UWLA Law Review

1999

Article

THE LEGAL ROCK AND THE ECONOMIC HARD PLACE: REMEDIES OF ASSOCIATE ATTORNEYS WRONGFULLY TERMINATED FOR REFUSING TO VIOLATE ETHICAL RULES

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I. INTRODUCTION

Sara, a newly admitted bar member has worked at a law firm (the firm) for six months. Sara likes and appreciates her job because it was very difficult for her to find an entry-level legal position. The firm employs twenty attorneys and is primarily run by three name partners that sit on the executive committee. The firm gets 60% of its business from Indicted Corp. and has had this relationship for more than twenty-five years.

Sara is assisting the firm prepare for a large case on behalf of Indicted, and is responsible for reviewing discovery documents. While reviewing documents, she notices many of them are missing. Upon further investigation, Sara realizes that the missing documents may be the "smoking gun" that would justify punitive damages.

Sara has a meeting with the three name partners of the firm and informs them that she believes Indicted is destroying documents that are required for discovery. Smith, one of the name partners, explains to Sara that he went to law school with the president of Indicted and that they are close friends. He explains that in the real world, many law firms alter a client's discovery to make it appear more favorable.

Sara, having been an attentive student in her recent professional responsibility class, knows destroying documents is unethical and tells the partners that the firm must report Indicted's president to the state bar because she is also an attorney. Accordingly, Sara demands that the firm report this misconduct. To Sara's amazement, the name partners tell her that if she reports the client's actions, she will be back at her law school's career services office.

While Sara knows that she is ethically required to report Indicted and the firm's misconduct, she also knows that she is bound to feed her two children and pay back her high debts that have accumulated throughout law school. Should Sara have a remedy if she follows her state bar's attorney rules of professional conduct and the law firm terminates her?

A. ETHICAL ISSUES FREQUENTLY ARISE IN THE PARTNER AND ASSOCIATE RELATIONSHIP AND THEREFORE IT IS IMPORTANT TO EXAMINE THE RIGHTS AND REMEDIES WITHIN THE RELATIONSHIP

Ethical conflicts frequently occur between partners and associates [FN1] within the law firm environment. [FN2] In a survey, 98% of associates indicated that ethical issues have arisen in their practices. [FN3] Of the 98%, 19% responded that they sometimes disagree about the resolution of an ethical issue and 14% indicated that they have withdrawn from a case because of an ethical disagreement with a partner. [FN4]

Not only do ethical issues frequently arise, but today more attorneys are practicing in law firms. [FN5] In 1951, 60% of attorneys were solo- practitioners. [FN6] Today, two-thirds of the lawyers now work in law firms or other organizations. [FN7] It is beyond this Article's scope to determine why these disputes occur, but the frequency necessitates the study of the legal rights and remedies of law firm associates. The literature and case law exploring an attorney's right to sue for refusing to violate an ethical rule has primarily been limited to the relationship between an in-house counsel and his corporate employer and has largely suggested that the lawyer is barred from recovering. [FN8]

In addition to the fact that more lawyers are now practicing in firms with other attorneys, law firms have also changed by evolving into what resembles major corporations. Many law

firms now employee hundreds, and some now have more than one thousand, lawyers. [FN9] Each year, the largest law firms each hire dozens of new associate attorneys knowing that the majority of them will be gone after three or four years. With such a high turnover rate, these associates are analogous to long term temporary workers. Knowing that an employee will be gone in a few years seems to lessen the likelihood that the associate will be properly mentored because the firm will be more concerned about the number of hours they can bill within the few years they are employed rather than the associates potential in five years after they leave the firm.

Just as the legal profession has evolved, so must the methods for resolving conflicts among its members. [FN10] Because the associate attorney's role has changed, it is necessary for academic literature, and eventually the judiciary, to recognize and protect this vulnerable segment of the legal community.

First, this Article will explore the legal theories and remedies associates have relied upon to sue firms when they have been terminated for refusing to violate an ethical rule. Second, this Article will explore arguments both in favor of, and against, permitting these associates to sue. In doing so, this Article examines whether the types of lawsuits permitted can compliment or hinder the goals of attorney rules of professional conduct. Third, after weighing both arguments in favor and against, this Article concludes that proper public policy dictates that associates must be permitted to recover both under tort and contract principles.

This Article argues that, for purposes of a wrongful discharge tort, a law firm associate should be afforded the same treatment as any other employee. In fact, this Article takes the position that because of the unique role of the legal profession's members, courts have a duty to provide remedies for associates. Finally, because this Article recognizes judicial reluctance for permitting traditional employment lawsuits among those in the legal profession, it also briefly examines alternative theories for recovery.

II. LEGAL THEORIES THAT ASSOCIATES HAVE USED AFTER BEING TERMINATED FOR REFUSING TO VIOLATE AN ETHICAL RULE

A. IMPLIED-IN-LAW CONTRACTUAL THEORY

1. Good Faith

Originally, at common law, parties relied upon the harsh doctrine of employment-at-will to govern the relationship between employer and employee, making it difficult for an employee to recover against his employer. Nevertheless, as social structures and mores changed, so did the law. [FN11] Now rooted within each contract, courts imply a covenant of good faith and fair dealings. [FN12]

An employer demonstrates bad faith, and thereby arguably breaches the implied covenant, when it fires an employee in retaliation for action taken or refused by the employee that is to promote public policy. [FN13] In reality, the employment-at-will doctrine has lost much of its backing because the courts have placed holes in it like a piece of Swiss cheese. [FN14] Furthermore, many terminated employees invoke tort principles and are now suing for wrongful discharge. [FN15] However, as of yet, many courts have been hesitant to find a breach of the covenant of good faith through a contractual theory. [FN16]

Bad faith in an employment contract is recognized as using one part of the contract to avoid the essence of the agreement. [FN17] A law firm that hires an associate to perform legal services and then invokes the employment-at-will doctrine to fire the associate for complying with the rules of conduct that govern the work he was hired to perform, seems to

fall within the category of bad faith. In other words, an employer invokes the employment-at-will doctrine to avoid the essence of the contract which is hiring the associate to perform legal services. New York's highest court relied upon this reasoning to permit an implied-in-law contractually based lawsuit against a law firm. [FN18]

a. Wieder v. Skala [FN19]

New York has permitted an implied-in-law contractual based claim against a law firm that terminated an associate for following a rule of professional conduct. [FN20] In Wieder, a small law firm associate (plaintiff) requested that his own law firm represent him in his condominium purchase. The firm assigned another associate ("L.L.") to handle the matter. L.L. neglected the plaintiff's real estate transaction and made false and fraudulent misrepresentations to hide his neglect. [FN21] When the plaintiff realized the false statements and the neglect, he told two of the firm's senior partners. The senior partners conceded that L.L. was a pathological liar. Eventually L.L. admitted that he committed fraud and deceit on other clients as well. [FN22]
The plaintiff asked the firm's partners to report L.L.'s misconduct to the disciplinary committee as mandated by New York's Code of Professional Responsibility, [FN23] but the partners initially refused. Eventually the partners reported L.L. because the plaintiff continued to insist that they do so. However, the law firm also terminated the plaintiff. [FN24]
The plaintiff alleged that the discharge constituted a contractual breach of the employment relationship and that it violated public policy and consequently, was also a tort. [FN25] First, the court addressed the contract claim. The Court recognized New York's history of respecting the employment- at-will relationship. In prior cases, the Court dismissed lawsuits by employees who were terminated for "blowing the whistle" on improper or unethical activities. [FN26] In previous New York precedent [FN27], the employee plaintiffs were members of their large corporate employer's financial departments. Although the employees performed accounting services, they did not do so in furtherance of their corporate management responsibilities. [FN28] The Court used beautiful language [FN29] and distinguished the cases because in Wieder, the plaintiff's performance of professional services for the:
firm's clients as a duly admitted member of the Bar was at the very core and, indeed, the only purpose of his association with the defendants. Associates are, to be sure, employees of the firm but they remain independent officers of the court responsible in a broader public sense for their professional obligations. Practically speaking, plaintiff's duties and responsibilities as a lawyer and as an associate of the firm were so closely linked as to be incapable of separation. It is in this distinctive relationship between a law firm and a lawyer hired as an associate that plaintiff finds the implied-in-law obligation on which he founds his claim.

