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Every lawyer owes a solemn duty to uphold the integrity and honor of the legal profession; . . .
To observe the Code of Professional Responsibility; . . .
To act so as to reflect credit on the legal profession and to inspire the confidence, respect and trust of clients and of the public;
And to strive to avoid not only professional impropriety but also the appearance of impropriety.

THE LAWYER'S DUTY

In sum, under New York law as it now stands, absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired.

Murphy v. American Home Products

INTRODUCTION

Suppose an attorney discovers that a fellow associate has committed fraud on a client. Abiding by his obligations under the New

York Code of Professional Responsibility to report the unethical conduct of other attorneys to appropriate authorities, he relates his knowledge of the incident to the firm’s partners and asks that the case be brought before the local disciplinary review board.\(^4\) Ethical duty fulfilled, and malfeasant associate presumably headed for a disciplinary hearing, the reporting attorney can return to the practice of law safe in the knowledge that he has “done the right thing.” In fact, he has done the only thing he could, for not reporting the incident would have exposed him to his own disciplinary hearing.\(^5\)

While this scenario may seem simple, if not routine, it turned out to be neither for New York Attorney Howard Wieder, who ended up on the unemployment line after reporting the fraudulent conduct of a fellow associate and demanding that his firm bring the wrongdoer before disciplinary authorities.\(^6\) During the litigation which has resulted from that discharge, the New York courts declared that attorney-employees are no more than employees at-will, subject to termination at any time for any reason at all.\(^7\) Following court-mandated ethical rules offers no protection from discharge.\(^8\)

\(^4\) See infra notes 102-08 and accompanying text.

\(^5\) See infra Part III, notes 92-150 and accompanying text.


\(^8\) Id.
While the decision directly impacts the New York legal community, it has the potential to affect all of the nation’s attorneys. For the reporting requirements found in New York’s code of ethics are similar or identical to those found in almost every state which has adopted a variation of either the ABA Model Code of Professional Responsibility, or the Model Rules of Professional Conduct.9 And courts are now beginning to enforce those requirements independently of any other ethical violation.

This Comment focuses on the potential repercussions of the Wieder case, especially as it affects the employment security of the hundreds of thousands of attorney-employees who make up the bulk of this nation’s legal profession.10 Part I will focus on the case itself, including the events which led up to the lawsuit.11 It includes a full review of the incident as it has been reported and litigated, from the fraud which allegedly cost Wieder nearly $30,000, through his later firing and the litigation which has so far created more questions than it has answered. Part II will briefly review New York’s employment at-will doctrine, from its century-old creation to its reaffirmation in the 1980’s.12 It includes a review of the limited exceptions created by the Court of Appeals and the Legislature, exceptions which have done little to bring the doctrine into the 20th century. It is this doc-

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9. Both ethical codes require attorneys to disclose varying degrees of misconduct performed by other attorneys to panels responsible for the enforcement of ethical rules - though each has its own unique wording (and possible interpretations). Compare Model Rules of Professional Conduct Rule 8.3(a) (1991) with Model Code of Professional Responsibility DR 1-103(A) (1983). This requirement to report is not limited to attorneys who are employed by law firms or other legal employers, but applies to all attorneys. However, the application of these rules to the attorney-employee context creates the special problem of retaliatory discharge of the type experienced by the in-house counsels discussed in Part IV, infra notes 149-199 and accompanying text, and by Howard Wieder in the law firm context.

10. According to the most recent statistics published by the American Bar Foundation, 53% of the attorneys in private practice (which are 72% of all lawyers) work as solo practitioners or with only one other attorney. See American Bar Foundation, 1988 Lawyer Statistical Report, 20-21 (1988). Those figures mean about 60% of the nation’s attorneys work as an employee, whether for a firm, the government, industry or a law school. In New York the numbers are similar - 52% of those in private practice (who are 74% of all attorneys in the state) - work as solo practitioners or with only one other attorney, leaving slightly more than 60% as employees of others. Id. at 154-55.

The most striking difference between the New York and national averages is the percentage employed by firms with 51 or more attorneys. Only 9.5% of attorneys in private practice nationwide work for such large firms. Id. at 21. In New York, the figure is nearly 23%. Id. at 155.

Overall, there were a reported 723,189 attorneys in the United States as a whole in 1988. Id. at 19. New York was home to 81,698 attorneys, the second largest population in the nation. Id. at 153.

11. See infra notes 19-59 and accompanying text.

12. See infra notes 60-91 and accompanying text.
trine, which leaves the vast majority of New York workers under the constant threat of any-cause discharge, which has now been officially applied to the state’s estimated 48,000 attorney-employees. Part III will review the legal obligations placed upon attorneys in New York and elsewhere by the reporting requirements of DR 1-103(A) and its codified cousins. The rule’s common nickname - the “Squeal Rule” -indicates with how little regard it has been treated by the profession since its creation more than 20 years ago. But with courts now actively enforcing its requirements for reporting attorney misconduct - two attorney’s were recently suspended for five years for violating its provisions - attorneys everywhere are beginning to take notice. Part IV will review recent court decisions which have struggled to define the degree of protection which codes of legal ethics offer to in-house counsel attorney-employees. The mixed signals of the two most prominent decisions in this area underscore the mystifying struggle courts have experienced in protecting the rights of attorneys who are fired for refusing to participate in unethical, and often illegal conduct - even in states which have considerably more modern views on employment at-will than New York. Part V offers the Court of Appeals and the New York Legislature options for correcting the dangerous precedent the Wieder decision has set for the legal profession. For without some action, attorneys will be left with what could be dubbed the “Wieder dilemma” - a choice between abiding by the Code of Professional Responsibility with its penalties and sanctions for violations, or keeping a job (which in the current economic climate, may be extremely difficult to replace).

PART I: THE CASE AND THE COURTS

Howard Wieder, a 1978 graduate of New York University School of Law, joined the Manhattan firm of Feder, Kaszovitz, Isaacson, Weber and Skala in June, 1986. He was reportedly promised financial rewards “beyond his ‘wildest expectations’” if he brought “unbridled moral and emotional commitment” to his new
Wieder apparently thrived at Feder, Kaszovitz, since he made plans to purchase a condominium costing upwards of $300,000 on the Upper West Side of Manhattan in March of 1987. He requested that the firm handle the details of the purchase. Feder, Kaszovitz assigned one of the firm’s real estate associates to handle the details of the condominium deal - reportedly for free. According to reports, this associate not only claimed that he had arranged a mortgage, but proposed design layouts for the condominium. But only days before the closing, Wieder discovered that there actually was no mortgage. The deal was salvaged, but at a reported additional financing cost of some $27,000. Wieder, both angry and obligated by New York’s ethical regulations, then went to the partners of Feder, Kaszovitz and asked that the matter be reported to disciplinary authorities.

While the partners agreed to reimburse Wieder for his losses, they refused to report the accused real estate associate to the local Appellate Division Disciplinary Committee. Over the next several months, Wieder and Feder, Kaszovitz partners became engaged in an ongoing debate over whether or not the associate would be reported to the ethics panel. Wieder claims that he was initially informed by the partners that they knew that the associate had a “pathology of lying,” but that it had never been “exercised . . . to the magnitude” that was displayed in the condominium transaction.

