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# Individual Liability for the Corporate Lawyer

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# "INDIVIDUAL LIABILITY OF THE CORPORATE LAWYER"

This is an excerpt from Chapter 6,

"Individual Rights and Liabilities of Corporate Counsel", of

***Corporate Counsel Guidelines***

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**SUMMARY**

## § 6.01 Introduction

This chapter is devoted to analyzing the personal rights and liabilities of inside corporate counsel sometimes in matters adverse to the corporation. It reviews the potential bases of civil liability to the corporation and, as privity-based defenses crumble, to third parties including employees, shareholders, business partners and others. As the visibility and importance of corporate counsel grow, they will become more attractive targets for civil litigation much as their colleagues in private firms have been for the past several decades.

The chapter also explores the tangled and fast-developing jurisprudence governing a corporate lawyer's employment rights *vis-a-vis* her corporate employer in (i) garden-variety breach of contract cases, (ii) ethics-based disputes, and (iii) discrimination cases. It also analyzes restrictions placed on corporate lawyers' right to litigate against their former corporate employers both as counsel and as a party. We have analyzed in Chapter 3 the corporate lawyers' ability to work for competitors.

A third major focus of the chapter is government sanctions against corporate counsel including limitations on practice before federal government agencies and even criminal investigations and prosecutions of corporate lawyers.

Finally, the chapter reviews various mechanisms that can provide some protection for the corporate lawyer -- malpractice insurance and corporate indemnity.

## §§ 6.02-6.04 Civil Liabilities to the Corporation, and Its Directors, Officers and Employees

Although the number of claims against corporate lawyers appear to be increasing, such claims are relatively infrequent as compared to claims against private lawyers. There are several reasons for this disparity. Most corporate employers choose not to sue their corporate counsel, even for inferior work, probably because of the possibility of disclosure of client confidences and the limited opportunity for financial recovery. Thus, for most corporations, the preferred solution is terminating the corporate lawyer's employment. Most of the claims against corporate counsel therefore come from other members of the corporate family -- employees, directors or officers -- who claim to have entered into an attorney-client relationship with

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the counsel. Five examples of such claims are described in the text.

Although there are no reported cases addressing the question whether members of a corporate counsel's office are vicariously liable for the acts of other lawyers in the office, the most likely answer is that they are not. In this way, corporate counsel are significantly different from and better off than their counterparts in private firms where all partners would ordinarily be liable for the torts of the other partners acting within their scope of employment.

As indicated above, there are very few reported decisions and presumably few instances in which corporate employers have sued their corporate counsel. The principal reasons for this are the lack of substantial assets or malpractice insurance to respond to such claims and the fear that the suit would result in disclosure is of confidential information. The concern for confidentiality is tempered for companies that are in bankruptcy or that have been taken over by a federal receiver (such as failed financial institutions) or a state court conservator (such as insolvent insurance companies). Nevertheless, even such failed corporations tend not to sue their former inside counsel because of the limited opportunities for financial recovery.

Historically a more troublesome area for corporate counsel has been claims by corporate officers and employees. Such claims usually arise out of joint representation of the corporation and a corporate officer or employee typically in civil litigation. While joint representation in criminal litigation is, if anything, much more treacherous than civil cases, most corporate counsel know to avoid that problem.

Often there is a true joint representation and the claim results from the fact that there was an unwaivable conflict, the counsel failed to explain adequately the nature of the potential conflict and obtain an informed waiver, or the individual client believed that his interests were sacrificed for the corporate good. There can also be claims arising out of situations in which the corporate counsel did not expressly agree to represent the individual but the individual believes (or at least claims) that the disclosure of confidences to corporate counsel was made pursuant to an attorney-client relationship.

Unions and union counsel face a similar problem. Union members often present claims against the employer for the union's counsel to evaluate and determine whether the claim should proceed with the union's support. During that evaluation process, union members sometimes believe that the union's

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lawyers were acting as their personal counsel, and this has led to claims against the lawyers.

The solution to all of these problems is the adoption of procedures, and strict adherence to them, that explain to corporate officers, employees and others, the scope of corporate counsel's representation. And if counsel undertakes to represent the individual, the joint representation should be preceded by a careful analysis of the likelihood of conflict, and a thorough discussion of the risks to the individual -- hopefully with a witness present.

**§ 6.05 Civil Liabilities—Civil Liability to Third Parties**

As privity erodes, corporate counsel have potential liability to an increasing array of third parties. Problems may arise with business partners or joint venturers where one partner's corporate counsel's office has undertaken the representation of the entire venture. The problem in these situations is that dispute may develop between counsel's corporate employer and the other business venturer or partner. As these conflicts sharpen, counsel may receive conflicting directions from, or perceive a conflict of interest between, her corporate employer and the other participants in the venture.