[FN30]

The Weider Court recognized that there is an implied fundamental understanding that an associate and the law firm will act in accordance with the rules of professional conduct. Furthermore, the Court recognized that the judiciary is responsible for regulating the legal profession and that the rules of professional conduct placed the plaintiff in the position of either failing to fulfill his professional obligation and thereby risking suspension or in losing his job. Therefore, the court held that the unique characteristics of the legal profession warranted finding an implied-in-law term in every contractual relationship between or among lawyers. [FN31]

The Weider Court limited its holding by suggesting that "we, by no means, suggest that each provision of the Code of Professional Responsibility should be deemed incorporated as an implied-in-law term . . . ." [FN32] The Court rejected the plaintiff's claim for the tort of abusive discharge [FN33] because the legislature would have to create the remedy. [FN34]

B. WRONGFUL TERMINATION

New York permitted Mr. Wieder, an associate, to sue for a contractual claim. However, a contractual claim is limited because money damages are far more restricted under contractual, when compared with a tort theory. [FN35] A majority of states have adopted a public-policy exception to the employment- at-will relationship. [FN36] The public-policy exception occasionally permits a tort claim if the employment discharge violates public policy. [FN37]

Terminating an employee for refusing to violate a professional standard of conduct interferes with important public policies and is sometimes recognized as a wrongful discharge. [FN38] Many have argued that there should be an expansion of the public-policy exception to permit a wrongful discharge lawsuit by a terminated attorney in a corporate environment. [FN39] This Article explores whether the expansion should also apply in the law firm setting.

1. Whether Rules of Professional Conduct Reflect Public Policy

Warranting a Tort Remedy

Jurisdictions are split on whether rules of professional conduct are a source of public policy. [FN40] Public policy has been defined as "what is right and just and what affects the citizens of the State collectively." [FN41] While the focus of many scholarly articles has been whether rules of professional conduct constitute public policy, it is not the focus of this Article. However, because the subject is germane to the topic of this Article, some mention will be made as it relates to associates of a law firm.

The argument in favor of rules of professional conduct being public policy is that lawyers are given public trust and are charged by state licensing procedures and professional codes to use their expertise for the public good. [FN42] In Rocky Mountain. Hosp. & Medical Serv. v. Mariani, [FN43] the court held that an ethical code is only a source of public policy if it serves the interests of the public--as opposed to solely the interests of the profession. Other courts have held that professional conduct rules which are merely administrative regulations concerned with technical matters do not constitute public policy. [FN44]

In Balla v. Gambro, [FN45] the Illinois Supreme Court barred a wrongful discharge lawsuit by an in-house attorney who refused to violate a rule of professional conduct that required an attorney to reveal a client's act that would cause death or serious bodily harm. [FN46] The Balla majority argued that the requirement of reporting is an assumed part of being an attorney. The Illinois Supreme Court reasoned that public policy is adequately protected by requiring an attorney to report the conduct. [FN47] Several years later in General Dynamics Corp. v. Superior Court, [FN48] the California Supreme Court held that a determination of a public interest is relevant to whether an in-house counsel can sue for retaliatory discharge based upon the refusal to violate a rule of professional conduct. Even now the question of whether rules of professional conduct constitute public policy, does not seem to have a clear answer.

a. Jacobson V. Knepper And Moga

In Jacobson, [FN49] an Illinois law firm associate sued for wrongful discharge after he objected to the firms improper debt collection practice. [FN50] The associate continually

objected to the debt collection process and was assured each time that the improper actions would be rectified. Nevertheless, the associate was relieved of his responsibility to oversee the debt collection process and was eventually terminated. [FN51]

Illinois' precedent establishes that an in-house attorney may not sue his employer for wrongful discharge because of the importance of maintaining the attorney-client relationship. [FN52] The Illinois appellate court concluded that Illinois' in-house precedent is not applicable for an associate that sues his law firm employer. The relationship between an in-house attorney and his employer is different from that of a law firm and associate because in the former, the employee is also the attorney for the employer. [FN53] An associate of a law firm does not represent his law firm in the manner that an attorney represents his clients. In this case the Illinois Appellate Court permitted Jacobson's complaint for both compensatory and punitive damages. [FN54]

After losing in the appellate court, the law firm defendant appealed to the Illinois Supreme Court. The Illinois State Bar Association's amicus brief stressed that it "does not believe that attorneys who are employees should be precluded from ever bringing a cause of action as a matter of law solely because they are an attorney with additional ethical obligations different from other similarly situated employees." [FN55] Consequently, the Illinois Supreme Court rejected the reasoning of both the appellate court and the ISBA and denied the associate's retaliatory discharge lawsuit.

The Illinois Supreme Court extended its previous rulings against in-house attorneys to also apply for lawyers that work for law firms. The Court held that the Illinois Rules of Professional Conduct adequately protect public policy and that the plaintiff was professionally obligated to report the unethical conduct of the law firm and rejected the attorney's lawsuit. [FN56] The high court rejected the assertion that only in-house attorneys should be precluded from suing their employers because the barring of in-house lawsuits is based "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." [FN57] Thus, the associate's lawsuit was blocked. Interestingly, an implied contractually based lawsuit was not a part of this lawsuit. Had it been, the result may have been the same as that in Weider.

III. ARGUMENTS IN FAVOR OF PERMITTING RECOVERY AGAINST LAW FIRMS

A. IT IS UNETHICAL AND HARSH TO FORCE AN ASSOCIATE TO CHOOSE BETWEEN UNEMPLOYMENT OR VIOLATION OF AN ETHICAL RULE

Under the A.B.A. Model Rules, a subordinate lawyer (often an associated lawyer) has an obligation not to act unethically, even if he is so directed by a supervising attorney. [FN58] Furthermore, the subordinate lawyer often has a duty to report the misconduct of his supervisory attorney. [FN59] An attorney may be severely punished for failing to report professional misconduct. [FN60] Nevertheless, as recognized above, courts have been unwilling to permit a wrongful discharge cause of action against law firms. Professor Stephen Gillers of the New York University School of Law recognized that this sends lawyers a mixed message because "[o]n the one hand they [courts] says 'You must report misbehavior on pain of losing your license.' Then, when lawyers do what the courts demand and they're fired for it, the courts tell them to scram." [FN61]

A professional employee forced to choose between violating his ethical obligations, or being fired, is put into an "intolerable position." [FN62] There is an inherent embarrassment and malign association with being unemployed--especially after being fired. Further, fired workers have longer periods of unemployment then those people that ended their jobs for other reasons. [FN63]

Permitting a cause of action for wrongful discharge may assist to equalize the balance of

power to an associate that has fewer contacts, economic strength, job stability and resources. Perhaps the only other protection an associate attorney has without a lawsuit is vengeance through his state's disciplinary commission. [FN64] Therefore, courts should not place associates into this intolerable position.

In Lowry v. State Bd. of Indus. Ins. Appeals, [FN65] an industrial appeals judge refused to permit unrepresented litigants to appear in contested hearings pursuant to the state's attorney general's finding that this would constitute the unauthorized practice of law. Because the judge refused to allow this, he was suspended for three days. The Washington Supreme Court overturned the suspension by realizing that it is improper to put the judge in the position of either facing a disciplinary suspension or violating the criminal codes and legal cannons. [FN66]

It is also intolerable to place an associate in the position of losing his job or possibly facing professional discipline. Furthermore, doing so is repugnant to deterring unethical attorney behavior. An associate's motivation to report improper conduct will be greatly enhanced if they have an incentive, especially a financial incentive, to do so. However, an associate will be deterred from reporting misconduct if placed in a position where they will be unable to meet their financial obligations because they are left without a remedy. As argued by New York's Committee on Professional Responsibility in Weider:

If lawyers are deterred from reporting misconduct, attorneys engaged in wrongdoing are likely to go undetected, and are also likely to continue their wrongdoing, to the harm of future clients. This too will impair the integrity of the profession. It is attorneys who are most likely to know of the misconduct of other attorneys; it is therefore attorneys who should especially be encouraged to report. Yet [not permitting an associate to sue] will clearly deter a lawyer, especially an associate, from reporting misconduct. The fundamental interests in self-reporting, in preserving the integrity of the profession, and in protecting the public should not be rejected in favor of an ironclad adherence to the employment-at-will doctrine. [FN67]

One may argue that all attorneys are required to face hard economic decision because of their profession. For example, consider a partner that has a client who insists he shred documents, or they will hire another lawyer. The partner is put in the position of choosing to violate an ethical rule, or perhaps, losing the client that provides most of his revenue. This Article, however, argues that the unique status of an associate distinguishes these otherwise analogous relationships.