21. Margolick, Ethics, supra note 6 at B4, col. 5; Harold, supra note 6 at 8.
22. Margolick, Ethics, supra note 6 at B4, col. 5; Harold, supra note 6 at 8; Clarke, supra note 6 at 3.
23. Margolick, Ethics, supra note 6 at B4, col. 5; Clarke, supra note 6 at 3.
24. Margolick, Ethics, supra note 6 at B4, col. 5; Harold, supra note 6 at 8; Clarke, supra note 6 at 3.
25. Margolick, Ethics, supra note 6 at B4, col. 5; Clarke, supra note 6 at 3.
26. Margolick, Ethics, supra note 6 at B4, col. 5; Harold, supra note 6 at 8; Clarke, supra note 6 at 3.
27. Margolick, Ethics, supra note 6 at B4, col. 5; Harold, supra note 6 at 8; Clarke, supra note 6 at 3.
29. Margolick, Ethics, supra note 6 at B4, col. 6; Harold, supra note 6 at 8; Clarke, supra note 6 at 14; Margolick, At The Bar: A Crusader’s Issue: What should be done when a whistle-blower in a legal firm is dismissed?, N.Y. Times, March 15, 1991, at B16, col. 1 [hereinafter, Margolick, Crusader].
30. Margolick, Ethics, supra note 6 at B4, col. 6; Harold, supra note 6 at 9.
31. Margolick, Ethics, supra note 6 at B4, col. 6; Harold, supra note 6 at 9; Clarke, supra note 6 at 14; Nat’l L.J., June 18, 1990, at 14.
32. Margolick, Ethics, supra note 6 at B4, col. 6; Harold, supra note 6 at 9; Clarke, supra note 6 at 14.
33. Clarke, supra note 6 at 14.
34. Margolick, Ethics, supra note 6 at B4, col. 6.
This “pathology” reportedly involved at least three other clients and the unauthorized signing of firm checks. The Feder, Kaszovitz partners claimed not to have known about the associate’s “pathology” until months later; the associate eventually admitted to the allegations raised by Wieder and the incidents involving other clients and the firm’s checks in a written statement handed to the firm’s partners.

During this period, Feder, Kaszovitz partners reportedly consulted with attorneys familiar with the official disciplinary process to determine “whether it was absolutely necessary” to report the associate. Wieder continued to push for the filing of a disciplinary complaint, even reportedly attempting to file one himself. In December of 1987, three months after Wieder made his initial request for the filing of a complaint, the firm finally contacted the local Appellate Division Disciplinary Committee. The associate left Feder, Kaszovitz soon before the complaint was filed. Right about the same time, Wieder noticed the firm had ordered new stationary - without his name. In March, 1988, after completing a major assignment, Wieder was fired.

The firing began the formal legal battle which continues to be waged in the New York Court system. Wieder filed suit in New York Supreme Court, primarily alleging wrongful discharge and asking for some $500,000 in damages. During this initial litigation before Judge Edward H. Lehner, Wieder described the central issue of the case as “whether a law firm may terminate the employment of an associate-employee without penalty where termination is motivated by the employee’s efforts to have the firm comply with a disciplinary rule” - an issue of first impression in New York. Feder, Kaszovitz has described the lawsuit in different terms - as “a bar-

35. Margolick, Ethics, supra note 6 at B4, col.6; Harold, supra note 6 at 8-9; Clarke, supra note 6 at 14.
36. Harold, supra note 6 at 8; Clarke, supra note 6 at 14.
37. Margolick, Ethics, supra note 6 at B4, col. 6; Harold, supra note 6 at 8; Clarke, supra note 6 at 14.
38. Clarke, supra note 6 at 14.
40. Margolick, Ethics, supra note 6 at B4, col. 6; Clarke, supra note 6 at 14.
41. Margolick, Ethics, supra note 6 at B4, col. 6; Clarke, supra note 6 at 14.
42. Margolick, Ethics, supra note 6 at B4, col. 6; Harold, supra note 6 at 9; Clarke, supra note 6 at 14.
43. Margolick, Ethics, supra note 6 at B4, col. 6; Harold, supra note 6 at 9; Clarke, supra note 6 at 14.
44. Nat’l L.J., June 18, 1990, at 14; Margolick, Ethics, supra note 6 at B4, col. 3.
45. Wieder, 144 Misc. 2d at 347, 544 N.Y.S.2d at 972.
rage of filthy, unsubstantiated allegations" and "the product of an unstable mind that cannot itself distinguish between ethical and unethical conduct." Wieder has likewise labeled the "name partners" in his former firm "the most unethical people I've ever met."

No matter the level of animosity, nor the worthiness of the legal arguments on each side, Judge Lehner never reached the merits of the case. He instead ruled that "the principles to be applied in this case are no different from those applied to any other at-will employee." After reviewing the state of New York's employment at-will doctrine and the exceptions to it, Judge Lehner declared that "the law firm had the right to terminate" Howard Wieder. His decision included a finding that New York's "Whistleblowers Law" did not apply to Wieder's situation. Strict adherence to the Lawyer's Code of Professional Responsibility, whether or not in good faith, was no block to discharge.

Wieder appealed. David Vladek and Alan Morrison of Washington D.C.'s Public Citizen Litigation Group (the legal arm of the Ralph Nader founded consumer group Public Citizen), and labor law specialists Judith Vladek and Laura Schnell of New York's Vladek, Waldman, Elias & Engelhard took on the case pro bono. In their appellate briefs, the group directly addressed the impact Judge Lehner's decision would have on New York's legal ethic's requirements:

New York can not require attorneys to . . . report violations only to say that the dominant policy goal that compelled their reporting is too insubstantial to safeguard them from reprisal. If the disciplinary rules are to be a sword to combat wrongdoing, they must also be a shield for the messenger.

In a one paragraph unanimous opinion, the First Department Appellate Division rejected Wieder's arguments and affirmed Judge Lehner's decision. In a later action rejecting Wieder's motion to amend his complaint the Appellate Division restated New York's

46. Margolick, Ethics, supra note 6 at B4, col. 5.
47. Clarke, supra note 6 at 14.
48. Id.
49. Wieder, 144 Misc. 2d at 347, 544 N.Y.S.2d at 972.
50. Id. at 349, 544 N.Y.S.2d at 974.
52. Wieder, 144 Misc. 2d at 349, 544 N.Y.S.2d at 973.
53. Clarke, supra note 6 at 15.
employment at-will doctrine: "in the absence of an agreement establishing a fixed duration of employment, an employment relationship is presumed to be freely terminable by either party, at any time, for any reason, or even for no reason at all." The case was appealed to New York's highest court, the Court of Appeals, which initially dismissed it on the grounds that a final order separating Wieder's claims of wrongful discharge and legal malpractice had not been issued. Wieder's attorneys sought and were granted such an order and filed a new appeal, which was granted on May 7, 1992. The case is expected to be heard during the Court's fall term.

**PART II: NEW YORK AND EMPLOYMENT AT-WILL**

In their analysis of the Wieder case, neither Judge Lehner nor the four judge appellate court panel found room for a legal ethics exception under New York's employment at-will doctrine. Such a decision can be considered in keeping with the strict adherence New York courts have shown to this century-old doctrine.

Since *Martin v. New York Life Ins. Co.* New York has followed the employment at-will doctrine first laid out by attorney H.B. Wood in 1877. "[T]he rule is inflexible that a general or indefinite hiring is, prima facia, a hiring at will. . . . [I]n all such cases the contract may be put to an end by either party at any time." This rule - known as "Wood's Rule" for its author - rapidly developed

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59. 79 N.Y.2d 759 (May 7, 1992).


62. *Id.* at 121, 42 N.E. at 417 (quoting H. Wood, *A Treatise On The Law Of Master And Servant* (2d ed. 1886)).
into a national employers’ right to discharge for “good cause, for no cause, or even for a cause morally wrong.”

In New York, the modern expression of “Wood’s Rule” is found in Murphy v. American Home Products. “In sum, under New York law as it now stands, absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer’s right at any time to terminate an employment at will remains unimpaired.” The Murphy court also explicitly rejected any adoption of a “public policy” exception to employment at-will, despite a plaintiff who claimed he was fired for uncovering more than $50 million in pension fund fraud.

However, the Court of Appeals has placed some limited restrictions on “Wood’s Rule.” Four months before Murphy, the court recognized an exception to the rigid rules of employment at-will where a “handbook on personnel policies and procedures” existed. Here the court found that the handbook had become part of the employment agreement based on the representations of the employer and the actions of the employee - during the recruitment process the employer had explicitly stated that the employee handbook would gov-

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63. Hutton v. Watters, 132 Tenn. 527, 530, 179 S.W. 134, 138 (1915); see also, Minda, supra note 60 at 966-75; Feinman, The Development of the Employment at will Rule, 20 AM. J. LEGAL HIST. 188 (1976).
65. Id. at 305, 448 N.E.2d at 91, 461 N.Y.S.2d at 237.
66. Id. at 298, 448 N.E. 2d at 88, 461 N.Y.S.2d at 234.