These problems can become insoluble and result in counsel's forced resignation at least as counsel for the venture. While careful waivers and prudential steps in segregating files and avoiding intra-venture conflict may avoid many issues, the potential for problems may convince most well-advised corporate counsel that it is unwise to represent a joint venture or partnership in which the corporation is a participant.

Another area in which there is potential liability but surprisingly few cases involves opinion letters. The widespread use of opinion letters by private counsel has spawned relatively few suits. There are also a few unusual situations in which corporate counsel may become liable to adversaries such as where the corporate lawyer makes misrepresentations as to her authority to settle a case.

A fertile ground for suits against corporate lawyers, both inside and outside, is relations with shareholders. The general rule is that a corporation's officers owe no separate duty to individual shareholders. Corporate fiduciaries (including corporate counsel) may, however, have duties and liabilities to shareholders through the corporation in a derivative action.

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Corporate counsel may also face individual liability for securities fraud. Although the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, rejected aiding and abetting liability under the federal securities laws, the lower courts have expressed their displeasure with this decision by expanding other means of holding lawyers liable. This includes holding lawyers liable as controlling persons under the securities laws and finding lawyers primarily liable.

## § 6.06 Employment Rights of Corporate Counsel—In General

The jurisprudence governing the rights of corporate counsel has developed rapidly in the past decade. The early cases likened the corporate counsel to private lawyers so that lawyers forced to resign employment for ethical reasons were afforded no legal recourse. Corporate counsel, at least those working without employment contracts, were seen as "at-will" employees who were entitled to be discharged for any reason or no reason at all. This was similar to the situation for private lawyers who ordinarily can be discharged by the client without reason or cause.

The more recent cases, however, have rejected the private lawyer paradigm and have treated corporate counsel more like a special class of employees with enhanced duties of confidentiality. There has been considerable softening of the rule that a lawyer who resigns for ethical reasons is without legal recourse. More importantly, corporate counsel can bring a wide range of employment-based claims based upon federal anti-discrimination laws and even contract principles provided that adequate precautions are implemented to avoid disclosure of corporate client confidences. More leeway is shown to the lawyer who is defending against claims by the corporation than bringing them.

## §§ 6.07-6.08 Ethics-Based Dismissal, Resignation and Termination of Corporate Counsel

Model Rule 1.16(a) requires that lawyers resign or withdraw if their clients intend to commit certain illegal acts or cause the lawyers to act illegally or unethically. While this rule may impose some hardship on a private lawyer in losing a client, the effect on the corporate counsel may be a career-ending decision. This is particularly harsh when one considers that it is the *client's* proposed misconduct that triggered the lawyer's ethical duties.

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That said, the landmark decision is *Balla v. Gambro, Inc.,* held that corporate counsel who objected to his corporate employer selling kidney dialysis machines that would allegedly be dangerous to patients, reported the matter to the FDA, and was fired, had no claim for "retaliatory discharge." Reasoning that such a tort action would undermine the lawyer-client relationship, in which the client historically could discharge counsel for any reason, the Illinois Supreme Court found against the lawyer.

*Balla v. Gambro* was at first followed by several courts and then the California Supreme Court held in *General Dynamics Corp. v. Superior Court*, that a corporate lawyer should be able to sue in situations where other corporate employees could sue provided that there are no sensitive confidentiality issues implicated or, if they arose, confidentiality could be safeguarded.

### §§ 6.09–6.10 Discrimination-Based Employment Suits by Inside Counsel

Suits by corporate counsel alleging discrimination in employment have been better received by the courts. The courts begin with the unspoken presumption that an employee can pursue such litigation and that there are adequate safeguards for confidentiality. This applies to claims of discrimination under Title VII including those based upon race, age, and sex.

Corporate counsel, of course, have the right to bring straight breach of contract claims if justified by their employment contracts and the applicable state law.

### § 6.11 State and Federal Whistle-Blower Protection Statutes

A few corporate counsel have also attempted to invoke the protection of federal and state "whistle-blower" statutes that protect employees from retaliatory discharge after disclosing their employers' wrongdoing. The extent to which such statutes will provide protection to the corporate lawyer remains unresolved.

### § 6.12 Restricting Lawyers from Practice Before Federal Agencies

Another sanction that can be levied upon corporate counsel is a limitation of the right to provide legal advice to a class of regulated businesses or to practice before a federal regulatory agency. The SEC and the federal banking agencies have the statutory authority to impose cease-and-desist orders that broadly restrict a lawyer's ability to provide legal services to

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entities subject to their regulation. While seldom used, these sanctions have potentially devastating impact.

Better known than the cease-and-desist orders is the regulatory agencies' authority to restrict those who practice before them. Perhaps the best known such procedure is the SEC's 2(e) proceedings; other federal agencies have analogous rules. The SEC's 2(e) proceedings have been the subject of ongoing judicial challenges and their validity has been in serious question. *Checkosky v. SEC*, 139 F. 3d 221 (D.C.Cir. 1998).

