

Analysis

In-House Counsel

Lawsuits by In-House Counsel Against Their Employers (Part I)

BY ROY A. GINSBURG

Nearly every day, C-level executives and other members of management confide in their companies' general counsel or other members of their in-house law departments about matters of critical importance to their companies. At times, these discussions necessarily reveal wrongful conduct by directors, executives, managers, or other employees. The problematic conduct may include matters as diverse as price fixing, insider trading, options backdating, discriminatory behavior, misuse of corporate funds, sexual harassment, or other actions inconsistent with well-established company policies or state and federal statutes. Almost always, these revelations will be addressed thoughtfully and confidentially by the in-house legal team and corporate management.

What risks exist, however, when executives' relationships with in-house counsel are strained? How are these risks affected if in-house counsel is terminated? Can in-house counsel initiate litigation against a current or former employer? Would pursuit of such claims violate the in-house lawyer's fiduciary obligations to the employer or the sanctity of the attorney-client privilege?

Basic Principles

Many courts have confronted the difficult questions associated with claims by in-house attorneys. Case law continues to evolve as courts define the appropriate parameters for these lawsuits. This article will review some of the key decisions and offer some practical guidance regarding how employers can minimize the

risks associated with these claims. Before examining these issues, however, let's briefly review the basics.

First, clients have an almost unfettered right to fire their lawyers. As the Minnesota Supreme Court stated in 1920, "The right of a client to discharge his attorney at his election, with or without cause, is universally recognized by the authorities." *Lawler v. Dunn*, 176 N.W.2d 989, 990 (citations omitted). See *Fracasse v. Brent*, 6 Cal.3d 784, 790 (Cal. 1972) ("a client should have both the right and the power at any time to discharge his attorney with or without cause"). This principle applies to in-house counsel, as well as outside counsel.

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Second, one factor limiting the preceding principle derives from the role of in-house counsel as employees. A company, for example, may not fire in-house counsel for reasons prohibited by Title VII, the ADEA, or the ADA. A company may not fire an in-house lawyer in violation of specific contract termination provisions. A company may not fire an in-house attorney for exercising statutorily protected rights under the FMLA, or in retaliation for filing a workers' compensation claim. In-house counsel discharged for these or similar reasons would have no legal impediment to litigation.

Third, assuming a termination decision is legally compliant (e.g., not

based on the lawyer's race, sex, gender, etc.), an employer may terminate in-house counsel who is not fulfilling its legitimate performance expectations. The mere fact that an employee is a lawyer does not provide insulation from discharge. Given the high degree of confidence that corporations must have in counsel, a company could advance compelling arguments in support of discharge, even if grounded on entirely subjective criteria.

In certain circumstances, however, an in-house lawyer's decision to sue his or her employer directly implicates issues relating to the information shared with in-house counsel, fiduciary duties owed to the corporation, and the scope of the attorney-client privilege. These cases arise in two primary contexts:

- a claim for wrongful discharge in violation of public policy; and
- a whistleblower claim, or a claim framed as "retaliation" for appropriate conduct by the lawyer (e.g., providing unwanted advice on an anti-trust issue).

These claims focus courts on the relationship between employer and in-house counsel and the rights and obligations they owe each other.

'Balla' Case

One of the earlier cases to address this issue was *Balla v. Gambro, Inc.*, 584 N.E.2d 184 (Ill. 1991). In *Balla*, an in-house attorney was fired by his employer after objecting to the company's acceptance of medical devices (dialyzers) that failed to meet FDA safety standards and allegedly put patients at risk of injury and death. The company's president initially stated that he would follow Balla's advice and reject the shipment, but he later reversed course and accepted the machines. Soon thereafter, the company fired Balla. Immediately after being discharged, Balla reported the situation to the FDA, which seized the shipment and determined

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the machines were “adulterated” under the statute. Balla then sued his employer for retaliatory discharge, contending that he had been fired for objecting to the company’s acquisition and planned resale of the dangerous medical devices, a discharge in contravention of a “clearly mandated public policy.”