New York remains among a small minority of states which have resisted placing judicial “public policy” curbs on employment at-will. See, e.g., Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); DeMarco v. Publix Super Markets, Inc., 384 So. 2d 1253 (Fla. 1980); Hinrichs v. Tranquility Hospital, 352 So. 2d 1130 (Ala. 1977). Other states have found “public policy” exceptions in a number of areas. See, e.g., Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989)(recognizing a public policy exception based on a clear mandate of law); Woodson v. AMF Leisuredland Centers, Inc., 842 F.2d 699 (1988)(finding a public policy exception under Pennsylvania law for a bartender who refused to serve liquor to an intoxicated customer); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985)(declaring that bad cause dismissals violate public policy); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 315 N.W.2d 834 (1983)(finding a public policy exception preventing employers from requiring employees to violate constitutional or statutory provisions); Palmateer v. International Harvester Co., 85 Ill. 124, 421 N.E.2d 876 (1981)(finding a public policy exception for reporting criminal investigations to superiors).

For general discussion of the public policy exception to employment at-will, see Note, Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception, 96 HARV. L. REV. 131 (1983).

ern the employment relationship. While the exception exists, the court has construed it narrowly, requiring express evidence of the handbook or the personnel procedures in dispute.

Outside of this limited exception, the Court of Appeals has balked at adopting limits to the at-will employment relationship, relying instead on the state Legislature to craft exceptions to the employment at-will doctrine.

The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be critically affected . . . and to investigate and anticipate the impact of imposition of [changes to the employment at-will doctrine].

The court has not been hesitant to reiterate this position in other opinions. "[S]ignificant alteration of employment relationships . . . is best left to the Legislature (citation omitted) because stability and predictability in contractual affairs is a highly desirable jurisprudential value."

These decisions have led to sharp criticism of the Court of Appeals' apparent disregard for the fact that employment at-will is a judicially - not legislatively - created doctrine. "[N]othing within the doctrines of legislative supremacy, separation of powers, or statutory construction prevents the court from reforming its own common law of employment at-will. The rule was judge-made and hence always subject to judicial modification." New York's employment at-will doctrine has thus acquired the label of "antique law of nineteenth century origin." With the court seemingly locked into its position, modification of employment at-will rules has fallen to the legislative process - a process which has not produced many changes to date. The Legislature has voted to protect at-will workers when


69. Murphy, 58 N.Y.2d at 306, 448 N.E.2d at 91, 461 N.Y.S.2d at 237.

70. Id. at 302, 448 N.E.2d at 89-90, 461 N.Y.S.2d at 236.


72. See supra notes 60-63 and accompanying text.

73. Minda, supra note 60 at 1012.

74. Id. at 941.
called for jury duty, those making a complaint about a labor law violation and those filing a complaint or testifying about unlawful discrimination. While clearly these are all areas of great public interest, they represent only small nicks in the great wall of employment at-will.

To date, the Legislature has enacted but one "broad based" exception to employment at-will - the so called "Whistleblowers' Law." While protecting employee's who "blow the whistle" on employers who act in ways jeopardizing the "public health or safety," the law has serious defects. For example, the statute is limited to

Any person who is summoned to serve as a juror under the provisions of this article and who notifies his or her employer to that effect prior to the commencement of a term of service, shall not, on account of absence from employment by reason of such jury service, be subject to discharge or penalty.

Id.

1. No employer or his agent, or the officer or agent of any corporation, shall discharge, penalize, or in any other manner discriminate against any employee because such employee has made a complaint to his employer or to the commissioner or his authorized representative, that the employer has violated any provision of this chapter, or because such employee has caused to be instituted a proceeding under or related to this chapter, or because such employee has testified or is about to testify in an investigation or proceeding under this chapter.

Id.

1. It shall be an unlawful discriminatory practice:

    (e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this article or because he has file a complaint, testified or assisted in any proceeding under this article.

Id.


Retaliatory personnel action by employers; prohibition

2. Prohibitions. An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:

    (a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety;

    (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or

    (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

Id.

For a critical review of this statute, see Minda & Raab, supra note 67 at 1182-87. For a review of the developing field of Whistleblower laws, see Id.; Howard, Current Developments in Whistleblower Protection, 39 Lab. L.J. 67 (1988).

actions which present a “substantial and specific danger” to public health or safety. It provides for recovery of employer attorney fees not only in cases of “frivolous and bad faith claims,” but also when employees make “good faith honest mistakes of fact or law.” The statute actually chills whistleblowing by penalizing those employees who honestly believe the employer has violated a legal standard but who may lack a reasonable belief in fact.

The law also requires employees to first go to supervisors with their concerns, and allow the employer a “reasonable opportunity to correct” the problem. While a seemingly well-intentioned provision, such reporting requirements can, in certain circumstances, provide an employer in obvious violation of the law time to attempt a cover up or destroy key evidence.

In practice, the law has provided little protection for employees. In one case, a woman who refused to participate in a scheme to bill New York City for fraudulent job, educational and training placements was found to be unprotected by the statute. “[W]e conclude that . . . fraudulent billing is not the type of violation which creates a ‘substantial and specific danger to the public health or safety.’” In another, an aide at a residence for the mentally handicapped was fired after reporting what she believed to be a rape of a patient by another resident. The lower court found that without hard evidence, the aide’s claim was insupportable under the Whistleblower statute. The appellate court ruled that while the “alleged wrongdoing may have presented a danger to the health or safety of the individual patient, [it] did not threaten the health or safety of the public at large.”

Decisions like these make it disturbingly obvious that New York’s Whistleblowers’ Statute offers little if any protection to attor-

80. Id.
81. Minda & Raab, supra note 67 at 1185.
83. N.Y. LAB. LAW § 740(3) (McKinney 1992).
84. Minda & Raab, supra note 67 at 1185.
88. Kern, 139 Misc. 2d at 973, 529 N.Y.S.2d at 267.
neys like Howard Wieder, whose claims are based upon ethical rules, rather than any immediate physical threat to anyone's health or safety. In fact, neither the Supreme Court nor Appellate Division found that the potential impact of unethical lawyering on the public - or the impact of flagrant disregard of the Code of Professional Responsibility on the legal profession - fell within the narrow scope of the Whistleblowers' Law. "[T]he alleged refusal of the law firm to report . . . to the Disciplinary Committee cannot be said to be an 'activity, policy or practice of the employer . . . which . . . presents a substantial and specific danger to the public health or safety.' "

It would seem no great stretch, however, to imagine how an unethical firm would pose a risk to its clients, not only financially but perhaps even constitutionally. Lives can hang in the balance during criminal trials, and even prison terms have a substantial impact on those convicted, their families and their communities.

Of course, unethical conduct also hurts the image of the profession and the entire legal process. The legal system's legitimacy is grounded in the faith the public at large has in the attorneys and judges who make it work. An 'ends justify the means' mentality, or even conduct far short of such an extreme which clearly displays ethical impropriety, can shake that faith and threaten that legitimacy.

New York's 19th century, judicially-crafted employment at-will doctrine has now come face-to-face with a 20th century invention adopted by the courts - an enforceable code of legal ethics. As the above discussion infers, and the following discussion explains, it appears doubtful that the two can exist in harmony with one another.

**PART III: THE REQUIREMENT TO REPORT**

The system of legal ethics which governs American lawyers is an overlapping series of rules, codes, statutes, orders and customs which have developed over the last century or so. From that collection two primary modern codes of legal ethics stand out: the ABA Model Code of Professional Responsibility (hereinafter "Model Code"), released in 1969; and the ABA Model Rules of Profes-
sional Conduct (hereinafter "Model Rules"), released in 1983. Today, the majority of jurisdictions have adopted some version of the newer Model Rules, while some maintain a form of the Model Code, and others an amalgam of the two or a code primarily their own. In 1990, New York adopted a modified version of the Model Code to replace an earlier version of the Code in place since 1970.