While the 2(e) procedure can have a major impact on counsel (and other professionals), its principal importance for corporate counsel may be that it has been a platform for the SEC to express its views about the appropriate role of corporate and securities lawyers. Thus, the most famous lawyers' 2(e) case is probably *In re Carter and Johnson,* a decision in which the SEC declined to impose sanctions but broadly stated what it expected of securities lawyers whose corporate clients fail to follow the lawyer's advice on disclosure issues. Similarly, another SEC report, not premised on 2(e), discusses the obligations of corporate counsel where there is knowledge of corporate wrongdoing and insufficient corrective action. This is the famous Salomon Brothers' bond-trading scandal that rocked Wall Street in the early 1990's. *In re Gutfreund*.

**§ 6.13 Malpractice Insurance**

With the rapid development of the corporate bar and the increased recognition of the risks of corporate practice has come malpractice insurance policies designed for the inside corporate counsel. While there may be some question about the need for such policies for every corporate lawyer, there are clearly some industries and some situations in which corporate counsel may find the availability of insurance reassuring and even helpful. The principal areas where corporate counsel are rightly concerned are where (i) the company may not be in existence to indemnify counsel because it is a start-up company or is in dire financial condition, (ii) the company is in an industry where failure frequently results in suits against directors and officers and lawyers (*i.e.*, banks and insurance companies), (iii) the company is in a highly volatile market that spawns shareholder litigation, (iv) the company is involved in joint ventures, and (v) corporate counsel often gives legal advice to third parties such as corporate insiders, pro bono clients or others. Insurance may be valuable in these situations, as well as in any case where the corporate counsel has significant personal assets.

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A significant issue with corporate lawyer's malpractice coverage is the possible overlap with directors' and officers' liability insurance (if counsel is also a director or officer). The overlap often provokes disputes between the carriers that paralyzes both carriers as they both invoke the "other insurance" clauses to decline coverage. Thus, careful integration of the two policies is essential.

The malpractice liability policy for corporate lawyers, often referred to as "employed lawyers coverage," is based on the familiar model of the classic directors' and officers' liability insurance policy. This includes what is known as "Part A" and "Part B" coverage for the situations where the corporation is not indemnifying the corporate counsel so the carrier makes direct payments to the corporate lawyer or her counsel (Part A coverage) and where the corporation is paying for the lawyer's defense costs and liability, and then obtains reimbursement from the carrier (Part B coverage). The major difference between d & o insurance and employed lawyers' insurance is that for the lawyer the liability insured against must result from "legal services."

The text of Chapter 6 reviews in detail one of the most popular employed lawyers' policies -- the Executive Risk policy which is endorsed by ACCA. One significant aspect of that policy is the exclusion for claims by the corporation against its own corporate counsel. Thus, corporate counsel sued by her own corporation will have coverage for legal expenses to defend the case (the "defense sublimit") but no coverage for liability. This structure should discourage suits by the corporation against its own counsel in order to collect on the insurance. A somewhat similar provision -- generally referred to as the "insured v. insured exclusion" -- is commonplace in d & o policies. Other exclusions that are often found in d & o policies are also present in employed lawyers' coverage include those for dishonesty, personal gain, etc.

## § 6.14 Corporate Indemnity and Limitations of Corporate Counsel's Liability

Although prospective limitations on liability are accepted tools in the corporate world to attract directors and other corporate fiduciaries, they are probably prohibited for corporate lawyers by Model Rule 1.8(h). Indeed, there is a split of authority among bar associations as to whether a corporation and its inside counsel can agree to liability limitations. There is no doubt, however, that a corporation and its former lawyer

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can release claims for past conduct as part of a settlement or otherwise. And a lawyer who successfully defends a case against him is entitled to corporate indemnity under Delaware law and the law of most states.

**§ 6.15 Limitations on Litigating Against the Company**

The ethical rules governing confidentiality of information gleaned during the attorney-client relationship limit corporate counsel's ability to work for competitors as we have seen in § 3.34 *supra*. The same confidentiality concerns impose restrictions on corporate counsel's ability to litigate against her former employer. While this does not prohibit corporate counsel from filing suit as a party against the former corporate employer, it may preclude her from acting as counsel in litigation against the corporation or even joining a class of former employees suing the corporation. The concern in all of these cases is balancing the former corporate counsel's right to enforce her rights against placing former corporate counsel in a position to, in effect, graymail her employer with the threat of disclosure of the confidences she has gained. A Solomonic compromise, adopted by some courts, is to permit the former corporate lawyer only to sue individually (which may be financially burdensome) rather than as part of a class so that the public disclosure of corporate client confidences can be more easily controlled. There is substantial authority that the court can monitor the disclosures of former corporate counsel even to her own counsel through *in camera* procedures or by sealing the records. Courts are becoming less tolerant of any attempts by former corporate counsel to use the threat of unveiling corporate confidences as a weapon in litigation against the corporation, and lawyers who have played this card are being rebuked.