An associate is likely to have less money than an experienced lawyer and is less likely to have other options for different employment. An experienced lawyer will have contacts that know of his reputation for honesty, while this may be untrue of the associate. The associate knows that in a job interview he will be asked why they quit a former job. The interviewing firm may question the veracity of a twenty-five-year-old who claims he was fired from a respectable law firm because a partner asked him to engage in unethical conduct. The associate will, perhaps, be seen as a complainer. The new firm may be afraid the associate will look for ethical problems within its firm. The bottom line is that the new law firm will have a plethora of attorneys it can hire. The firm will be less likely to hire an attorney who may be viewed as unable to cope in in the environment of a law firm.

The legal profession does not have a period similar to a residency program used by the medical profession. Accordingly, the judiciary should take heed to protect its young members. By not providing a remedy for a wrongfully terminated associate, the associates are placed into an intolerable position that most likely works against the ethical goal of peer-reporting and self- regulation.

B. WHEN AN ATTORNEY STANDS AS A LITIGANT TO VINDICATE HIS LEGAL RIGHTS, THE COURT MUST SEPARATE THE ATTORNEY'S ROLE AS AN OFFICER OF THE COURT AND THAT AS AN EMPLOYEE

This Article has pointed out that some courts have refused to recognize an associate

attorney's wrongful discharge action because reporting unethical conduct is already an attorney's duty. [FN68] Nevertheless, these courts fail to recognize that attorneys are not only officers of the court, but they are also employees. Attorney employees have families to feed and mortgages to pay. To suggest that associate lawyers can merely stand as stone statues and be unaffected by these pressures is inspirational, but inaccurate.

Without permitting associates' lawsuits, law firms could employ "economic blackmail" to force associates to violate ethical and legal standards. [FN69] "A holistic approach would look to a balancing of the attorney's professional responsibility with an attorney's individual rights as an employee." [FN70] Courts should be able to separate the attorney's role as an officer of the court and that of a human being.

Undoubtably, by taking an oath to practice law, attorneys do commit themselves to being an officer of the court. By being an officer of the court, and practicing in a profession that regulates itself so stringently, lawyers do have many obligations that distinguish themselves from other people as well as other professionals. Nevertheless, just as attorneys must protect the integrity of the courts, the courts must protect the integrity of the attorney. Rules of professional conduct do not exist in a vacuum. To the contrary, the court must mend the tangential issues relating to professional conduct in a manner that will permit rules of conduct to thrive while being respected. Will an associate have respect for a set of ethical codes he was fired for following and then find themselves unemployed and placed into financial hardship without a remedy? Simply put, in deciding which party should bear the loss of the associate's unemployment, it should not be the associate that acted improperly. Rather the malign, unethical and more wealthy law firms should assume the burden.

C. THE LEGAL PROFESSION IS SELF-REGULATED AND THEREFORE JUDICIAL ACTIVISM IS APPROPRIATE TO PROVIDE A REMEDY TO A TERMINATED ASSOCIATE

Courts have been reluctant and unwilling to carve out a tort exception to the employment-at-will doctrine because the courts believe this is a proper act of the legislature. [FN71] Nevertheless, the legal profession is self- regulated. "It is anomalous to await action by the [l]egislature concerning a profession governed and controlled by the judiciary." [FN72] Moreover, the judiciary is in a better position to permit a public policy exception because lawyers understand the law firm and associate relationship better than those in the legislature. By assuming the role of self-regulation, courts have a duty to provide remedies to wrongfully terminated associate attorneys.

If a lay-person had the hypothetical fact pattern described at the beginning of this Article posed to them and asked if the associate attorney should have a remedy, the lay-person would undoubtably answer "yes." The employment- at-will doctrine has been weakened because of the legislative attacks on it. Presumably, the at-will exception represents the will of the majority. The will of the majority has been so strong, that these exceptions have been permitted even though employers probably have stronger abilities to lobby.

If the public sees that associate attorneys are not able to enjoy the same rights as other workers, then the bar and the public's perception of the ability of the judiciary to regulate itself may be questioned. [FN73] Certainly if attorneys see that other professionals have a remedy when wronged, then they will feel that they too should have a remedy. Furthermore, attorneys are in the best position to enforce their ethical rules as recognized by the duty of reporting. If attorneys do not have causes of action, they will be deterred from reporting other attorneys. Some have gone so far as to argue that if an associate terminated for refusing to violate an ethical rule is not given an appropriate remedy, the judiciaries' ability to self-regulate is threatened. [FN74] Because the Bar regulates itself and should do so in a fair and effective manner, courts must permit an associate's wrongful discharge lawsuit.

D. IF ASSOCIATES ARE PERMITTED TO SUE, LAW FIRMS WILL BETTER ADHERE TO THE

RULES OF PROFESSIONAL CONDUCT

Traditionally, law firms have widely escaped state regulatory discipline because the punishment is generally directed at individual attorneys. [FN75] Perhaps this approach is logical because the law firm's people, and not the firm itself, actually violated the ethical rules. [FN76] But nevertheless, if law firms were directly financially liable for its attorney's actions, its members would be less willing to allow their fellow partners to commit ethical violations.

By forcing the law firm to satisfy judgments by paying associates, a law firm may be economically strong-armed into making its practice more ethical and associate friendly. Charles W. Wolfram of Cornell School of Law recognized that the Wieder case is significant because "[i]t's a question of whether a law firm has the ability to sweep bad dealings under the carpet and not be called to task for it." [FN77] Law firms will change and respond if punished through lawsuits. Lawsuits will force the firm to pay financially and expose their unethical conduct to the public in an embarrassing light. If state regulatory agencies continue to grant law firm immunity, the courts should permit an associate to indirectly punish the law firm through a civil lawsuit.

IV. ARGUMENTS AGAINST PERMITTING AN ASSOCIATE TO SUE HIS LAW FIRM

A. PERMITTING LAWSUITS WILL HAVE A CHILLING EFFECT ON ZEALOUS ADVOCACY

If supervisory attorneys are concerned about defending lawsuits against associates, it may have a chilling effect on the law firm's obligation of zealous advocacy. [FN78] The victim in this situation is the client because it does not have all the available resources working for it. For example, if a supervisory attorney wants an associate to perform a task that is arguably ethically permitted, but arguably not, then the supervisor may choose not to have the subordinate do the task for a fear of reprisal. [FN79] "[A]llowing subordinate lawyers too much freedom to define the scope of their duties will subject the supervisory lawyer to endless second guessing, which will make managing a law firm or legal department even more difficult." [FN80]

Law firms that set up proper channels of ethical dispute resolution will not experience a chilling effect on zealous advocacy. For example, if a dispute arises, a law firm should have a method to resolve it. If the firm had an independent committee that could review associate's ethical complaints, the partner would be less worried about a wrongful termination lawsuit. The partner and associate could resolve the dispute through the committee. If the associate still disagreed with the committee, he could still sue for wrongful termination. Nevertheless, the paper work trail would likely help to assure that the ethical rules are properly followed in a manner consistent with zealous advocacy.

B. LITIGATION WILL COMPROMISE THE FIRM'S CLIENT'S CONFIDENTIALITY

When a law firm partner orders an associate to violate a rule of professional conduct, it is usually indirectly for the client's benefit. Courts protect the client's secrets and confidences by guarding the attorney - client relationship. [FN81] Arguably, by permitting associates to sue law firms, the client's confidences will be revealed in court and both parties tread upon violating the rules of professional conduct. [FN82]

While the distinction between an in-house counsel suing a corporate employer and an associate suing a law firm has been distinguished in this Article, the rationale to the extent it deals with divulging a client's confidences seems analogous. [FN83] Nevertheless, it can be argued that while courts have generally not permitted in-house attorneys to sue, in part, because of confidentiality, the courts can get around this problem with associates by merely forbidding the client's name or identification to be used throughout the proceedings. [FN84] The client will not be a party to the lawsuit. Furthermore, if the client is the party that

insists upon the illegal conduct, then the courts should not bend over backwards to protect the client's so called 'good' name. [FN85]
Even if courts are careful to protect the client's confidences, it is likely that the client will be dragged into the litigation because the dispute arose out of its business and representation. Therefore, when permitting wrongful discharge lawsuits, courts must be mindful of their impact on third party clients.