Whatever code is in place in a particular jurisdiction, it is accompanied by enforcement procedures. These procedures include sanctions for violation of ethical rules, sanctions which can range from a simple reprimand to disbarment. One such rule, found in both the Model Rules and the Model Code, requires attorneys to report certain types and degrees of unethical conduct by other attorneys to appropriate disciplinary panels. For purposes of discussion, it will be called the "whistleblowing rule."

The history of this rule stretches back into the ABA's earliest draft of an ethical code - the Canons of Professional Ethics. Canon 29, labeled "Upholding the Honor of the Profession," reads in part, "lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession." This exhortation found new life - and teeth - as Model Code DR 1-103(A) - "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority in power to investigate or act upon such violation." DR 1-102 involves such acts as violation of a disciplinary rule, "conduct involving moral turpitude," and (most importantly for Howard Wieder) conduct "involving dishonesty, fraud, deceit or

Hazard, supra note 92 at 1251-53.
94. See Wolfram, supra note 92 at 60-63; Hazard & Hodes, supra note 92 at lxvii-lxiii; Hazard, supra note 92 at 1253-55, 1257-60.
95. See Hazard & Hodes, supra note 92 at 1255-59, 1269-71; Wolfram, supra note 92 at 56, 62-63.
96. See supra note 4 and accompanying text.
98. Wolfram, supra note 92 at 117-41; Hazard & Hodes, supra note 92 at 917-30.
100. Canons of Professional Ethics (1908).
101. Rotunda, The Lawyer's Duty To Report Another Lawyer's Unethical Violations In The Wake of Himmel, 1988 U. Ill. L. Rev. 977, 979 (quoting the Canons of Professional Ethics Canon 29 (1908)).
misrepresentation."\(^{105}\)

New York's new version of the Model Code now requires the violation of DR 1-102 to "raise[] a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer" before it must be reported.\(^{106}\) The provision in the Model Rules is quite similar to this New York rule.\(^{107}\) Some jurisdictions have modified the "shall" provisions of this rule to "should," making the reporting a more optional event.\(^{108}\)

The nuances of these provisions are not the topic of discussion in this Comment, however - what is at issue is the general pattern of enforcement of these whistleblowing rules and the penalties which attorneys may suffer for violating them. Until recently, there was no enforcement at all. "If we look through all of the courts of this land, it is virtually unheard of to find a case where a lawyer is disciplined merely for refusing to report another lawyer."\(^{109}\)

That began to change in 1988 with \textit{In re Himmel}.\(^{110}\) Here, the Illinois Supreme Court suspended attorney James Himmel from practice for one year solely on the basis of Illinois' equivalent of the whistleblower rule, also known as DR 1-103(A).\(^{111}\) Himmel was representing a client in an action to recover an award another attorney had misappropriated from the client.\(^{112}\) In settlement of the action, Himmel worked out an agreement for the client with the absconding attorney which provided for payment of the award plus damages, with the express provision that no "criminal, civil or attorney disciplinary action" be pursued by the client against this attorney.\(^{113}\) The client specifically instructed Himmel not to take any other action against the attorney, including reporting the attorney's misconduct.

\(^{106}\) N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (McKinney 1992).
\(^{107}\) MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 8.3(a) (1991).
\(^{108}\) REPORTING PROFESSIONAL MISCONDUCT
(a) A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
\textit{Id.}

\(^{109}\) HAZARD & HODES, supra note 92 at 938-39.
\(^{110}\) Rotunda, supra note 101 at 982. See also, Wolfram, supra note 92 at 684 ("[T]hese obligations . . . seem to result in discipline only in the rare cases, and then as one charge among many.").
\(^{111}\) 125 Ill.2d 531, 533 N.E.2d 790 (1988).
\(^{112}\) Id. See also, \textit{Comment, Attorney and Client: Duty to Report Lawyer Misconduct}, 67 N.D.L. REV. 359 (1991); Rotunda, supra note 101 at 982-91.
\(^{113}\) 125 Ill. 2d at 535, 533 N.E.2d at 791.
An action was later brought against Himmel for violating the whistleblowing requirement in Illinois ethical code, and he was found guilty. On appeal, the Illinois Supreme Court upheld the finding of the disciplinary committee.

[T]he evidence proved that respondent possessed unprivileged knowledge of [the] conversion of client funds, yet [Himmel] did not report [the] misconduct. This failure to report resulted in interference with the . . . administration of justice. Perhaps some members of the public would have been spared from [further] misconduct had [Himmel] reported the information as soon as he knew [about it].

While the court's decision has received some sharp criticism for apparently placing an attorney in the position of choosing between twin disciplines - violation of the attorney-client confidence requirements of the ethical codes or violation of the attorney misconduct reporting requirements - it inarguably places attorneys on notice that the whistleblowing requirements of ethical codes are not being ignored any more.

A 1990 New York case has only reinforced this warning. In Matter of Dowd the Second Department Appellate Division slapped five year suspensions for failure to report attorney misconduct on two attorneys caught up in a kick-back scandal which was operated from the office of the late Queens Borough President Don-

114. Id. at 536, 533 N.E.2d at 792.
115. Id. at 536-37, 533 N.E.2d at 791-92.
116. Id. at 545, 533 N.E.2d 795-96.

The Committee on Professional Ethics of the Bar Association of Nassau County, New York, reached similar conclusion in a 1990 ethics opinion dealing with the responsibility to report in a legal malpractice case.

Because inquiring counsel proposes to approach the offending attorneys and discuss a possible settlement of the client's claim against them, this Committee warns that it is improper to use the threat of charges against them to bargain for better terms. . . . Since the reporting of misconduct is mandatory, this Committee recommends that the better practice is to make the report immediately so that there can be no claim that inquiring counsel was willing to forbear in exchange for a more generous settlement offer.


But at least one other ethics opinion has come to the opposite conclusion when a client instructs the attorney not to report (the situation in Himmel). In 1991 the Oregon State Bar Association found that an attorney could not reveal knowledge of ethical violations by other attorneys when a client who believed such reporting would either embarrass or damage her instructed the attorney not to report the information. Or. Ethics Op. 1991-95 (1991).

Both Attorneys Michael Dowd and Albert Pennisi had been forced to pay kickbacks through the office of Queens Borough President Donald Manes to keep a contract to collect overdue parking fines. The court found that the two attorneys failure to report the extortion being demanded by Manes—a fellow attorney—to the proper authorities was a violation of DR 1-103(A). The case has received significant criticism, not only for the length of suspension, but also because Dowd actually contacted law enforcement officials about the extortion scam and testified at later trials.

While Howard Wieder was certainly not reporting conduct on the scale of the corruption of the Manes administration, he was clearly reporting conduct which fell within DR 1-103(A) as it existed at the time (and even under today's revised rule). A recent New York City Bar Association ethics opinion on the new misconduct provision predicted "increasingly vigilant enforcement" of the rule based upon the Himmel case alone. The Chief Counsel to the Disciplinary Committee of New York's First Judicial Department has predicted a similar future. "Lawyers have for many years been required to report their unprivileged knowledge of a colleague's dishonest or illegal conduct. Himmel and Dowd and Pennisi have caused the bar and the courts to reexamine this duty, one which more than a few lawyers may have forgotten or wilfully ignored."

Legal Ethics expert Professor Monroe H. Freedman of Hofstra University School of Law has declared whistleblowing ethical rules crucial to the success of the legal professions self-regulating system.