**§ 6.16 Taking Documents from Corporations**

The general rule is that corporate documents belong to the corporation and employees can take neither the originals nor copies when they leave the corporation's employ. This obligation would appear heightened by the fact that corporate counsel's documents contain confidential information that the lawyer could seldom, if ever, ethically use after employment. The one instance in which a former corporate counsel may ethically be permitted to use confidential information from her corporate employment is under Model Rule 1.6(b)(2) in order to establish a claim or defense against the corporate client. Whether that possibility would permit removal of confidential corporate documents is questionable but one court has entertained such an

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argument seriously. In *X Corp. v. Doe*, a district court appeared to approve of a departing corporate counsel taking confidential information and documents if a reasonable attorney could conclude that the documents clearly established a client-employer's crime or fraud. Although the court later held that the documents did not meet that test and ordered them returned to the corporation, the initial decision was nonetheless surprising in that it appeared to encourage corporate lawyers to remove files on their departure.

**§ 6.17 Qui Tam Suits**

While there is no per se prohibition on corporate counsel acting as qui tam relators, this does not mean that their duties of confidentiality are in any way diluted. Indeed, a former corporate counsel who improperly utilizes confidential information may not serve as a qui tam relator.

**§§ 6.18-6.22 Criminal Exposure for Corporate Counsel**

Corporate counsel, as well as all other lawyers, are becoming more attractive as targets for law enforcement than at any time in the past. They are valued because of their visibility, stature and the fact that they may be able to be pressured into providing unusually valuable information on other targets (including the corporation). Their trophy status and their potential benefit to prosecutors is enhanced by their vulnerability to pressure: knowing that any criminal charge is likely to lead to disbarment, they are often highly motivated to cooperate with law enforcement.

As a result, law enforcement has been increasingly attracted to lawyers as witnesses and targets. By placing pressure on corporate counsel, the prosecutors may be able to neutralize an "advice of counsel" defense, disrupt the corporation's defense and possibly obtain vital or even privileged information. Corporate counsel who sees herself being cast as a suspect or target in a criminal investigation which also involves the corporation must be cognizant of the ethical restrictions governing her conduct.

The basic principles are embodied in Model Rule 1.7 governing conflicts of interest and Model Rule 1.6 governing confidentiality of information. Thus, if the corporate lawyer is either a subject or target of the investigation, or has reason to believe that she will eventually become one, there is a very serious question as to whether she may continue giving advice to the corporation regarding the handling of the investigation.

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Model Rule 1.7(b) renders it a conflict if the lawyer's own interests interfere with her responsibilities to the client unless waived by the client after consultation. A criminal investigation focussing partially on the lawyer would appear to trigger a Model Rule 1.7 analysis.

Apart from the potential conflict issues in Model Rule 1.7, the corporate counsel must carefully weigh the confidentiality restrictions in Model Rule 1.6 against her desire to vindicate her own conduct. While Model Rule 1.6(b)(2) allows a lawyer to disclose otherwise confidential information "to establish a defense to a criminal charge," this does not authorize wholesale revelation of privileged information. Careful examination of the application of Model Rule 1.6 is necessary for the lawyer who is concerned about compliance with the ethical rules. Of course, a lawyer who has engaged in illegal acts may be more concerned with fending off a criminal prosecution than compliance with ethical norms.

The ethical rules can provide a defense to lawyers charged with criminal conduct because they can show that their silence was not in furtherance of a crime but required by the legal ethics.

**§ 6.23 Attorney–Director**

We examined in Chapter 3 the ethical issues confronting the attorney-director and concluded that, for the most part, they were theoretically subject to solution. See § 3.32 supra. As we observed in that section, and as we reiterate here, the attorney-director has become such a lightning rod for litigation, the risks may effectively moot the analytical.

There are basically two risks to the attorney-director. The first risk is that she fails to explain the conflicts issues that her dual capacity presents and/or fails to clarify what "hat" she is wearing at all times. This problem can be solved through strict adherence to the rules discussed in § 3.32. A more substantive concern arises from the enhanced standard of care that a few courts have imposed on the attorney-director. Extrapolating from *Escott v. Barchris*, a few cases have opined that an attorney-director may be held to a higher standard than another (in that case outside) director. This heightened standard of care became a rallying cry for the FDIC, FSLIC and RTC in the failed bank and thrift cases and it elevated the lawyer-director to the target of choice in those cases. The notion continues today and the lawyer-director can expect to be subjected to greater scrutiny and exposed to more claims than

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the other directors -- not necessarily for good reason. This new reality, however, may be more important than the theoretical defenses of the attorney-director in assessing the wisdom of this course.