C. IF THE JUDICIARY CREATES A CAUSE OF ACTION, IT WILL CREATE LEGAL AMBIGUITIES
If the judiciary attempts to enact a public policy exception in a piecemeal manner through court opinions it will likely create confusion. While the legislature usually enacts clear, coherent and researched laws, the judiciary, at least in theory, should limit its decision to the case before it. For example, commentators have criticized Wieder because the court inadequately defined "good faith." [FN86] Allowing the legislature to enact a wrongful discharge statute covering attorneys would properly follow our tri-part system of government.
By enacting laws in a piecemeal manner, unresolved issues will arise because the judiciary will not write laws, but rather articulate principles through the development of the common law of attorney wrongful discharge litigation. [FN87] For example, would a termination based upon any rule result in a permitted lawsuit--or just the more egregious violations? If an attorney and an associate get into a good faith dispute over an interpretation of a rule, [FN88] and the associate refuses to follow his superior's directions, would this permit a lawsuit? [FN89] Furthermore, the violations of certain ethical rules are worse than others. Along the continuum, the punishment for violating certain rules is more harsh than others. While it is wrong to violate any rule, it must be decided whether certain rules would be treated differently than others. A piecemeal approach would leave these and many other questions unanswered.
While there would likely be some ambiguities, courts are very experienced at interpreting and developing legal principles. Furthermore, just as the judiciary enacts state bar rules of professional conduct, they could also enact laws for associates to sue under. This would allow the judiciary to appoint a committee that could enact coherent and researched laws that will provide clear precedent and predictability for the legal profession.

D. IF THE COURT CARVES OUT AN EXCEPTION FOR ATTORNEYS, THEN IT WILL HAVE TO MAKE EXCEPTIONS FOR OTHER PROFESSIONS
If courts permit associate attorneys to sue on either an implied-in- law contract theory or wrongful discharge theory, it seems the flood gates may open and other professionals will rely on the same reasoning to permit lawsuits if their employers terminate them for violating their rules of professional ethics. [FN90] It is believed that New York's Weider precedent has already set the ground for other professionals to sue. [FN91] The Weider Court distinguished its past denial of an accountant from suing because in those cases, the accountant was merely hired to further corporate management. On the other hand, because the associate's only legitimate purpose, only basis, and at the core of his responsibilities was to perform professional services for the law firm, a contractually based lawsuit was permitted. [FN92]
Time has dispelled the paranoia of expanded use of the ethical rules for other professions because of the Weider precedent. In McConchie v. Wal- Mart Stores, Inc. [FN93] an at-will pharmacist brought a wrongful discharge claim against Wal-Mart for terminating him for refusing to fill prescriptions in an illegal and unethical manner. The federal district court recognized that Wieder's rationale theoretically applied to the case, [FN94] but refused to extend the precedent because Weider was so carefully worded to limit it to the relationship of associates and their law firm employers. [FN95] On the other hand, the D.C. Court of Appeals permitted a wrongful discharge action based on the public policy exception by a nurse that was terminated, in part, for speaking publically on tort reform because her view

was contrary to that of her employers. [FN96] The court read the phrase "vary narrow exception" for public policy in a previous precedent to permit an additional public policy exception. Furthermore, other jurisdictions are split as to whether other professionals, and which ones, may rely on their ethical codes. [FN97]

If other professionals see that attorneys carved out a special exception for themselves, but see that they do not have protection, animosity will occur. [FN98] As much as we may enjoy thinking that lawyers are 'different' from other professionals, and thus, deserving of our own set of legal principles, it seems that in many respects the Weider rationale applies elsewhere. There is not an undermining distinction between a junior accountant performing work for an audit on behalf of a client [FN99], and an associate ascertaining which documents are privileged while doing a document review on behalf of a corporate client. Nevertheless, while the professional rules of accountancy are disregarded, the lawyer rules are read with a magical light.

To suggest that only lawyers should be permitted to sue demonstrates an elitist view of our honored profession. Just as society relies upon attorneys to provide social order, we rely upon physicians to heel, [FN100] municipal employees to run our cities, bankers and investment brokers to safeguard our treasures, and psychologists to mend broken minds. Arguably, special treatment for attorneys is unwarranted under tort or contract law.

On the other hand, because the legal profession is not regulated by the legislature, judicial activism is necessary to protect lawyers. [FN101] Other professions can seek protection via lawmakers. The expansion of wrongful termination lawsuits is beyond this paper, but has been the subject of significant academic literature. [FN102] However, it is worth mentioning that instead of arguing that lawyers should not be held out and given additional protection, one must question whether the protection should merely be applied to all employees. While many valid arguments exist to suggest that courts should treat all professionals the same, there are also valid arguments to support treating attorneys' differently. Furthermore, there are good arguments to suggest that all professionals should have wrongful discharge lawsuits based on their different public-policy rules of professional conduct. Because the judiciary regulates the legal profession, it is appropriate for the judiciary to start permitting lawsuits for lawyers.

E. ECONOMIC IMPACT

If a tort action for wrongful discharge is permitted, then presumably, many jurisdictions will also allow punitive damages. [FN103] Two critical questions are raised by this economic distribution. First, why should the attorney be enriched for merely following what is ethically required under his code of professional conduct. While compensatory damages will put the associate back into his or her rightful position, punitive damages will greatly enrich them. Second, who would eventually bear the loss of the lawsuits?

Punitive damages may indeed be warranted based upon a partner's strong-arming an associate to violate an ethical rule and then firing the associate for refusing. Punitive damages are designed to punish and also deter future behavior. [FN104] The Ballo court denied a wrongful discharge lawsuit, in part, because part of the cost and responsibility of being an attorney is to refuse to perform unethical conduct. [FN105] By permitting an associate to recover punitive damages, the associate would be indirectly benefitted by his conduct. Perhaps it is more equitable to permit the associate attorney to recover his losses, but then have all, or most, of the punitive damage award go to the bar, or another worthwhile cause. [FN106]

If a law firm is required to pay damages to an associate for a wrongful discharge, the money has to come from somewhere. It seems likely that the burden will merely be passed onto clients in the form of higher billing rates. As a profession, it seems unfair to have clients' bear the cost of our rules of professional conduct. On the other hand, if unethical attorneys are forced to pay, this may put them out of business, or reduce the individual lawyer's profits.

On the other hand, if a partner, rather than the associate, is forced to perform the unethical conduct, then there is an economic deterrent against any unethical conduct occurring. By forcing the partner to perform the unethical conduct himself, a malpractice or breach of a fiduciary duty threat from a client or third party may provide an economic deterrent to the partner.

If an associate agreed to perform the unethical conduct, then in many situations, a client would have a cause of action against the law firm or directly against the associate. However, under agency principles, the associate, being the tortious actor, would ultimately be liable either directly to the client, or subject to a lawsuit from the law firm for reimbursement.

If agency law places the economic burden on the associate for his tortious conduct, then one might suggest that by acting ethically, the associate indirectly placed the potential tort liability back on the partner. When the partner decides to act unethically, he will then be directly financially liable--rather than the associate. This liability may deter a partner from acting unethically. Furthermore, punitive damages are available when clients begin suing for torts such as breach of a fiduciary duty.

Many valid arguments against permitting punitive damages exist. However, the rationale of punitive damages is not on who collects them, but on punishing the wrongdoer. Perhaps the associate would collect a windfall from the punitive damages. However, many tort victims collect a windfall for punitive damages. Therefore, the economic impact of wrongful discharge lawsuits does not warrant baring them, and arguably supports their use.

