[75]

Montana courts have also expanded the "self defense" exception to render it applicable to the situation in which an in-house counsel discloses confidential client information in order to bring a claim of retaliatory discharge.[76] In *Burkhart v. Semitool, Inc.,* the Montana Supreme Court found that an in-house attorney was permitted to use attorney-client privileged information in his wrongful discharge suit after he was fired for refusing to prepare fraudulent patent applications.[77] The

Burkhart court decided that the attorney did not violate his ethical obligations to his client because the information fell under the self-defense exception enumerated in Model Rule 1.6(B)(2) and thus was exempted from the attorney-client privilege. Specifically, the *Burkhart* court found that the Montana self-defense exception, which permitted attorneys to disclose attorney-client privileged information "to establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and the client," was broad enough to permit an attorney to use attorney-client information in his wrongful discharge suit against his employer.[78]

The findings in Oregon and Montana are clearly the minority.[79] Even those few states that permit attorneys to use privileged information in this manner demand that the trial court go to any length, including sealing, protective orders and in camera proceedings, to protect the privileged nature of this information.[80]

CONCLUSION

In deciding Sarbanes-Oxley retaliation claims filed by attorneys, the Department of Labor will most likely follow the approach used in *Wiley*. It should not permit an attorney to bring forth evidence that breaches the attorney-client privilege to advance his own claim, particularly where Congress has not created an exception to do so. There is limited authority from courts throughout the county to permit attorneys to do so either. For these reasons, attorneys who intend to bring Sarbanes-Oxley claims against their employers for retaliation should be substantially constrained by the attorney-client privilege as well as the controlling rules of professional conduct. Ultimately, the policies advance by the long-standing privilege should prevail over an attorney's "right" to file a whistleblower claim.

NOTES

1. 18 U.S.C. § 1514A, *et seq.* (2002).

2. 18 U.S.C. § 806, *et seq.* (2002).

3. Welch v. Cardnal Bankshares Corp., 2003-S04-15 (ALJ Jan. 28, 2004), at 36.

4. Weinstein's Federal Evidence § 503.03 [1] (2d ed. 1998), citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

5. Charles Wolfram, *Modern Legal Ethics*, § 6.3.1 at 250 (West 1986).

6. *Id.*

7. Weinstein's Federal Evidence § 503.10 (2d ed. 1998).

8. *Id.* at §503.11[1].

9. Scott W. Williams, Keeping Secrets "In-House": Different Approaches to Client Confidentiality for General Counsel," 1 *J. Legal Advoc. & Prac.*, 78, 82 (1999). Since there are multiple individuals in a corporation who may consult with corporate counsel, there is some confusion in the case law as to which communications are privileged in the corporate context. The Supreme Court has not articulated a standard for determining when corporate communications are privileged, but in the last case it decided dealing with the issue, it cited an Eighth Circuit opinion which established the following standard: for the attorney-client privilege to apply, it must be the case that "(1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of a corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents." Weinstein's Federal Evidence § 503.22 (2d ed. 1998)

(describing the standard established in Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978), which was often referred to in Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

10. *Id.*

11. *Id.* at § 503.13.

12. Hickman v. Taylor, 329 U.S. 495, 510 n.9 (1947).

13. Wolfram, Charles, *Modern Legal Ethics*, § 6.4.10 at 279 (West 1986).

14. *Id.* at 280.

15. *Id.*

16. Cal. Evid. Code § 956.5 (Deering 2004).

17. Wolfram, Charles, *Modern Legal Ethics* § 6.4.2 (West 1986).

18. *Id.* § 6.4.4 at 269–271.

19. *Id.* at 271.

20. *Id.*

21. Rachel S. Arnow Richman, A Cause Worth Quitting For? The Conflict Between Professional Ethics and Individual Rights in Discriminatory Treatment of Corporate Counsel, 75 *Ind. L. J.* 963, 966 n.122 (2000) (citing Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct §AP4:101 (2d ed. Supp. 1994). This section will discuss the attorney's obligation of confidentiality according to the Model Rules of Professional Conduct because of their widespread influence. This section will also discuss the variations in California, Massachusetts, Montana, Tennessee, and Texas since "[o]nly California, Massachusetts, Montana, Tennessee, and Texas have definitively ruled that attorneys may state a claim for common law retaliatory discharge." Lisa Overall, Retaliatory Discharge and In-House Counsel—A Comparative Analysis of State Law in the Wake of the Tennessee Supreme Court's Decision in Crews v. Buckman Laboratories, 33 *U. Mem. L. Rev.*, 629, 657 n.168 (2002).

22. Model Rule of Prof'l Conduct R. 1.6(a) (2000).

23. Wolfram, Charles, *Modern Legal Ethics*, § 6.7.2 at 298 (West 1986).

24. *Id.*, § 6.7.3 at 201.

25. Model Rules of Prof'l Conduct R. 1.6(b)(1) (2000).

26. Pa. RPC 1.6 (2003).

27. Restatement (Third) of Law Governing Lawyers §§ 60, 66, 67 (2004).

28. Model Rules of Prof'l Conduct R. 1.6, cmt. ¶14 (2000).

29. Brenda Marshall, In Search of Clarity: When Should In-House Counsel Have the Right to Sue for Retaliatory Discharge?, 14 *Geo. J. Legal Ethics* 871, 887. *See*, *e.g.*, Mass. Ann. Laws Sup. Jud. Ct. Rule 3:07, RPC 1.6(b) (2004) ("A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b), or Rule 8.3, must reveal, such information: 1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another."); Tex. Disciplinary R. Prof. Conduct 1.05(c) (2003) ("A lawyer may reveal confidential information . . . . 7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act. 8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyers' services had been used."); Mont. Prof. Conduct R. 1.6(b) (2002) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."); Tenn. Sup. Ct. Rule 8, Canon 1.6 (b)(1) (2004) ("A lawyer may reveal information relating to the representation of a client to the extent

the lawyer reasonably believes disclosure is necessary: To prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3."). Tennessee's rule is permissive only with regard to client conduct that is less detrimental to the public interest than death or substantial bodily harm.