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**§ 6.06 Employment Rights of Corporate Counsel—In General**

Although a lawyer is required to abide by the ethics rules or face professional discipline, the first reported decisions construing corporate counsel's rights against the company when he has taken a stand purportedly based upon, or even required by, ethical rules, were surprisingly harsh toward the lawyer. The law, however, is evolving in a direction that is more favorable for the corporate counsel. The early cases involving corporate counsel followed the time-honored rule for private lawyers that the client could discharge the lawyer at any time with or without a reason and the client is liable only for the work performed (and quantum meruit in a contingent or deferred fee case). Those cases held that if the corporate counsel is an employee-at-will, *i.e.* one without an agreed-upon term of employment, the corporate counsel may be discharged for any reason -- including the fact that the lawyer believed himself to be ethically required to disregard the orders of senior management.[1] Likewise, a corporate counsel who resigned rather than perform what he believed was an unethical act could not collect for any work not performed.

The more recent cases eschew the private lawyer/discharge-at-will-for-any-reason paradigm and move far along the spectrum toward viewing corporate counsel as an employee who has enhanced duties of confidentiality and loyalty. In a number of jurisdictions, corporate counsel can assert all or most of the employment claims of other employees -- especially all manner of federal discrimination claims -- except to the extent that to do so would wholly undermine the lawyer's duties to former clients of confidentiality and loyalty. Moreover, some courts are devising imaginative ways of preserving confidentiality that would permit nearly every such case to proceed.

[1]In some large corporate counsel's office, it may be theoretically possible for the lawyer to decline to participate in the problematic act by having the task reassigned to another lawyer in the office. While this may avoid the dilemma posed by Model Rule 8.4(a), which prohibits a lawyer's personal involvement in activities that he regards as a violation of the ethical rules, it may, as a practical matter be as damaging to the lawyer's career as resignation. Furthermore, if the lawyer is convinced that the problematic act would violate the ethics rules, he may be obligated to "inform the appropriate professional authority" if the lawyer to whom the case is reassigned performs the act. *See* Model Rule 8.3(a).

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Courts draw the line where the lawyer who was *defending* employment claims for the company now wants to join other employees in *bringing* such claims. The courts frequently prohibit the former corporate counsel's joining, or leading, a class action because it would result in disclosing privileged information to the company's adversaries. In a Solomonic compromise, former corporate counsel who were involved in employment matters are forbidden from participation in the employee class action, and are required to pursue an individual suit.

## § 6.07 Employment Rights of Corporate Counsel—Dismissal and Wrongful Termination of At Will Corporate Counsel

We have discussed at some length the issue whether counsel may or must resign because of ethical violations. See § 3.20 *supra*. That section must be reviewed with care before beginning the analysis of corporate counsel's employment rights against the corporation.

Model Rule 1.16(a) was obviously developed with the private lawyer in mind. Resignation would end the representation of that client but not leave the lawyer unemployed. There is a significant policy question whether inside counsel should be required to resign if that means no longer being employed since that can impose a crushing financial hardship on the inside lawyer for the misconduct of the corporate client. Philosophical musings, however, are beyond the scope of this treatise and the inside corporate lawyer is now, and probably always will be, subject to the standards of Model Rule 1.16(a) to the same extent as private counsel.

The distinction between ethically-required (Model Rule 1.16(a)) and ethically-permissible (Model Rule 1.16(b)) withdrawal and termination of employment is essential to evaluating the contract rights of inside counsel. While inside counsel may rely upon a public policy exception to provide rights against the corporate employer where the lawyer is ethically required to resign because of the employer's misconduct, it is doubtful that he will have equal rights where the resignation is only permitted by the ethical rules.

## § 6.08 Employment Rights of Corporate Counsel—At-Will Counsel's Legal Rights for Ethics-Based Discharge

The traditional rule is that an at-will employee -- including a lawyer -- can be fired for cause or for no cause at

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all.[2] Most jurisdictions, however, recognize a "retaliatory discharge" or "wrongful discharge" exception to this rule.[3] In those situations in which the exception is recognized, it is typically justified by some public policy.[4] The first cases that addressed this issue did *not* recognize a "wrongful discharge" exception for lawyers for ethics-based concerns,[5] although the jurisprudence seems to be in transition in those cases in which the disposition of the suit would not raise confidentiality concerns.

In a leading case in this area, *Balla v. Gambro, Inc.*,[6] a dismissed corporate counsel sued his former employer, a marketer and distributor of kidney dialysis machines. Plaintiff had been responsible for all the entity's legal matters, including regulatory affairs and governmental compliance issues. Counsel obtained from the corporate parent a letter indicating that certain machines would be dangerous to dialysis patients and not in compliance with applicable FDA regulations, and advised company officials to reject the machines for noncompliance with applicable FDA regulations, and because they could be potentially dangerous to users.