V. JURISDICTIONS SHOULD PERMIT CONTRACT AND TORTS RECOVERY FOR VIOLATIONS OF

ATTORNEY RULES OF PROFESSIONAL CONDUCT

Admittedly, many valid arguments exist to limit an associate's recovery to only contract damages. Merely permitting contract, but not punitive damages, would solve many of the problems raised in this Article, and perhaps avoid others. For example, this Article suggested that if associates are left without a remedy, they will be deterred from reporting ethical conduct and placed in the intolerable position of choosing between following the rules of professional conduct or facing financial hardship. If permitted to recover contract damages, the associate would not become rich, but they would be able to maintain their normal manner of living until they found a new job. Furthermore, because contract damages permit recovery for all foreseeable harm, [FN107] the problem discussed concerning when associates have a harder time finding a new job would not occur. It is arguably foreseeable that when you fire an employee, they will have a harder time finding a new job. So even if it took extra time to mitigate the damage and find a new job, the associate would not face financial hardships.

Moreover, only permitting a contract action would have the effect of giving the firm bad publicity. The good faith value of a law firm is important and a firm may be embarrassed by the publicity of a lawsuit. Furthermore, the publicity would tarnish the firm's reputation in the legal community. However, on balance, punitive damages through tort-based wrongful discharge lawsuits better serves public policy when an associate is terminated for refusing to violate a rule of professional conduct.

If the state legislatures do not carve out tort actions for wrongfully terminated ethical associates, then the courts may continue to permit actions based upon an implied-in-law contract. [FN108] However the legal profession, and judges need to ask whether this is enough. As previously discussed in this Article, many jurisdictions consider rules of professional conduct to be public policy. If an associate is terminated for refusing to violate an ethical rule, and while quitting, informs his state's disciplinary commission, he has

served the public's interest. The disciplinary commission will be able to investigate the unethical conduct and avoid future wrongs.

In Paralegal v. Lawyer [FN109] a paralegal sued her former employer for wrongful discharge after being terminated for disclosing her lawyer-employer's unethical behavior of fabricating and backdating a letter to trick an attorney disciplinary board into thinking he had made a particular communication with his client. [FN110] The federal district court applied Pennsylvania law and found that common law permits a lawsuit when an at-will employee is terminated in contravention of public policy. [FN111] Therefore, Paralegal's wrongful termination claim was permitted. [FN112] As in Paralegal, permitting associates to sue when terminated for violating a rule of professional conduct would serve the public policy of assuring that the attorney rules of professional conduct are obeyed and respected. Furthermore, it would protect the public because the ethical rules protect clients and other third parties from harm. [FN113]

This Article suggested that requiring law firms to be responsible for its attorney's unethical conduct would help to regulate law firms and thereby put financial pressure on its members to act ethically. However, contract damages may be so insubstantial that they do not influence the firm's behavior. If a large law firm has to pay a few thousand dollars to cover an associate's salary until he finds new employment, it is unlikely to influence the firm's behavior.

Tort actions based on public policy are designed to deter unethical behavior through monetary punishment. It is unlikely that many attorneys would bring a lawsuit based solely on contract damages because they are so limited. First, if an attorney is able to quickly find a new job at a similar salary, then his contract damages are virtually nil. Accordingly, a lawsuit would not likely be brought. Furthermore, even if an associate is out of work for a few weeks or months, the idea of collecting the limited amount of contractual damages would need to be weighed against the hassle of a lawsuit.

Not only is the amount of contract damages insignificant, but other factors would deter the associate from bringing the lawsuit. For example, if a lawsuit becomes publicized, the associate will carry a stigma of being a formerly fired attorney in whatever legal community he lived in. Without permitting punitive tort damages, it is unlikely that many attorneys will sue. Thus, the rules of professional conduct will not be enforced.

What is more, an unemployed associate will likely be financially unable to hire a lawyer to represent him against a law firm that will likely have an arsenal of attorneys. If punitive damages are permitted, the associate is more likely to find legal representation that is willing to work on a contingency basis.

Arguably, whether tort damages are permitted turns on whether rules of professional conduct for lawyers are deemed public policy. [FN114] Nevertheless, even if lawyer rules of professional conduct are not deemed to serve the public interest, the judiciary has an interest in permitting punitive damages because it would help to protect the integrity of the judicial system. If lawyers are more likely to sue because punitive damages are permitted, then the judiciary will be able to weed out and better punish the bad apples and shysters [FN115] in the profession. [FN116]

All jurisdictions should, at the very least, recognize an implied-in-law action for contract damages. However, progressive reasoning and public policy is enhanced if punitive damages are also permitted. It is unlikely that many associates would sue for merely contract damages, and the recovery would not influence law firm behavior. Therefore, the courts should also permit actions sounding in tort.

VI. ALTERNATIVE THEORIES THAT ASSOCIATES MAY RELY ON TO RECOVER FROM UNETHICAL LAW FIRMS

While the precedent for suing a law firm is certainly not strong or universal, associates may still be able to recover by relying upon alternative theories.

A. TORTIOUS INTERFERENCE THEORIES

Assuming that a court will not permit a wrongful discharge tort action against a law firm, the associate should invoke a tortious interference theory against the individual supervisory attorney. [FN117] In Nordling v. Northern States Power Co., [FN118] an in-house attorney brought a tortious interference claim against his corporate employer's member of the board of directors. In permitting the lawsuit, the court recognized that "[t]he at-will employment subsists at the will of the employer and employee, not at the will of a third party meddler who wrongfully interferes with the contractual relations of others." [FN119] Further:

One who intentionally and improperly [FN120] interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract. [FN121]

If a partner of a law firm terminates an associate's employment because he will not follow an ethical guideline, the partner has interfered with the associate's contract with the law firm. [FN122] The Restatement would certainly suggest that the interference is improper. For example, the social interests of protecting the partner's conduct are greatly outweighed by not permitting the unethical conduct. By forcing an associate to practice unethical law, the law firm partner has made the associate unable to perform the implied contract involving good faith. Thus, associates should consider invoking tortious interference theories against the individual partners.

An associate could invoke a tortious interference action in a jurisdiction that permits implied-in-law contracts, but refuses to recognize the tort of wrongful discharge. For example, consider if the law firm of X, Y & Z employed associate A. X told A that he was to destroy discovery documents or he would fire A. A refuses and is fired. Since X improperly interfered with A's relationship with the partnership of X, Y & Z, a tortious interference theory seems plausible. [FN123] The obvious advantage is recovering punitive damages.

B. AGENCY--THE PRINCIPAL'S DUTIES TO THE AGENT

An associate is an agent of his law firm. [FN124] Inherent within the agency relationship is the principal's duty to act in good faith and not to prevent the agent's performance. [FN125] An agent does not have a duty to perform acts which are illegal, unethical or unreasonable. [FN126]

Courts have held that an agent does not have an agency obligation to commit acts that are contrary to public policy. For example, in Ford, [FN127] the court held that a real estate broker did not have a duty to obey the principal's instruction to racially discriminate in showing the principal's property. Similarly, if a principal (a partner) insists on conduct that the associate is forbidden to do (violate an ethical rule), then the principal has prevented the associate's performance.

Unfortunately, a strict agency-based argument would offer little advantage over an implied-in-law contractually based theory of recovery. Rather the recovery for breaching the agency contract would probably be the same as that of an implied-in-law contractual theory. As a result, punitive damages are unavailable. Therefore, although agency principles provide a plausible legal theory, it adds little beyond that available under a traditional implied-in-law contract theory.

VII. CONCLUSION

Associates must have access to the courts when they are terminated for refusing to violate the rules that keep our profession honorable. While contractually based implied-in-law contracts have been permitted, these alone are insufficient. While there are valid arguments

to deny associates recovery in tort, public policy is better served by permitting the lawsuits. The judiciary is responsible for regulating the legal profession and must protect wrongfully terminated associate employees. It is harsh to put associates in the position of being fired or not being able to meet their financial obligations. To ignore the distinction between the associate as an officer of the court and that of an employee is repugnant to reality. Furthermore, by permitting lawsuits, law firms will better monitor the treatment of associate attorneys.