A disdain for the reporting of misconduct may be appropriate for the schoolyard or the alley, but it is an unacceptable ethic for a profession that claims to be self-regulating. . . . We hear a good deal of cant these days about "professionalism." Whatever that
An ethics opinion issued by the Bar Association of Nassau County, New York, is equally forceful on the requirement to report. "Neither sympathy nor self interest will diminish the unconditional obligation to report thus imposed by the code. Anything less than prompt diligence and rigorous compliance by reporting counsel would violate both the letter and the spirit of the code and reflect badly on the entire profession."126

Whether or not one accepts the positions of Professor Freedman or the Nassau County Bar Association, the fact remains that whistleblowing - or "squeal" rules - are part of the enforceable ethical codes of nearly every jurisdiction. And as the cases of Himmel and Dowd point out, those who do not abide by them face potentially stiff penalties.127 Howard Wieder found himself in such a position and decided to follow his obligations. It may have cost him his job. New York attorneys now face a twist on the Himmel dilemma - the "Wieder dilemma" discussed earlier: don't report and face severe discipline, or report and lose your job.

In fact, Wieder impacts upon not only the disclosure rules, but the entire code of legal ethics. Commentators have pointed out that a prime motivation for adherence to ethical codes is that others also follow them. "For each lawyer, it is the compliance of other lawyers that makes acting as the Model Rules require both rational and morally obligatory."128 But in a situation like that found in Wieder, where attorneys face the prospect of job loss if they do follow ethical dictates, adherence to ethical codes may well falter. "[I]f the [ethical codes] set standards so high that sufficient compliance is unlikely, each lawyer may reasonably conclude that not enough other lawyers will act as required. He would then be justified in ignoring


the [ethical codes] himself."

A court decision which forces attorneys to confront such a question seems to confute the chorus of attorneys and academics clamoring for a more “ethical” profession. But regardless of the drum-beating for “ethics” and “professionalism,” the importance of functional codes of ethics has long been recognized by many professions, including the law. “Ethical standards create a moral tie between the profession and the public interest. The standards transform the sale of personal services into a calling, one impressed with a service obligation.” However, while these ties bind the professional to the public, they alienate him from his employer. “[T]he at-will professional employee motivated by ethical concerns attempts to correct a problem at the risk of substantial financial investment in his education, his long-term financial security, and his career standing and reputation.”

While applicable to professionals in a general sense, the parallel to the “Wieder dilemma” is unmistakable. When these “ethical concerns” rise to the level of obligations, legal professionals face not only loss of job but criminal sanction. “The attorney is a helpless prisoner caught between the dictates of the law and the economic power of his employer.”

Professor Gary Minda, who has written extensively on New York’s at-will employment doctrine, has described the “Wieder di-

129. Id.
130. See, e.g., N.Y. St. B.J., May 1990. In this edition, which was dedicated to the topic of “professionalism,” no less than 10 articles focused on the perceived shortcomings of the profession.

Former Federal Bar Council President Peter Megargee Brown, in an article entitled “America’s Legal Profession Is In Trouble. What Are We Going To Do About It?” called for attorneys to learn and work within ethical bounds:

Law professors should devote themselves to actively grooming more qualified legal professionals who are equipped ethically, as well as intellectually to carry on a high professional role. . . . Bar members should maintain their own vigilant self-policing system. Lawyers should be intelligent enough to enforce their own codes and rule.

Id. at 18 (emphasis in original).

New York State Bar Association Past President John J. Yanas expressed his concern at the outset of the issue about “whether [the legal profession] will continue to move away from [its] established traditions and canons of professional ethics.” Id. at 3. Even Warren Burger, the former Chief Justice of the United States Supreme Court joined in: “The increasingly bad image of the profession is not the work of only the borderline shysters and ‘ambulance chasers,’ but of a more diverse segment [of the legal profession].” Id. at 9.

131. See generally, Hazard, supra note 92 (legal ethics); M. Bayles, Professional Ethics (1981) (professional ethics generally).

133. Id. at 59.
134. Id. at 59-60.
135. Id. at 63.
lemma" as "one huge catch-22. If [Wieder] had refused to report an ethical violation of another lawyer, he could have been subject to possible disciplinary action by the Bar. In reporting the violation, however, he was subject to dismissal by the employer." Other commentators have been equally critical.

Cornell Law Professor Charles Wolfram, a noted legal ethics expert who has filed amicus briefs in support of Howard Wieder's position, has attacked the courts' decisions. "The message the case sends to new lawyers is one of intimidation. . . . It suggests that a very hostile firm environment awaits associates, where rocking the boat will gain you nothing." Wolfram also believes the case has implications beyond young attorneys. "It'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.

N.Y.U. Legal Ethics Professor Stephen Gillers has called the Wieder decision a "mixed signal" to those in the legal profession. "On the one hand [the courts] say, 'You must report misbehavior by other lawyers, 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." Professor Clyde Summers of the University of Pennsylvania Law School has had trouble answering student questions about the case. "If the decision of the Appellate Division is not reviewed, what shall I tell my students who plan to practice in New York? Shall I warn them not to report misconduct lest they lose their jobs? Shall I tell them the Court of Appeals does not care?"

A student-journalist at Georgetown Law Center wrote of the quandary she would face if confronted with a Wieder situation.

"[I]f I see some ethics rules actively and knowingly flouted, what then? If the firm doesn't act ethically to correct internal abuses, will I have the backbone to risk my job for a principle? To risk disdain or ridicule from colleagues, who will dismiss me as a fanatic? To risk a silent blackball from other firms, who won't hire a troublemaker, no matter how ethically upright they may be?"

Not all members of the legal profession agree. One attorney

138. Harold, supra note 6 at 10.
139. Clarke, supra note 6 at 3.
140. Margolick, Ethics, supra note 6 at B1, col. 5.
141. Id.
142. Margolick, Crusader, supra note 29 at B16 col. 2.
143. Harold, supra note 6 at 10.
with a prominent New York firm described "the threat of losing a single job" as a relatively small price to pay when weighed against losing the right to practice law.\textsuperscript{144} Anyone who thinks they may be fired for reporting an ethical wrong ought to leave that firm anyway. It speaks volumes for the kind of firm you're with."\textsuperscript{145} But in the midst of the steepest downturn in the legal profession in many years, such a statement rings hollow. Ethical codes may be important, and the threat of sanction real, but as one judge recently remarked, "attorneys are no less human than nonattorneys and, thus, no less given to the temptation to either ignore or rationalize away their ethical obligations when complying therewith may render them unable to feed and support their families."\textsuperscript{146} Or, for that matter, making loan payments, car payments, and meeting the rent.

And what of the impact on the historically shaky image of the bar in the eyes of the public?\textsuperscript{147} One does not have to go beyond recent anecdotes to understand the public's distrust of the profession. U.S. Representative and lawyer Patricia Schroeder recently commented on the reaction she received when she told her mother she was going to become a lawyer, and later go into politics. "When I told her I was going to law school she was shocked. . . . When she found out later I was entering politics, she said, 'You had to work hard to find a profession even worse.'"\textsuperscript{148} In an address to students at Western New England Law School, U.S. Court of Appeals Justice Dolores K. Sloviter cited a \textit{National Law Journal} poll which found that only five percent of the public rated lawyers their most respected profession, and only twelve percent of parents would recommend the legal profession as a career choice for their children.\textsuperscript{149} Even the somewhat successful lawyer bashing of that "noted" jurist Dan Quayle underscores the public relations problem facing the le-

\begin{itemize}
\item \textsuperscript{144} Clarke, \textit{supra} note 6 at 15.
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} Balla v. Gambro, 145 Ill. 2d 492, 511, 584 N.E.2d 104, 113 (1991)(Freeman, J., dissenting). \textit{See infra} note 178 for full text of quote.
\item \textsuperscript{147} Professor Monroe H. Freedman traced the history of poor public opinion of the legal profession from Shakespeare to the 1950's in sardonic review of the hunt for the profession's "Golden Age." Freedman, \textit{A Brief "Professional" History}, Legal Times, December 17, 1990 at 22. Among the examples he cited were a 1645 Virginia act "expelling 'all mercenary lawyers,'" and a 1934 speech by then Supreme Court Justice Harlan Stone which unhappily described the "successful lawyer" as no more than a "general manager of a new type of factory, whose legal product is increasingly the result of mass production methods." \textit{Id.}
\item \textsuperscript{148} Address by U.S. Representative Patricia Schroeder, Hofstra University School of Law (March 12, 1991).
\item \textsuperscript{149} Sloviter, \textit{Perceptions Of The Legal Profession}, 10 \textit{W. New Eng. L.Rev.} 175 (1988).
\end{itemize}
gal profession.\textsuperscript{150}

The \textit{Wieder} decision has placed attorneys between the proverbial "rock and a hard place." But to date, courts have yet to fully recognize this dilemma or address its impact on codes of ethics. But cases have begun to surface which are forcing courts to grapple with the irreconcilable goals of employment at-will and enforceable ethical standards.