30. *See*, *e.g.*, Ill. Sup. Ct. R. Prof'l Conduct, R 1.6(b) (2004) ("A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm.") (emphasis added); N.J. Court Rules RPC 1.6(b)(1) (2004) ("A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person: 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 interest or property of another.") (emphasis added); Tenn. Sup. Ct. Rule 8, Canon 1.6(c)(1) (2004) ("A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary: [t]o prevent reasonably certain death or substantial bodily harm.") (emphasis added). Tennessee's rule is only mandatory with regard to a client's conduct that may result in death or substantial bodily harm. *See supra*, n.28.

31. Cal. Evid. Code § 956.5 (Deering 2004).

32. Model Rules of Prof'l Conduct R.1.6, cmt. at ¶14 (2000).

33. Model Rules of Prof'l Conduct R.1.6(b)(2) (2000).

34. Wolfram, Charles, Modern Legal Ethics § 6.7.8 at 307–308 (West. 1986).

35. *Id*.

36. Richman, supra note 21 (citing Model Rules of Prof'l Conduct R. 1.6(b) (2000)).

37. Burkhart v. Semitool, 5 P.3d 1031, 1040–1041 (Mont. 2000).

38. ABA Model Rules of Professional Conduct 1.13(b).

39. *Id*.

40. *Client Confidences*, at 532 *citing to* Board of Directors of the ACCA Policy Statement on Wrongful Discharge suits filed by in-house counsel (adopted Nov. 6, 1991).

41. *Id*.

42. Willy v. Coastal Corp., DOL ARB, No. 98-060, 2/27/04.

43. *Id*.

44. *Id*.

45. *Id*. at 28.

46. *Id*. at 34.

47. *Id*.

48. *Id*. at 35.

49. *Id*.

50. Crandon v. State, 897 P.2d 92 (Kan. 1995).

51. *Id*.

52. *See* Balla v. Gambro, Inc., 584 N.E.2d 104, 108 (Ill. 1991) (citing to the decision of the Illinois Appellate Court in Herbster v. North American Co. for Life and Health Ins., 501 N.E.2d 343 (Ill. Ct. App. 1986)).

53. *Id*. at 106.

54. *Id*.

55. *Id*.

56. *Id*.

57. *Id*.

58. *Id*. at 109.

59. *Id*.

60. *Id*.

61. *Id*.

62. The States include, California, Massachusetts, Montana, Tennessee, Connecticut and Minnesota. *See* General Dynamics Corp. v. Superior Court, 876 P.2d 487, 9 BNA IER Cases 1089 (Cal. 1994); GTE Products Corp. v. Stewart, 653 N.E.2d 161, 10 BNA IER Cases 1507 (Mass. 1995); Burkhart v. Semitool, Inc., 5 P.3d 1031, 16 BNA IER Cases 1135 (Mont. 2000); Crews v. Buckman Lab. Int'l., Inc., 78 S.W.3d 852, 18 BNA IER Cases 1246 (Tenn. 2002); O'Brien v. Stolt-Nielson Transp. Group, LTD, 838 A.2d 1076 (Conn. 2003); Nordling v. Northern States Power Co., 478 N.W.2d 498, 7 BNA IER Cases 10 (Minn. 1991).

63. *See* General Dynamics Corp. 876 P.2d at 490.

64. *Id*.

65. *Id*. at 491.

66. *Id*. at 503.

67. *Id*. at 504.

68. *Id*.

69. *Id*.

70. *Id*.

71. *See* GTE Products Corp. v. Stewart, 653 N.E.2d 161, 10 BNA IER CAS 1507 (Mass. 1995); Burkhart v. Semitool, Inc., 5 P.3d 1031, 16 BNA IER Cases 1135 (Mont. 2000); Crews v. Buckman Lab. Int'l., Inc., 78 S.W.3d 852, 18 BNA IER Cases 1246 (Tenn. Ct. App. 2002); O'Brien v. Stolt-Nielson Transp. Group, LTD, 838 A.2d 1076 (Conn. 2003).

72. GTE Products Corp., 653 N.E.2d at 166.

73. 2004 U.S. Dist. LEXIS 20450 (D. Or. September 29, 2004).

74. *Client Confidences*, at 522 *citing to* Or. St. B. Ass'n on Ethics and Prof'l Responsibility, Formal Op. 1994-135 (1994) (finding that the plain language of the Self-defense exception would permit disclosure to establish a wrongful discharge claim.)

75. *Id*.

76. Burkhart, 5 P.3d at 1040–1041.

77. *Id*.

78. *Id*. (finding that the language "set forth in the Model Rules is extremely broad."

79. This argument has only been adopted by two other states, Tennessee and Utah. *See* Crews v. Buckman Labs. Int'l, 78 S.W.3d 852, (Tenn. Ct. App. 2002) and Sprately v. State Far, Mut. Auto Ins. Co., 78 P.3d 603 (Utah 2003).

80. Burkhart, 5 P.3d at 1041–1042.

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