Punitive damages will help to better enforce the attorney ethical rules. If only contract damages are permitted, associates will not vindicate their rights and unethical conduct will continue. Punitive damages will assure that associates have access to the courts and they will get the attention of unethical law firms. Finally, if an associate sues in a jurisdiction that lacks the progressive thinking necessary to have a cause of action, alternative theories of recovery will allow actions directly against the individual partner attorney.

The travails of young associates in law firms are a commonplace. Competing demands for billable hours and client development both exact a heavy toll upon these attorneys. The addition of yet another demand-potential ethical compromises-places an intolerable burden that should not be countenanced by the profession or the judiciary. The establishment of judicial protections for such associates would foster the complementary goals of public confidence in the legal profession and professional development of young attorneys.

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FN1. Associate, as used in this Article, refers to any attorney that is hired by a law firm and is not a partner.

FN2. See generally Leonard Gross, Ethical Problems of Law Firm Associate, 26 Wm. & Mary L. Rev. 259, 313-315 (1985) (The author collected data by mailing a survey to 201 Illinois law firm associates).

FN3. Id.

FN4. Id. questions 17-19.

FN5. See generally Ted Schneyer, Professional Discipline for Law Firms? 77 Cornell. L. Rev. 1, 4 (1991).

FN6. Id.

FN7. Id. Schneyer also points out that the size of law firms has also grown. The largest 100 law firms account for approximately twenty percent of all legal fees.

FN8. For the eminent and foundational article dealing with these issues see generally Daniel S. Reynolds, Wrongful Discharge of Employed Counsel, 1 Geo. J. Legal Ethics 553, 557-558 (Winter 1988).

FN9. Lawrence J. Fox, Money Didn't Buy Happiness: An Honest Look at the Legal Profession, 57-apr Or. St. B. Bull. 9. (Apr. 1997).

FN10. As recognized in 1881 by Oliver Wendell Holmes, "[t]he life of the law has not been logic: it has been experience." The Common Law (1881).

FN11. Elliot M. Lonker, General Dynamics v. Superior Court: One Giant Step Forward for In-House Counsel or One Small Step Back to the Status Quo? 31 Cal. W. L. Rev. 272, 279 (1995).

FN12. Harper v. Healthsource New Hampshire, Inc., 674 A.2d 962, 694 (N.H. 1996); Restatement (Second) of Contracts § 205 (1979).

FN13. Harper, 675 A.2d at 965.

FN14. See generally Christopher L. Pennington, The Public Policy Exception to the Employment-at-Will Doctrine: Its Inconsistencies in Application, 68 Tul. L. Rev. 1583, 1590-1591 (1994) (courts imply contractual relationships on the employer and therefore the relationship was never really at-will because it was subject to the parameters of the implied contract). The following list of law review articles and judicial opinions dealing with the deterioration of the employment-at-will doctrine were cited in: Seymour Moskowitz, Employment-at- Will and Codes of Ethics: The Professional's Dilemma, 23 Val. L. Rev. 33, 56 (Fall 1988); Feinman, The Development of the Employment at Will Rule, 20 Am. J. Legal Hist. 118 (1976); Glendon & Lev, Changes in the Bonding of the Employment Relationship:

An Essay on the New Property, 20 B.C.L. Rev. 457 (1979); Peck, Unjust Discharges From Employment: A Necessary Change in the Law, 40 Ohio St. L.J. 1 (1979); Summers, The Rights of Individual Workers: The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will, 52 Fordham L. Rev. 1082 (1984); Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 Va. L. Rev. 481 (1976); Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, Note, 93 Harv. L. Rev.

1816 (1980);, 36 Rec. N.Y.C.B.A. 170 (1981).

FN15. See generally Daniel S. Reynolds, Wrongful Discharge of Employed Counsel, 1 Geo. J. Legal Ethics 553, 557-558 (Winter 1988).

FN16. Id.

FN17. Id. at 581.

FN18. Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992) (Wieder).

FN19. Weider, 609 N.E.2d at 105.

FN20. Id.

FN21. Weider, 609 N.E.2d at 106.

FN22. Id.

FN23. Weider, 609 N.E.2d at 106:
A lawyer possessing knowledge, not protected as a confidence or secret, of a

violation ... that raises a substantial question as to another lawyer's honest, trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
DR 1-103(A).

FN24. Weider, 609 N.E.2d at 106.

FN25. Id.

FN26. Wieder, 609 N.E.2d at 108.

FN27. Murphy v. American Home Prods. Corp., 448 N.E.2d 86 (N.Y. 1983); Sabetay v. Sterling Drug Inc., 506 N.E.2d 919 (N.Y. 1987).

FN28. Wieder, 609 N.E.2d at 108.

FN29. For a critique of Wieder, see generally Cathyrn C. Dakin, Protecting Attorneys Against Wrongful Discharge: Extension of the Public Policy Exception, 44 Case W. Res. L. Rev. 1043, 1071 (1995) (arguing that because of the far reaching implications of the Wieder analysis, an implied-in-law obligation

inferred on a law firm is inappropriate).

FN30. Id.

FN31. Wieder, 609 N.E.2d at 109.

FN32. Id.

FN33. It should be noted that while the Wieder court refused to provide a tort remedy based on public policy, the New York Legislature had enacted a statutory "whistle-blower exception" to employment-at-will. However, Wieder was unable to plead facts to fall within the legislative exception. See generally Anthony J. Blackwell, Wieder's Paradox: Reporting Legal Misconduct in Law Firms, 1992/1993 Ann. Surv. Am. L. 9, 16 (Apr. 1993).

FN34. For a discussion of wrongful discharge, see supra §B.

FN35. Seymour Moskowitz, Employment-at-Will and Codes of Ethics: The Professional's Dilemma, 23 Val. L. Rev. 33, 56 (1988).

FN36. Genna H. Rosten, Annotation, Wrongful Discharge Based on Public Policy

Derived From Professional Ethics Codes, 52 A.L.R. 5th 405 (1997).

FN37. Id.

FN38. Christopher L. Pennington, The Public Policy Exception to the Employment- at-Will Doctrine: Its Inconsistencies in Application, 68 Tul. L. Rev. 1583 (1994).

FN39. See generally Seymour Moskowitz, Employment-at-Will and Codes of Ethics: The Professional's Dilemma, 23 Val. L. Rev. 33 (1988) (arguing for the creation of a "privilege" for workers that refuse to violate their rules of professional conduct that would permit a wrongful discharge lawsuit).

FN40. Genna H. Rosten, Annotation, Wrongful Discharge Based on Public Policy Derived from Professional Ethics Codes, 52 A.L.R. 5th 405, 417 (1997).

FN41. Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981).

FN42. Lonker, supra note 11, at 300.

FN43. Rocky Mt. Hosp. & Medical Serv. v. Mariani, 916 P.2d 519 (Colo. 1996) (holding that a section of the Colorado State Board of Accountancy Rules of Professional Conduct was public policy); See also Rosten, supra note 39, at 405.

FN44. Pierce v. Ortho Pharm. Corp., 417 A.2d 505 (N.J. 1980).

FN45. Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991).

FN46. Rule 1.6(b) of the Rules of Professional Conduct governing attorneys in Illinois.

FN47. See also Isaacson v. Keck, Mahin & Cate, 1993 WL 68079 at 10 (N.D. Ill.) (federal court applying Illinois law has refused to find public-policy exception for an attorney that was terminated for filling a complaint with the Attorney Registration and Disciplinary Commission); But see Herbster v. North American Co. for Life & Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986) (there is "no question" that public policy contravenes public policy where in-house counsel refused to destroy discovery materials because such actions would affect a citizen's rights, but nevertheless because an attorney is different from a regular employee, an attorney may not bring a retaliatory

discharge lawsuit); see also ISBA's Amicus Brief at 4, Jacobson, (Illinois Supreme Court) (No. 84740)) (arguing that the Illinois Rules of Professional Conduct are "well-defined public policy).

FN48. General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Ca. 1994).

FN49. Jacobson v. Knepper and Moga, P.C., 688 N.E.2d 813 (Ill. App. Ct. 1997), rev'd, No. 84740, 1998 WL 906697 (Ill. 1998).

FN50. The associate alleged that the law firm was violating the venue provisions of the Fair Debt Collection Practices Act, (15 U.S.C. § 169(2)(a) (2)(B) (1988)) and the Illinois Collection Agency Act (225 ILCS 425/9(20)(West 1994)); 688 N.E.2d at 814.