The Illinois Supreme Court rejected Balla’s claims, finding that extending the retaliatory discharge tort to in-house counsel would have an undesirable effect on the attorney-client relationship between companies and their in-house lawyers. The court emphasized that the attorney-client relationship is “based on trust” and that a company “must have confidence in [its lawyers] . . . to ensure that relationship will function properly.” *Id.* at 109. The court speculated that if in-house counsel were permitted to sue their employers, “employers might be less willing to be forthright and candid with their in-house counsel.” *Id.* Given its concern that allowing this type of litigation would have a “chilling effect” on attorney-client communications, the court declined to recognize this cause of action for in-house counsel. With regard to the possibility that the public interest might be compromised as a result of its decision, the court noted that the Rules of Professional Responsibility required Balla to report on the dangerous machines regardless of the ramifications such reporting might have on his employment. If he lost his job as a result, too bad.

‘Nordling’ Case

Just one week after the *Balla* decision, the Minnesota Supreme Court decided *Nordling v. Northern States Power Company*, 478 N.W.2d 498 (1991). Nordling, a member of NSP’s legal department, was discharged shortly after objecting to the company’s tentative “plan” to conduct an investigation into the personal lifestyles of the employees at a new power plant. In addition to registering his objections within NSP’s legal department, Nordling shared his reservations with members of NSP’s line management, who promptly killed the proposed plan. Soon after, NSP fired Nordling.

Nordling brought a number of claims, including breach of contract and violation of Minnesota’s whistleblower statute. His claims were dismissed on summary judgment by the trial court, a decision affirmed by the

intermediate appellate court. The Minnesota Supreme Court examined whether Nordling’s status as in-house counsel altered the ordinary attorney-client relationship in a way that modified the client’s right to discharge its counsel at any time. Like the Illinois Supreme Court, the *Nordling* court focused on the issue of trust. “At the heart of the attorney-client relationship is the element of trust. If the relationship is to work, the client must confide in the attorney, trusting that the attorney will keep confidences and will ably perform. If the client loses this confidence, whether justifiably or not, the client must be able, without penalty, to end the relationship.” *Id.* at 501.

The Minnesota Supreme Court, however, was unwilling to adopt the blanket prohibition on lawsuits by in-house counsel articulated by the Illinois court.

The Minnesota Supreme Court, however, was unwilling to adopt the blanket prohibition on lawsuits by in-house counsel articulated by the Illinois court, noting that Nordling was an employee entitled to the “job security aspects of the employer-employee relationship if this can be done without violence to the integrity of the attorney-client relationship.” *Id.* at 502. The *Nordling* court concluded, that in-house counsel should not be precluded from bringing a breach of contract action, provided that “the essentials of the attorney-client relationship are not compromised.” *Id.* With regard to Nordling’s retaliatory discharge claim, however, the court found that it was “more likely to implicate the attorney-client relationship, raising issues not only of divulging client confidences, but confidences that relate to client wrongdoing.” *Id.* at 504. Because the court did not believe that Nordling had engaged in conduct implicating Minnesota’s whistleblower statute, the court did not find it necessary to resolve the apparent conflict between protecting the rights of in-house counsel and protecting the corporation.

‘General Dynamics’ Case

Several years later, in *General Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. 1994), the California Supreme Court weighed in on these issues.

In *General Dynamics*, the discharged in-house lawyer contended that he had been fired for cumulative reasons, including his role in exposing drug use by General Dynamics’ employees, his objections to impermissible bugging of an executive’s office, and his efforts to expose illegal pay practices. Perhaps unsurprisingly (it is California, after all), the court reached a different conclusion regarding the rights of in-house counsel to sue their employers. As the California high court observed, “there is no reason inherent in the nature of an attorney’s role as in-house counsel to a corporation that in itself precludes the maintenance of a retaliatory discharge claim, provided it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship.” *Id.* at 490.

Moreover, the California court repudiated the “tough luck” message of *Balla* and like courts, noting that in-house counsel should not be forced to choose between complying with an illegal corporate demand or sacrificing his or her career—“Why, then, did the courts in these three cases [*Balla* and two other cases] content themselves with the bland announcement that the only ‘choice’ of an attorney confronted with an employer’s demand that he violate his professional oath by committing, say, a criminal act, is to voluntarily withdraw from employment, a course fraught with the possibility of economic catastrophe and professional banishment?” *Id.* at 502.

Even the California court concluded, however, that where the in-house lawyer’s retaliatory discharge claim is “incapable of complete resolution without breaching the attorney-client privilege, the suit may not proceed.” *Id.* Giving with one hand and taking with the other, however, the California court went on to describe the many options trial courts have to ensure that confidentiality is preserved.

Editor’s note: Part II of this article will appear in next week’s issue.



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