\section*{PART IV: IN-HOUSE COUNSEL AND CODES OF LEGAL ETHICS}

As Part III has described, courts have only recently begun to enforce the reporting requirements of legal codes of ethics.\textsuperscript{151} Courts have also only just begun to grapple with the question of the impact that these requirements have on attorney-employees. While the \textit{Wieder} case remains the only reported decision dealing with an attorney in a law firm setting, recent cases have dealt with attorneys employed as corporate counsel.\textsuperscript{152} This situation is more complicated than that in \textit{Wieder}, for a corporate counsel can be considered part of not only an employee-employer relationship with his company, but also an attorney-client relationship. Two recent court cases out of the Mid-West - \textit{Balla v. Gambro}\textsuperscript{153} and \textit{Nordling v. Northern State Power Co.}\textsuperscript{154} - have come to opposite conclusions on the rights of dismissed in-house counsels to sue their employers for wrongful discharge.\textsuperscript{155} The issue of the attorney-client relationship played a role in each.

\begin{flushright}
\textsuperscript{151} See supra notes 109-22 and accompanying text.
\textsuperscript{153} 145 Ill.2d 492, 584 N.E.2d 104 (1991).
\textsuperscript{154} 478 N.W.2d 498 (Minn. 1991).
\end{flushright}
A. Balla v. Gambro

Roger Balla was in-house counsel for Gambro, Inc., the Illinois-headquartered American arm of the Swedish company Gambro Lundia. The American operation distributed kidney dialysis equipment manufactured by the German subsidiary of the Gambro company. In 1985, Gambro Germany announced a forthcoming shipment of dialyzers to Gambro America which Balla discovered did not meet F.D.A. requirements, and would have potentially damaging health impacts if sold. He advised the president of Gambro America to reject the shipment. The president decided to accept the shipment anyway, and Balla informed him that he would be forced to report the company’s actions to the F.D.A. Balla was then fired. Immediately following the firing, he reported the shipment to federal authorities, who quickly seized it as “adulterated.” Balla then filed a $22 million retaliatory discharge action against Gambro.

The trial court granted Gambro’s motion for summary judgment. Describing Balla’s acts as “conduct clearly within the attorney-client relationship,” the court found that Gambro had an “absolute right” to discharge him. On appeal, Balla won a reversal. The appellate court found that an attorney was not barred from bringing a retaliatory discharge claim as a matter of law and imposed a three-part test for standing to bring such an action:

1. whether Balla’s discharge resulted from information he learned as a ‘layman’ in a non-legal position; (2) whether Balla learned the information as a result of the attorney/client relationship; if so whether the information was privileged; and (3) whether there were any countervailing public policies favoring disclosure of privileged information learned from the attorney/client relationship.

While itself not ruling on the merits, the appellate court re-

156. Balla at 145 Ill.2d 494, 584 N.E.2d at 105.
157. Id.
158. Id. at 496, 584 N.E.2d at 106.
159. Id.
160. Id.
161. Id. at 497, 584 N.E.2d at 106.
162. Id.
163. Id.
164. Id.
165. Id.
167. Id. at 63, 560 N.E.2d at 1047 (1990).
viewed Balla's ethical obligations to disclose information about a client when that client's actions would result in death or serious injury to others. It found that Balla was indeed obligated to report Gambro's actions. It also noted that "[i]f Balla had been a layman-employee rather than an attorney-employee, there would be no question as to his standing to bring a cause of action for retaliatory discharge." It further found that Gambro's right to terminate Balla would not be infringed upon by a suit for monetary damages - the company would simply be liable for damages based on a "termination [that] was in retaliation for the employee[-attorney]'s activities [in] contravention of public policy."

The Illinois Supreme Court found otherwise. While acknowledging that "there is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens," the court rejected Balla's claim for retaliatory discharge "because of the special relationship between an attorney and client."

Balla argued that his obligations under the Illinois ethics code placed him in an impossible position: to comply with the company and face possible loss of license or criminal sanction; or to comply with the ethics code and face the loss of a full-time job and benefits. The court saw no difficulty at all:

In-house counsel do not have a choice of whether to follow the illegal and unethical demand of their clients. In-house counsel must abide by the Rules of Professional Conduct. [Balla] had no choice but to report to the FDA Gambro's intention to sell or distribute these dialyzers, and consequently protect the aforementioned public policy.

The court recognized that this ethical obligation might make corporate officials hesitant about revealing potentially questionable practices to their in-house counsel - but found that "extending the tort of retaliatory discharge might have a [further] chilling effect on

168. Id. at 62, 560 N.E.2d at 1046.
169. Id.
170. Id. at 61, 560 N.E.2d at 1045.
171. Id. at 62, 560 N.E.2d at 1046.
172. Balla, 145 Ill. 2d at 499, 584 N.E.2d at 107-08 (quoting Palmateer v. International Harvester Co., 85 Ill. 2d 124, 132, 421 N.E.2d 876, 879 (1981)).
173. Id. at 500, 584 N.E.2d at 108.
174. Id. at 502, 584 N.E.2d at 109.
175. Id. "If we're going to tell lawyers they have to do something," Gillers asserts, "we must protect them when they do it." Varchaver, Opposite Answers in Whistle-Blower Cases, American Law., March, 1992, at 52 (quoting NYU Ethics Professor Stephen Gillers).
the communications between the employer/client and the in-house counsel."

The court also found

that it would be inappropriate for the employer/client to bear the economic costs and burdens of their in-house counsel’s adherence to their ethical obligations. . . . [A]ll attorneys know or should know that at certain times in their professional career, they will have to forgo economic gains in order to protect the integrity of the legal profession.

In a stirring dissent, Justice Freeman found the reasoning of his colleagues “fatally flawed.”

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

Justice Freeman also pointed out that any additional “chilling” of the in-house counsel/corporate client relationship which might occur if retaliatory discharge actions were available would only occur where “the employer decides to go forward with particular conduct, regardless of advice that it is contrary to law.” To allow corporate employers to discharge their counsels in such situations without sanction “is truly to give the assistance and protection of the courts to scoundrels.”

Unfortunately for Roger Balla and the hundreds of other corporate counsels in Illinois, Justice Freeman was the lone dissenter in the case.


A second corporate attorney case decided within days of Balla

176. Balla at 504, 584 N.E.2d at 110.
177. Id. at 505, 584 N.E.2d at 110. “It doesn’t follow that a client shouldn’t have to pay for a lawyer behaving ethically — it goes with the territory. You might as well say you don’t have to respond to discovery because it’s expensive.” Scheffey, Counsel Catch-22: Be Ethical, Get Fired, Don’t Sue, Conn. L. Tribune, January 27, 1992, at 10 (quoting Yale Ethics Professor Geoffrey Hazard, Jr.).
178. Balla at 511, 584 N.E.2d at 113.
179. Id.
180. Id. at 512-13, 584 N.E.2d at 114.
181. Id. at 513, 584 N.E.2d at 114.
by the Minnesota Supreme Court involved a significantly smaller charge of corporate evil-doing, but a significantly more favorable holding on the rights of attorney-employees.