FN51. Id.

FN52. Herbster v. North American Co. for Life & Health Ins., 501 N.E.2d 343 (Ill. 1986); Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991).

FN53. Jacobson, 688 N.E.2d at 816.

FN54. Jacobson, 688 N.E.2d at 813.

FN55. ISBA's Amicus Brief at 2, Jacobson, (Illinois Supreme Court) (No. 8474) (emphasis added).

FN56. Jacobson, 1998 WL 906697 at 3.

FN57. Id. (quoting Balla at 505); but see Harrison, C.J. dissenting at 4. "[O]ne class of employees in this state, attorneys, has been stripped of a remedy which Illinois clearly affords to all other employees in such 'whistle- blowing' situations. Today's opinion serves as yet another reminder to the attorneys in this state that, in certain circumstances, it is economically more advantageous to keep quiet than to follow the dictates of the Rules of Professional Responsibility."

FN58. See Model Rules of Professional Conduct [MRPC] Rule 5.2. The Rule's comment states that if the subordinate lawyer is faced with an ambiguous ethical question, and he seeks the guidance of a supervisory lawyer that feels the action is ethically permitted, and it turns out the action is not permitted, then the subordinate lawyer is protected from discipline by his reliance on the supervisor.

FN59. MRPC 8.3 requires that a lawyer must report another lawyer if he has knowledge that the other lawyer has committed a violation of the Rules of Professional Conduct if the violation raises a substantial question of the violating lawyer's honest, trustworthiness or unfitness as a lawyer in other respects.

FN60. See generally In re Himmel, 533 N.E.2d 790 (Ill. 1988) (one year suspension of attorney for not reporting that another lawyer had stolen funds from disbarred attorney's client); Matter of Down; 160 A.D.2d 78 (N.Y. App. Div. 1984) (five year suspension for not reporting misconduct of public official that was an attorney).

FN61. David Margolick, Lawyer Says his Case Pits Ethics vs. Right to Dismiss, N.Y. Times, Nov. 13, 1989 at B1, as quoted in Anthony J. Blackwell. Wieder's Paradox: Reporting Legal Misconduct in Law Firms, 1992/1993 Ann. Surv. Am. L. 9, 16 (Apr. 1993).

FN62. Rocky Mountain Hosp. and Med. Serv. v. Mariani, 916 P.2d 519, 525 (Colo. 1996).

FN63. Seymour Moskowitz, Employment-at-Will and Codes of Ethics: The Professional's Dilemma, 23 Val. L. Rev. 33, 55 (Fall 1988).

FN64. See generally Leonard Gross, Ethical Problems of Law Firm Associates, 26 Wm. & Mary L. Rev. 259, 267 (1985); but see Brief of Amicus Curiae, The Committee on Professional Responsibility of the Association of the Bar of the City of New York at 4, Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992) (No. 17278/88)[hereinafter Wieder Amicus Brief] ("The denial of a cause of action to Howard Wieder will mean that law firms can, without fear of liability, pressure and intimidate associates into keeping quiet.").

FN65. Lowry v. State Bd. of Indust. Ins. Appeals, 684 P.2d 678 (Wash. 1984).

FN66. Id. at 681.

FN67. Wieder Amicus Brief, 609 N.E.2d 105 (N.Y. 1992) (No. 17278/88).

FN68. See generally Balla v. Gambro, Inc. 584 N.E.2d 104 (Ill. 1991). But see Anthony J. Blackwell, Wieder's Paradox: Reporting Legal Misconduct in Law Firms, 1992/1993 Ann. Surv. Am. L. 9, 48 (Apr. 1993) (arguing that more incentive is needed to persuade attorneys to follow ethical rules when they are

faced with losing their jobs).

FN69. ISBA's Amicus Brief at 6, Jacobson, (Ill. Sup. Ct.) (No. 84740).

FN70. Id. at 19.

FN71. See generally, Weider, 609 N.E.2d 105, 110. ("significant alternations of employment relationships are best left for the legislature.") (internal citations omitted).

FN72. Wieder Amicus Brief at 7. The Wieder Amicus Brief quoted from the following applicable law review article passage:
A claim that the standards of professional responsibility require client- alienating action supplies a basis for finding a violation of public policy. Though not enacted by the legislature, [the courts] promulgate such standards for the states. *** Though the Bar regulates itself, the highest court of the jurisdiction oversees and takes part in the regulation and discipline. This involvement of the government provides a link missing in other professions. The standards adopted by the government are public policy. Court[s] [sic] should treat rules of professional responsibility as being akin to statutes and other legislative statements and recognize them as

expressions of public policy such that those courts should not condone discharges of ***attorneys for activities mandated by the standards.
Giesel, The Ethics or Employment Dilemma of In-House Counsel, 5 Geo. J. Legal Ethics 535, 572-4 (1992).

FN73. When attorneys are treated better, the public has also felt resentment. See generally Chicago Daily Law Bulletin, Volume 144, No. 207, Oct. 22, 1998, at 1, Lawyers Held Immune to Consumer-law Suits. After the Illinois Supreme Court refused to apply a consumer fraud statute against attorneys, the consumer's attorney suggested that this "will

further fuel the public perception that the legal profession is trying to protect itself and doesn't want the same rules that apply to all other professions applied to them."

FN74. Anthony J. Blackwell, Wieder's Paradox: Reporting Legal Misconduct in Law Firms, 1992/1993 Ann. Surv. Am. L. 9, 45-46 (Apr. 1993).

FN75. See generally Ted Schneyer, Professional Discipline for Law Firms? 77 Cornell. L. Rev. 1 (1991).

FN76. Even if the firm technically made a violation, there is a human being that actually did the act.

FN77. Margolick, supra note 60, at 1(B), as quoted in Anthony J. Blackwell, Wieder's Paradox: Reporting Legal Misconduct in Law Firms, 1992/1993 Ann. Surv. Am. L. 9, 16 (Apr. 1993).

FN78. This actually may be a positive effect. For example, if the supervisory attorney wants the associate to shred evidentiary documents, then a lawsuit threat may deter such conduct. While that partner may go ahead and do it himself, at least the associate is not put in the position of compromising his ethical obligations or being fired.

FN79. Courts interpreting "whistle-blowing" statutes have not permitted wrongful discharge actions unless the conduct was actually illegal. An employee's reasonable belief that the conduct was illegal is often insufficient. See generally Bordell v. General Electric Co., 208 A.D.2d 219 (N.Y. Sup. Ct. 1995).

FN80. Kenneth J. Wilbur, Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility, 92 Dick. L. Rev. 777, 791-792 (1988).

FN81. Robert Fitzpatrick, 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? Ca 30 ALI-ABA 539, 546 (1995).

FN82. MRPC 1.6

FN83. If an in-house attorney sues an employer, he directly sues the client. However, if an associate attorney sues, he only sues their employer. Nevertheless, in both instances, during judicial proceedings, the client's confidences are revealed because the violations occur during the course of representing a client.

FN84. The client could be referred to as "John Doe" or John Doe Corporation. There is not a probative value in releasing a client's name. See generally X Corp. v. Doe, 816 F.Supp. 1086 (E.D. Va. 1993).

FN85. When the client is in cahoots with the law firm in seeking illegal conduct, it would seem that a court should not recognize a privilege. Communications for the purpose of committing a crime or fraud are not privileged because they are not in furtherance of the attorney and client relationship. See generally John W. Strong, Mccormick on Evidence §95 at 350 (4th ed. 1992) ("Since the policy of the 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. Advice given for these purposes would not be a professional service but participation in a conspiracy. Accordingly, it is settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended crime or fraud.") (emphasis added).

FN86. Note, Contract Law-Employment-at-Will-N.Y, Court of Appeals Implies Reporting Requirement Into Law Firm-Associate Employment Relationship-Wieder v. Skala, 609 N.E.2D 105 (N.Y. 1992), 106 Harv. L. Rev. 2033, 2037 (1993) ("[I]n adopting the 'good faith' standard, the court failed to justify its placement of the burden of proof and, as a result, may not have provided adequate protection for a discharged attorney. Under the implied obligation of 'good faith and fair dealings' adopted by the court, an employer who discharges an employee in 'good faith' because of an honest disagreement over the interpretation of an ethical rule will be under no liability. Instead, the court could have chosen the 'reasonable belief' standard adopted by the Supreme Court of Washington.").