The Gambro president announced an intention to sell the machines and counsel informed the company president of his intent to stop that sale. The president fired corporate counsel (Balla) who then reported the defective machines to the FDA, which seized the machines before they could be distributed. Balla brought a retaliatory discharge claim against the company for the firing, alleging contravention of a fundamental public policy by his corporate employer. Affirming summary judgment for the employer, the Illinois Supreme Court ruled that no retaliatory discharge cause of action was available for in-house corporate attorneys, because they were not just employees, but

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[2]*See generally* Rand v. CF Industries, Inc., 797 F.Supp. 643 (N.D.Ill.1992).

[3]*See In House Counsel's Right to Sue for Retaliatory Discharge*, 92 Colum.L. Rev. 389, 394 (1992).

[4]*But see* General Dynamics Corp. v. Superior Court, 7 Cal.4th 1164, 32 Cal.Rptr.2d 1, 876 P.2d 487 (Cal. 1994), discussed *infra*, in which the court's allowance of a retaliatory discharge claim by in-house counsel turned upon a simple analogy: if a non-attorney employee can sue for wrongful discharge, so, too, can in-house attorney employees, so long as the attorney-client relationship is not breached. *Id.* at 490.

[5]Patricia Leigh Odell, *Retaliatory Discharge: Corporate Counsel in a Catch–22 (Note)*, 44 Ala. L. Rev. 573, 576 (1993).

[6]145 Ill.2d 492, 164 Ill.Dec. 892, 584 N.E.2d 104 (Ill. 1991)

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also general counsel. The court found that the allowance of such a tort action would undermine the attorney-client relationship.[7]

*Balla v. Gambro* is consistent with *Willy v. Coastal Corporation*,[8] where corporate counsel alleged that he had been terminated for insisting that the company comply with environmental and securities reporting obligations. The court interpreted Texas law to preclude assertion of a "wrongful discharge" tort by corporate counsel, noting that there existed an established course of behavior for attorneys in the position alleged -- serve the client or withdraw -- and that those were the options available to corporate counsel.[9]

The *Balla v. Gambro* rule was too harsh to survive for long, and courts are now recognizing a right to sue where the corporate counsel is acting on ethical considerations. In a leading decision, *General Dynamics Corp. v. Superior Court*,[10] the California Supreme Court challenged the basic thesis of the *Balla v. Gambro* line of cases. The court held that a lawyer should be entitled to the rights of a non-lawyer to sue where no sensitive confidentiality concerns are implicated or, if they exist, confidentiality can be adequately safeguarded. It

[7]*Id.* at 109-110. The Illinois Supreme Court expressed some concern that allowing such a suit, even on public policy grounds, would cause employers to be less than candid with in-house counsel in many situations, including instances of questionable conduct.

[8]647 F.Supp. 116 (S.D.Tex.1986), *rev'd in part on other grounds*, 855 F.2d 1160 (5th Cir.1988). *See also McGonagle v. Union Fidelity Corp.*, 383 Pa.Super. 223, 556 A.2d 878 (Pa.Super.1989).

[9]*Id.* at 118. As one commentator has stated, "*Willy's* logic is neither clear nor convincing ... [since] logic hardly dictates that the rules must go unsupplemented by wrongful discharge protection for house counsel." Ted Schneyer, Professionalism and Public Policy: The Case of House Counsel, 2 Geo. J. Legal Ethics 449, 470-71 (1988). *See also Herbster v. North American Co.for Life & Health Insurance*, 150 Ill.App.3d 21, 103 Ill.Dec. 322, 501 N.E.2d 343 (Ill. App. 1986), *cert.denied*, 484 U.S. 850, 108 S.Ct. 150, 98 L.Ed.2d 105(1987)(plaintiff lawyer was unsuccessful in claim of retaliatory discharge, when fired for refusal to act in violation of ethics rules and other laws, because attorneys occupy what the court calls a special place in our society).

[10]7 Cal.4th 1164, 32 Cal.Rptr.2d 1, 876 P.2d 487 (Cal. 1994)

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rejected the notion that inside counsel's only choices were to resign or commit an ethical breach.[11]

The *General Dynamics* case was followed by *GTE v. Stewart*,[12] where the court recognized the right of an in-house attorney to file suit for retaliatory discharge for ethics-based reasons. It also suggested that this could be accomplished without disclosing confidential information.

Thus, since *Balla v. Gambro*, the pendulum is beginning to swing back toward the corporate counsel. Of chief concern to courts, as seen in the *General Dynamics* case, is the issue of protection of client confidentiality. Current or former in-house lawyers who improperly disclose or seek to disclose client confidences to further their claims have received a chilly reception by the courts.[13] Corporate counsel now appear to have a chance to redress a true retaliatory discharge, and an additional avenue to pursue, other than resignation as a matter of professional responsibility.