Gale Nordling served as a staff attorney for Northern States Power's legal department. During the planning of a new plant, Nordling was made aware of a plan to investigate the personal lives of employees at the new plant by the director of the legal department. Nordling objected to the proposal on legal grounds to the director, and also informed the general manager of the new plant construction project. The general manager passed along the concerns up the corporate ladder, where the investigation proposal was killed. Within a short period, the legal department director had placed Nordling on "positive discipline," which was quickly rescinded. This discipline was regulated by an employee handbook issued by the company. Within months, Nordling was fired, and his attempt to gain employment elsewhere in the company was blocked by the director of the legal department. Nordling sued for wrongful and retaliatory discharge.

Northern States won a series of summary judgment motions at the trial court level, the final victories coming on a determination that the attorney-client relationship barred Nordling's discharge claims. The appellate court upheld the trial court's judgment, finding that "the general rule allowing a client to discharge an attorney without liability for breach of contract applies to in-house counsel." Judge Kalitowski disagreed, finding that the role of in-house counsel was as much "employer-employee" as "attorney-client," and therefore allowed at least some claims for wrongful discharge.

In an unanimous decision, the Minnesota Supreme Court adopted a position similar to that of Judge Kalitowski. "[T]he in-house attorney is also a company employee, and we see no reason to deny the job security aspects of the employer-employee relationship if this can be done without violence to the integrity of the attorney-

183. Id. at 500.
184. Id.
185. Id.
186. Id.
187. Id. at 499.
188. Id. at 500.
189. Id.
190. Id.
192. Id. at 87.
client relationship." The court cited issues of compensation, promotion and tenure as ones which fell within the purview of the "employer-employee" relationship. The court also pointed to the presence of the employee handbook as a strong indicator of a more traditional "employer-employee" relationship. That decided, the court allowed Nordling's claim for wrongful discharge money damages to proceed.

While mentioned only in passing, the court also touched directly on the issue of dispute in Wieder. "Although the attorney-client status is not involved when a private firm discharges one of its employee attorneys, it is worth noting that the employee attorney, if wrongfully discharged, can bring a claim against his or her employer." Thus the Nordling case recognizes not only an in-house counsel's right to sue for wrongful discharge in at least some situations, but reaffirms the right of attorney-employees of law firms to sue for wrongful discharge as a matter of course.

C. Which precedent to follow?

As these two cases illustrate, the employment rights of in-house counsel remain in flux. It is likely that the issue will continue to be litigated from state to state, with a pattern emerging over time. Legal Ethics expert Professor Geoffrey Hazard has maintained that no state can support the position that corporations have an "absolute right" to fire their attorneys. "[I]f the right [to discharge] were really 'absolute,' a corporate law department could discharge a staff member on the grounds of gender or race, in violation of anti-discrimination laws." He has also questioned the results of cases like

194. Id.
195. Id. See also, supra notes 67-69 and accompanying text.
196. 478 N.W.2d at 502 (emphasis added).
198. Hazard & Hodes, supra note 92 at § 1.16:206.
199. Id.
Balla. "It . . . seems bizarre that a lawyer employee, who has affirmative duties concerning the administration of justice, should be denied redress for discharge resulting from trying to carry out those very duties." 200

While the Wieder case does not involve the issue of the attorney-client relationship, the results of Balla and Nordling provide several clear messages for the New York Court of Appeals. Perhaps most important is the clear signal sent by the Minnesota court in Nordling that law firm employee-attorneys have an unfettered right of wrongful discharge actions. Free of the complications of the attorney-client relationship, such attorneys can be therefore be treated by the courts as employees, albeit ones bound by the special requirements of codes of professional responsibility.

The Balla court's dissent, pointing out the folly of separating reality from the 'textbook' operation of legal ethics codes, is also instructive. Attorneys do not operate in a vacuum, but face economic realities of everyday life. They can not be expected to make what amounts to heroic acts of self-sacrifice, especially when they themselves have done nothing wrong but are solely observers of another's bad conduct.

PART V: Solutions to the "Wieder Dilemma"

As the above discussion describes, the Wieder decision has placed New York attorneys - and all others in states with traditional employment at-will doctrines - in an extremely difficult situation. As yet, no court has explained how an attorney is to realistically make the choice between his job or his ethical duty.

It is now up to the Court of Appeals, the New York Legislature, or both, to set things straight. The Court will have the first opportunity when it hears the case this fall. The Legislature is likely to only face pressure to act if the Court does not ease the "Wieder dilemma."

A. Options For The Court

Wedded at the heart of the Wieder case are the employment at-will doctrine and the power of the Code of Professional Responsibility. The Court of Appeals must first recognize that the twin issues are irreconcilable - an unfettered right to discharge for following ethical requirements can not be harmonized with an ethical code demanding fealty, and punishing those who do not comply. The lower

200. Id.
courts have so far decided that attorneys bear the entire cost of this conflict - if they lose their job, so be it.

Exclusive Power of the Court to Regulate

Courts have long been recognized as having primary, if not exclusive control over attorneys. In New York, the courts are recognized by statute as the arbiter of admissions and regulation of all attorneys who practice within the state's borders. "Unlike other employment relationships, which are controlled by the Legislature, the relationship between attorneys, and indeed the conduct of attorneys in general, is regulated not by the Legislature but by the courts." Boiled down to its essence, the Wieder case involves the regulation of attorneys. The Court of Appeals therefore has a natural, if not statutorily mandated, role to play in deciding the case.

Of course, the employment at-will elements of the case can not be ignored. Nor do they have to be. For the court can settle the dispute without infringing upon the "legislative" territory it has so strongly expressed its intention to stay out of. Attorneys are completely within the bailiwick of the courts, the Lawyer's Code of Professional Responsibility is adopted and administered by the courts, and problems applying the code to attorneys are solely issues for decision for the courts.

Without implicating any legislative power, the Court of Appeals can find that attorney-employees reasonably and correctly following their ethical obligations as detailed in the Lawyer's Code are protected by those very same obligations. Such a decision would implicate no other group, expand no rights, and in no way impinge upon the legislature's role in drafting employment law. It would mean that solely that attorneys would not be penalized as a result of ethical obligations. For example, reporting unethical conduct of a fellow attorney would shield the actor from a libel action, or allow the opportunity for recovery from an employer who discriminated against an attorney acting out his ethical responsibilities. Such a holding

201. Wolfram, supra note 92 at 22-33.
203. Clarke, supra note 6 at 15 (quoting Fordham Law Professor Daniel Capra).
204. See supra notes 70-71 and accompanying text.
205. See Weber v. Cueto, 209 Ill. App. 3d 936, 568 N.E.2d 513 (1991)(holding that a communication to three local panels describing unethical conduct by an attorney which was obligated by the reporting requirement of the local code of ethics was absolutely privileged).
206. See Parker v. M & T Chemicals, Inc., 236 N.J. Super. 451, 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989) (holding that an attorney could sue for damages as a result of being fired for refusing to participate in a scheme to cheat a competitor which would have
is not only within the court's power, but arguably the court's alone to make. It would avoid the potential problems of involving the employment at-will doctrine and preserve a sense of balance in the operation of the Lawyer's Code of Professional Responsibility.

In fact, firing an attorney for following the code arguably violates numerous provisions of DR 1-102, including prohibitions on "dishonesty, fraud, deceit or misrepresentation,"207 "engag[ing] in conduct that is prejudicial to the administration of justice,"208 and "engag[ing] in any other conduct that adversely reflects on the lawyer's fitness to practice law."209 In addition, EC 1-8 admonishes law firms to "adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules."210 While ethical considerations do not carry the force of law that disciplinary rules do, they are advertised as the aspirational goals of the profession. Firing an attorney for following her ethical responsibilities would appear to be somewhat inconsistent with these ethical aspirations. In fact, the Court of Appeals may find it so inconsistent as to be unethical.

Modifying Murphy

It may be impossible for the Court to avoid direct discussion of the Murphy decision, and the strict employment at-will doctrine which it upheld.211 If a way can not be found to protect ethical attorney's from unethical employers without such a discussion, than it will be necessary for the Court to make at least modest modifications to its interpretation of the rules of employment at-will.