FN87. However, a court could appoint a committee or agency to draft legislation

in a similar manner as it does to has them draft the rules of professional conduct or court rules.

FN88. Associates unhappy with their jobs may try to create ethical problems. There are often conflicting interpretations about how rules of professional conduct apply to any given fact situations. If an associate really looks hard for an ethical violation, one can most likely be found.

FN89. For example, a dispute may arise where an associate and a partner get into a disagreement about whether an authority is controlling in the jurisdiction and therefore must be revealed to the tribunal pursuant to MRPC 3.3. If the partner fires the associate for turning over the authority, would this good faith dispute permit a lawsuit? Some commentators have suggested that the associate should be protected from discharge whenever he refuses to comply with a superior's order that he "reasonably believes would violate the code." See generally Kenneth J. Wilbur, Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility, 92 Dick. L. Rev. 777 (July 1988).

FN90. See supra note 86. (Weider case will likely "invite a broad range of claims from members of other professions who are discouraged because of

disputes with their employers over ethical rules ... [f]or example, it could easily be asserted that a physician's 'duties and responsibilities' as a physician and as an employee of a hospital are 'so closely linked as to be incapable of separation,' just as the court asserted for lawyers.")

FN91. See generally Sandra J. Mullings, Weider v. Skala: A Chink in the Armor of the At-Will Doctrine or A Lance for Law Firm Associates? 45 Syracuse L. Rev. 963, 964 (1995) (The Weider case will likely "at the very least, provide fertile ground for litigation by other professionals.")

FN92. Wieder, 609 N.E.2d at 108-110; The Wieder Amicus Brief at 7 suggested that "The integrity of lawyers and of our system of justice depends on compliance with ethical obligations. The public policy supporting attorney self-regulation and reporting can thus

easily be distinguished from the vague public policy arguments that have been previously rejected by this Court.".

FN93. McConchie v. Wal-Mart Stores, Inc., 985 F.Supp 273 (N.D.N.Y. 1997).

FN94. Id. at 277.

FN95. New York courts have also refused to extend the precedent. See

generally Mulder v. Donaldson, Lufkin, & Jenrette, 623 N.Y.S.2d 560, 563 (1 st Dept. 1995) (brokerage house auditor sued because he was terminated for reporting a violation of the New York Stock Exchange and the appellate court rejected lower court's interpretation to extend the implied professional rules to any licensed business or professional that is subject to compliance with laws or regulations that govern the profession or business).

FN96. Carl v. Children's Hosp., 702 A.2d 159, 160 (D.C. Cir. 1997).

FN97. For an excellent discussion of how each state has treated various professionals, see Rosten, supra note, 35 § 5-15. The article examines the following professionals: attorneys, pharmacists, accountants, municipal employees, physicians, nurses, social workers, pilots, securities brokers, defense contractors, and polygraph examiners.

FN98. See supra note 72 and accompanying text.

FN99. Mullings, supra note 90, at 992.

FN100. For an excellent analysis of the implications of a physician's retaliatory discharge claim against an HMO, see Peter B. Jurgeleit,

Physician Employment Under Managed Care: Toward a Retaliatory Discharge Cause of Action for HMO-Affiliated Physicians, 73 Ind. L.J. 255 (1997).

FN101. See supra § III(3).

FN102. See generally David J. Walsh, State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales, 33 Am. Bus. L.j. 645 (1996).

FN103. See generally Damian Edward Okasinski, Annotation, In-House Counsel's Right to Maintain Action for Wrongful Discharge, 16 A.L.R. 5th 239 (1994).

FN104. Id.

FN105. See supra note 67 and accompanying text.

FN106. However, if the associate does not receive punitive damages, he will be unlikely to sue for them.

FN107. See generally Hadley v. Baxendale, 156 Eng. Rep. 145 (1854).

FN108. See generally Weider, supra note 18 and accompanying text.

FN109. Paralegal v. Lawyer, 783 F.Supp. 230 (E.D.Pa. 1992).

FN110. Id. at 231.

FN111. Id. at 232. The court found that the Pennsylvania Rules of Professional Conduct were clear mandates of public policy.

FN112. But see Brown v. Hammond, 810 F.Supp. 644 (E.D.Pa. 1993) (distinguishing Paralegal from a case involving a secretary of a law firm that protested that her employer required her to bill her work at attorney time despite her complaints that this was improper. The court characterized her protests as merely "gratuitous disclosures" because she was not the person responsible for reporting such conduct and did not violate clearly mandated public policy even though the attorney's conduct would have violated Pennsylvania Rules of Professional Conduct).

FN113. See Model Rules of Professional Conduct [MRPC] Rule 2.3 "Evaluation for use by Third Persons;" MRPC Rule 4.1 "Truthfulness in Statements to Others."

FN114. For a discussion of whether they do constitute public policy, see §

II(B)(1).

FN115. The term "shyster" is derived from a New York attorney with the name of Sceuster (pronounced "shoister") that practiced in the 1840's. A local Justice became irritated with this attorney and would condemn other attorneys for their "scheuster practices." From Peter Hay, the Book of Legal Anecdotes 49, Barnes and Noble Books (1989).

FN116. But see David J. Fish, The Use of the Illinois Rules of Professional Conduct to Establish the Standard of Care in Attorney Malpractice Litigation: An Illogical Practice, 23 S. Ill. U. L.J. 65 (Fall 1998) (arguing against civil lawsuits to help enforce rules of professional conduct in malpractice lawsuits because disciplinary rules are to be used as a measure to ascertain whether an attorney is properly admitted to practice law and not as a basis for financial recovery).

FN117. For example, in Lorenz v. Dreske, the court held that a tortious interference with contract theory was permitted for an employment-at-will relationship. Lorenz v. Dreske, 214 N.W.2d 753 (Wis. 1974). The Lorenz plaintiff sued both a corporation and one of its officers alleging that the corporation could not pay the plaintiff because an officer diverted funds.

Lorenz, 214 N.W.2d at 758. The court permitted a lawsuit against the officer because one that induces or causes another not to perform a contract with another, or makes it harder to do so, is liable for the harm caused. See also LaRocco v. Bakwin, 439 N.E.2d 537, 539 (Ill. App. Ct. 1982) (general counsel permitted to maintain tortious interference with contract and interference with prospective economic advantage based upon life-time employment contract against officers of employer's corporation).

FN118. Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991).

FN119. Nordling, 478 N.W.2d at 505.

FN120. In determining whether an actor's conduct intentionally interfered with a contract or a prospective contractual relation of another is improper, consideration is given to the following factors:
(a) the nature of the actor's conduct,
(b) the actor's motive,
(c) the interests of the other with which the actor's conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and
(g) the relations between the parties.
Restatement (Second) of Torts § 767 (1979).

FN121. Restatement (Second) of Torts § 766 (1979).

FN122. In a recent lawsuit in Chicago, a former associate won a tortious interference lawsuit against a partner of her former law firm when she was constructively discharged because he sexually harassed her. See generally Brendan Stephens, Lawyer Wins $1.4 Million Jury Award In Suit Claiming Sexual Harassment, Chicago Daily Law Bulletin, September 29, 1998 at 1.

FN123. But see Condon v. Body, Vickers & Daniels, 649 N.E.2d 1259 (Ohio. Ct. App. 1994) (summary judgment granted against associate when he sued his former law firm's office administrator for tortious interference with contract. Court held that the firm administrator

was not a third party that could be subject to liability for interfering with associate's contract with the law firm).

FN124. Cindy Holland, The Liabilities and Ethical Responsibilities of a Law Firm Associate, 16 J. Legal Prof. 241, 242 (1991).

FN125. See generally Romulado P. Eclavea, Agency and Independent Contractors, Rights, Duties and Liabilities Between Principal and Agent, 2A NY Jur. 2d § 256 (1998).

FN126. Ford v. Wisconsin Real Estate Examining Bd., 179 N.W.2d 786 (Wis. 1970).

FN127. Id.