## § 6.09 Employment Rights of Corporate Counsel—Discrimination-Based Employment Suits by Inside Counsel

A different rule is emerging for suits based upon federal antidiscrimination laws -- at least to the extent that there is little risk of disclosure of confidential information. In *Kachmar v. Sungard Data Systems, Inc.*,[14] the Third Circuit, confronting a situation in which discharged counsel asserted a non-ethics based Title VII claim, adopted a significantly more permissive view than *Balla* in allowing a retaliatory discharge claim to go forward. *Kachmar* involved a suit by former in-house counsel fired after a series of disputes with top corporate officials. She brought both Title VII and pendent state law

[11]In its discussions, the court considered the similar plight of in-house attorneys and their non-attorney colleagues, and noted that similarities of circumstance dictate analogous courses of action, *i.e.*, availability of the right to sue for wrongful discharge. *Id.* At 489-490. Note, however, that the court also stated, in strong language, that where a retaliatory discharge claim cannot be completely resolved "without breaching the attorney-client privilege, the suit *may not proceed*." *Id.* at 490 (emphasis added).

[12]421 Mass. 22, 653 N.E.2d 161 (Mass. 1995).

[13]*See e.g.*, Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364 (5th Cir.1998); Siedle v. Putnam Investments, 147 F.3d 7 (1st Cir.1998).

[14]109 F.3d 173 (3d Cir.1997).

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claims. The district court "alluded to" the notion that maintenance of a retaliatory discharge claim would improperly implicate communications subject to the attorney-client privilege and/or information relating to Kachmar's representation of Sungard.

The Third Circuit first noted that other federal courts confronting this question had upheld the right of discharged in-house counsel to proceed under Title VII and related statutes.[15] It then pointed out that the policies underlying the federal antidiscrimination laws took precedence over state law at-will discharge principles. The court then found that the concerns for disclosure of client confidences, although reasonable, were not enough to "warrant dismissing a plaintiff's case, especially where there are other means available to prevent unwarranted disclosure of confidential information." The court enumerated a range of judicial measures, including "the use of sealing and protective orders, limited availability of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings." The court reversed and remanded for the trial judge to frame a procedure permitting vindication of retaliatory discharge claims while still "preserving the core values of the attorney-client relationship."[16] *Kachmar* suggests that those corporate counsel who claim the protection of federal anti-discrimination (or other employee-protective) law have a stronger hand in responding to dismissal.[17]

At the other end of the spectrum, at least one court has held that disclosure of client confidences by an inside counsel as a matter of law *may not* constitute "protected activity" under federal discrimination laws, and that termination of the counsel/employee was permissible. In *Douglas v. Dyn McDermott Petroleum Operations*,[18] the court held that an inside lawyer's disclosure of information about alleged discrimination in the corporate work place to a federal agency amounted to a violation

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[15]*Id.*

[16]*Id.* at 182.

[17]The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Op. No 1994-1 stated that no ethical provision barred a terminated in-house counsel from pursuing a claim for employment discrimination against his former employer. The Committee did note that former in-house counsel was precluded from serving either as attorney or class representative for a proposed class action suit against his former employer. That role would create intolerable tension between the duty to represent the class zealously and the duty to protect the confidences of his former employer.

[18]163 F.3d 223 (5th Cir.1998)

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of the confidentiality provisions of Model Rule 1.6. The court dismissed as "patently implausible" Douglas' argument that she reasonably understood that the government agency was her client, along with her corporate employer. Because the inside lawyer had declined contemporaneously to term her disclosure as a "whistle-blower" complaint, the court did not need to reach the question whether the disclosure fell within the exception contained in Model Rule 1.6(b)(2) as necessary to establish a "claim or defense" by Ms. Douglas against her employer-client. The court concluded with a blistering rebuke for lawyers who violate ethical rules and the "unique position of special trust" that inside counsel enjoys.

Excepting an unusual case like *Douglas*, where the inside counsel disclosed client confidences and failed to invoke the "claim or defense" exception in Model Rule 1.6(b)(2), the rule in *Kachmar* is probably the prevailing standard, thus allowing inside counsel to sue for employment discrimination if confidences can be protected. *Kachmar* capped a series of cases that either explicitly or implicitly allowed corporate counsel to sue their current or former corporate employers for employment discrimination prohibited by federal law.[19]

The limitation that the courts have imposed on these federal discrimination suits by corporate counsel are: (i) protective orders and other devices to prevent unwarranted disclosure *and* (ii) the lawyers may not be able to start or join a class of other employees *if* the corporate counsel had participated in the defense of such claims.[20]

## § 6.10 Employment Rights of Corporate Counsel—Breach-of-Contract Claims by Inside Counsel

Dismissed corporate counsel may have other options, such as a breach of contract action[21], an action for violation of an

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[19]Whittlesey v. Union Carbide Corp., 742 F.2d 724 (2d Cir.1984) (age discrimination); Stinneford v. Spiegel, Inc., 845 F.Supp. 1243 (N.D.Ill.1994) (age discrimination); Golightly-Howell v. Oil, Chemical and Atomic Workers, 806 F.Supp. 921 (D.Colo.1992) (race or sex discrimination); Rand v. C.F. Industries, Inc., 797 F.Supp. 643 (N.D.Ill.1992) (age discrimination); Hoskins v. Droke, 1995 WL 318817 (N.D.Ill.1995) (Title VII); Vanek v. Nutrasweet, 1993 WL 535209 (N.D.Ill.1993) (sex discrimination); Verney v. Pa. Turnpike Commission, 903 F.Supp. 826 (M.D.Pa.1995) (Title VII—retaliation).