In fact, such a change may be long overdue. Recent commentary has described how the state may become an employee "graveyard." "New York law now provides less protection to discharged employees than almost any other state. Indeed, there is the possibility that New York may become the executive graveyard of corporate America - a place where corporate executives are transferred and then discharged."212

In order to protect ethical attorneys, however, the Court of Appeals need not go far in its modification of employment at-will. A

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208. Id. at DR 1-102(A)(5).
209. Id. at DR 1-102(A)(7).
210. Id. at EC 1-8.
211. See supra notes 61-74 and accompanying text.
212. See Minda, supra note 60 at 940; see also, Newsday, June 18, 1989 at 74 ("You've heard of an elephant's graveyard. Well, New York is an executive's graveyard.").
simple option would be the adoption of a public policy exception to the employment at-will doctrine based upon professional codes of ethics.\textsuperscript{213}

As discussed in Part III, "ethical standards create a moral tie between the professional and the public interest. The standards transform the sale of personal services into a calling, one impressed with a service obligation."\textsuperscript{214} This tie has been recognized by the legal profession as a powerful element in its legitimacy.\textsuperscript{216} But there are other reasons for the court to create an ethics exception to the employment at-will doctrine. Ethical codes are not only enriching forces, but disciplinary ones.\textsuperscript{216} If a professional bears the consequences for failing to follow them, should he not receive protection when he abides by them?\textsuperscript{217} "The professional ordered to perform an unethical act is... trapped in the same dilemma faced by workers ordered to do acts barred by statute or public policy."\textsuperscript{218} And aren't ethics codes truly statements of public policy?\textsuperscript{219}

In \textit{Pierce v. Ortho Pharmaceutical Corporation}\textsuperscript{220} the New Jersey Supreme Court answered that question with a yes. "Employees who are professionals owe a special duty not only to abide by federal and state law, but also by the recognized codes of ethics of their professions. ... In certain instances, a professional code of ethics may contain an expression of public policy."\textsuperscript{221} In the universe of ethical codes, it is likely that none would be more an expression of public policy than codes of legal ethics. Not only are they adhered to and enforced upon members, but they are actually adopted and administered in most jurisdictions by the courts.

Recovery options for wrongly discharged attorneys (or other professionals) could be limited under such a public policy exception to simple damages rather than reinstatement. Such a recovery option would allow a wrongfully discharged professional redress, punish the wrongdoing employer, but allow each to go their separate ways with-

\begin{itemize}
\item \textsuperscript{214} Moskowitz, supra note 132 at 58.
\item \textsuperscript{215} See generally Hazard, supra note 92; Wolfram, supra note 92 at 48-53.
\item \textsuperscript{216} See Moskowitz, supra note 132 at 60-63; Wolfram, supra note 92 at 117-41.
\item \textsuperscript{217} See Moskowitz, supra note 132 at 62-63.
\item \textsuperscript{218} Id. at 65.
\item \textsuperscript{219} See Wilbur, Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility, 92 Dick. L. Rev. 777, 786-91 (1988); Moskowitz, supra note 132 at 56-66.
\item \textsuperscript{220} 84 N.J. 58, 417 A.2d 505 (1980).
\item \textsuperscript{221} Id. at 71-72, 417 A.2d at 512.
\end{itemize}
out imposing further strains on the relationship.222

The Court of Appeals may also be able to protect ethical attorneys through the very language of *Murphy* and its sister cases. Under *Murphy*, "absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired."223 As expressly adopted law of the legal profession, the Lawyers' Code of Professional Responsibility could easily be considered a "statutory proscription." In fact, it may also be considered an express limitation on attorney-employee employment contracts.

In *Sabetay v. Sterling Drug*, the court further explained that "[n]o [contractual] obligation can be implied . . . which would be inconsistent with other terms of the contractual relationship."224 An "obligation of good faith and fair dealing" could in fact be read into a contract only if it "is in aid and furtherance of other terms of the agreement of the parties."225 The Lawyer's Code of Professional Responsibility, by its very nature, imposes an obligation of "good faith and fair dealing" on every attorney in New York. As the rules come part and parcel with each attorney, when any attorney enters an agreement the rules therefore must become part of that agreement. It matters not whether the agreement is explicit or implicit, for ethical codes are indelible - attorneys can not opt out or negotiate out of their requirements. Since every contract involving an attorney therefore includes the Lawyer's Code, and the hiring of an attorney-employee implicates contract, the relationship between the attorney and the employer must include the Lawyers' Code.226 To find otherwise would be "internally inconsistent."227

If the Lawyers' Code is in fact a part of every attorney-employees' employment agreement, two results are implicated. Either the employment at-will contract is modified to block dismissal based on compliance with the provisions of the ethical code - or attorneys are

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223. 58 N.Y.2d at 305, 448 N.E.2d at 91, 461 N.Y.S.2d at 237.
224. 69 N.Y.2d at 335, 506 N.E.2d at 922, 514 N.Y.S.2d at 212.
225. Id.
226. See Maraud v. Automobile Club Ins. Assoc., 465 N.W.2d 395 (Mich. App. 1991). In a decision involving an in-house counsel, the court here found that professional ethics can become part of an employment situation involving an attorney. "Defendants, by hiring plaintiff as an attorney, knew or should have known that plaintiff was bound by the code of professional conduct and incorporated this fact in creating a just-cause employment contract." *Id.* at 400.
not employees at-will. If the employment at-will doctrine can not bend to permit exceptions to the "unfettered right to terminate," then employment at-will can not be applied to attorneys. Such a conclusion flows from the premise that the Lawyer's Code of Professional Responsibility is the primary governing law for the legal profession. Its provisions impose rules and punishment for failure to abide by those rules. "Pure" employment at-will allows for no cause, and bad cause firings. To allow an attorney to be fired for adhering to the ethical strictures of the Lawyer's Code would be to place the employment at-will doctrine ahead of the code of ethics.

The Court of Appeals thus has several options before it, which offer varying degrees of protection for the attorney-employee. No matter which avenue it chooses, the Court must reverse the Wieder decision as it now stands and eliminate the "Wieder dilemma" if it is to protect the legal community and the Lawyer's Code of Professional Responsibility.

B. Options For The Legislature

The Legislature has within its power the ability to statutorily create any of the exceptions previously discussed as possible options for the Court of Appeals. While the court is the natural regulator of attorneys, the Legislature must be prepared to step in if called upon.

One clear option which does fall substantially within the "legislative" realm is reform of New York's "Whistleblowers' Law." Professor Minda of Brooklyn Law School has long proposed expanding the law to protect "employees who reveal any abuse of fiduciary position, gross mismanagement, ethical, or legal violation by their employer, even if the subject matter does not directly affect the public health and safety."

Such modifications to the law would provide attorney-employees with a legal option if they are fired unjustly. Since the current law already contains penalties for false claims, employers would be shielded from frivolous lawsuits.

The Legislature must also be ready to step in and pass legislation providing attorney-employees the right to sue for wrongful or retaliatory discharge if the Court of Appeals fails to act. Such a weapon, if properly tailored, will provide a balance to arbitrary acts by legal employers.

228. See supra notes 61-63 and accompanying text.
229. See Minda & Raab, supra note 67; See also Minda, Employment Law, 41 SYRACUSE L. REV. 265, 281 (1990).
CONCLUSION

By accepting the *Wieder* appeal, New York’s Court of Appeals will become the first high court in the United States to directly decide whether legal codes of ethics act as a shield or a suicide pact for attorney-employees in a law firm setting. The court has within its power the ability to strengthen or weaken the bonds which bind the profession. If it chooses the latter, it will be up to New York’s Legislature to take corrective action.

Whatever the outcome, this much is certain - the “*Wieder* dilemma” described in these pages is quite real, in New York and beyond. Unless the ruling of the court as it now stands is changed, Howard Wieder will truly not be alone, for other New York attorneys will either risk joining him on the unemployment line - or risk joining Michael Dowd and Albert Pennisi on suspension.

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