[20]*See e.g.*, Doe v. A Corp., 709 F.2d 1043 (5th Cir. 1983); Hull v. Celanese, 513 F.2d 568 (2d Cir.1975); New York City Bar Ethics Op. 1994-1.

[21]*See Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn.1991) (affirming dismissal of retaliatory discharge tort

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applicable whistle-blower statute,[22] or a breach of an implied-in-fact dismissal-for-cause-only agreement arising from company manuals or hand-outs.[23] The availability of these avenues is relatively sparse, state-specific, and of limited usefulness as an *ex ante* protection against retaliatory dismissal.

## § 6.11 Employment Rights of Corporate Counsel—State and Federal Whistle-Blower Protection Statutes

Although the Anglo-American endorsement of the common law doctrine of employment-at-will still reigns over the world of free enterprise, including the area of employment of corporate counsel, employees in some fields have been successful in challenging retaliatory discharge, also known as firing after "whistleblowing." Under federal and state law provisions which protect whistleblowers from retaliatory discharge, in-house counsel are attempting to prove in court that they, too, are protected "employees" under the terms of most whistleblowing statutes.[24]

To date, only one judicial decision has extended state statutory whistleblower protection specifically to corporate counsel.[25] Of the approximately 33 states that have enacted

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claim but reversing lower court and allowing breach of contract action for in-house attorney).

[22]*See, e.g., Parker v. M & T Chemicals*, 236 N.J.Super. 451, 566 A.2d 215 (N.J.Super.Ct.App.Div.1989)(in suit filed under N.J. whistleblower statute, court rejected employer's defense that a client, even a corporation, can end the lawyer-client relationship despite the provisions of the whistleblowing statute).

[23]*Mourad v. Automobile Club Ins. Ass'n*, 186 Mich.App. 715, 465 N.W.2d 395 (Mich.Ct.App.1991).

[24]*See generally* John L. Howard, *Current Developments in Whistleblower Protection*, 39 Labor L. J. 67,69 (1988). A typical state whistleblowing statute, for example, provides that employees may not be discharged for reporting company wrongdoing and related actions. The term "employee" generally is defined as an individual who performs services under the control and direction of an employer, and receives wages or other remuneration for such activities. This broad definition would not preclude, on its face, employees of corporate general counsel's office.

[25]*See* Parker v. M & T Chemicals, 236 N.J.Super. 451, 566 A.2d 215 (N.J.Super.Ct.App.Div.1989) (recognizing that in-house attorneys are employees within the meaning of the New Jersey Whistleblower statute and can, therefore, sue an employer for retaliatory discharge).

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whistleblowing statutes, less than half extend such protection to private sector employees.[26] Even among those states that create a cause of action for private employees, none explicitly addresses the issues facing in-house counsel. Moreover, some whistleblower statutes contain restrictions that severely restrict in-house counsel's ability to invoke statutory protection. For example, in *Wieder v. Skala*,[27] the court held that the whistleblower statute did not apply to a retaliatory discharge claim by a law firm associate based upon the attorney's efforts to have the firm comply with disciplinary rules, because the statute was not pleaded in the complaint and because the whistleblower statute is expressly limited to "activity, policy or practice of the employer ... which ... presents a substantial and specific danger to the public health or safety."[28]

Other state courts have left open the possibility that an attorney could sue under the applicable whistleblower statute but have denied protection on the specific facts before them.[29]

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[26]John Jacob Kobus, Jr., Note, *Establishing Corporate Counsel's Right to Sue*, 29 Val. U. L. Rev. 1343,1401 (1995). The majority of the whistleblower statutes only apply to public sector whistleblowers, and only a few extend protection to private sector whistleblowers. *Id.*

[27]144 Misc.2d 346, 544 N.Y.S.2d 971 (N.Y. 1989)

[28]*Id.* At 973.

[29]*See* Chilingirian v. City of Fraser, 194 Mich.App. 65, 486 N.W.2d 347 (Mich.Ct.App.1992) (private attorney could not recover for wrongful termination as city attorney under state Whistleblower Protection Act because attorney was an independent contractor rather than an employee; "it is clear that plaintiff was not 'in-house' counsel for the city"), *aff'd* 200 Mich.App. 198, 504 N.W.2d 1 (1993); Contreras v. Ferro Corporation, 1993 WL 437585 (Ohio App.1993) (in-house counsel, although an employee under the whistleblower statute, could not invoke the act's protection because he failed to follow procedures for internal notification of alleged violations before contacting outside authorities as required by the statute).

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