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Case Note: The "In-house" Whistleblower: Walking the Line Between "Good Cop, Bad Cop"

Peter D. Banick

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CASE NOTE: THE “IN-HOUSE” WHISTLEBLOWER: WALKING THE LINE BETWEEN “GOOD COP, BAD COP”

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To their supporters, whistleblowers are nothing short of heroes who risk their lives or careers for the public good. On the other hand, critics view whistleblowers as ‘snitches,’ ‘stool pigeons,’ or ‘industrial spies.’ . . .

I. INTRODUCTION

“Good cop, bad cop” is an interrogation or negotiation strategy whereby one person is antagonistic and overtly unsympathetic and his or her colleague is excessively friendly and supportive. While the “good cop, bad cop” routine is usually performed by two or more parties, in-house counsel often have to carry out both functions, “good cop” and “bad cop,” in their relationship with their companies. The in-house counsel “good cop” seeks to please the organizational actors, coordinates with its business purpose, and works to meet operational needs from the legal perspective. In-house counsel act as the “good cop” in their...
roles as: gatekeeper;\textsuperscript{4} zealous advocate;\textsuperscript{5} business executive and strategist;\textsuperscript{6} and confidential counselor.\textsuperscript{7} Conversely, the in-house counsel “bad cop” seeks to limit organizational and employee misconduct, maintain legal compliance, and, arguably, uphold ethical standards. In-house counsel act as the “bad cop” in their roles as: nonparticipant in illegal activity;\textsuperscript{8} compliance facilitator;\textsuperscript{9} and potential whistleblower.\textsuperscript{10}

\textsuperscript{4} Lawrence A. Cunningham, Beyond Liability: Rewarding Effective Gatekeepers, 92 MINN. L. REV. 323, 328 (2007) (“Gatekeepers include auditors and attorneys, who work directly with and essentially inside the enterprise.”); Ronald J. Gilson, The Devolution of the Legal Profession: A Demand Side Perspective, 49 MD. L. REV. 869, 883 (1990) (“[In a] well-functioning gatekeeper regime . . . . [w]rongdoing is prevented, rather than punished after the fact . . . .”).

\textsuperscript{5} See MINN. RULES OF PROF’L CONDUCT pmbl. (2008) (describing the lawyer’s role as “zealous advocate”); MODEL RULES OF PROF’L CONDUCT pmbl. (2007) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”). The obligation of zealous representation applies not only in the litigation context, but also when an attorney is advising or counseling a client in any legal matter. Monroe H. Freedman & Abbe Smith, UNDERSTANDING LAWYERS’ ETHICS 69 (4th ed. 2010) (“I[t] is not just the client currently in litigation who may both require and be entitled to ‘warm zeal in the maintenance and defense of his rights.’”).

\textsuperscript{6} See Nandu Machiraju, When Hot Docs Set Your Company on Fire: Expanding the Role of the General Counsel to Manage Antitrust Risk, 22 GEO. J. LEGAL ETHICS 997, 1004–07 (2009) (asserting that a general counsel’s role should not be limited to legal advice; arguing that a general counsel should have some duties similar to “other functional chief executives,” including increased involvement in strategic decision-making).


\textsuperscript{8} MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2007) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . .”); accord MINN. RULES OF PROF’L CONDUCT R. 1.2(d) (2008).

\textsuperscript{9} Sarah Helene Duggin, The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility, 51 ST. LOUIS U. L.J. 989, 1012 (2007) (“T[he general counsel and other in-house lawyers play a major role in ensuring legal compliance throughout the entity.”).

\textsuperscript{10} See Deborah L. Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 TEX. L. REV. 689, 711 (1981) (discussing the “lawyer’s role as whistleblower”).
It is this dual nature that makes the job of the in-house counsel so complex. It is also this dual nature that makes attorney-whistleblower lawsuits, and the underlying public policy interests, difficult to resolve. Whistleblower claims by in-house counsel implicate legal doctrines of employment law and ethical obligations of client confidentiality, as well as practical and moral constraints that attorneys encounter in their decision-making process.

This article begins by describing the policy rationales and sources of whistleblower law. It continues with an explanation of the unique issues faced by in-house counsel and discusses Kidwell v. Sybaritic, Inc., which involved an in-house attorney’s claim for whistleblower protection. Next, it analyzes and debates the two main issues raised by Kidwell: the job duty exception from whistleblower protection and the client confidentiality rule for attorney-whistleblowers. This article concludes that the job duty exception is an inappropriate mechanism for determining whistleblower cases and that a breach of confidentiality should not necessarily preclude attorneys from recovering on otherwise meritorious whistleblower claims. Moreover, this article recognizes the validity of whistleblower claims by in-house counsel and recommends a balancing test for determining good faith—an issue which, due to its role in the analysis, can alter the way whistleblower cases are decided.

II. THE LAW AND POLICY OF WHISTLEBLOWER STATUTES

A. Defining “Whistleblowers”

In order to appropriately discuss “whistleblowers” and the acts for which they are named (i.e., “whistleblowing”), it is necessary to define the term. An expansive understanding may designate as a whistleblower any employee who “opposes” the conduct, actions, or decisions of his or her employer. Such a broad explanation is...
inadequate for the purposes of this article because it fails to provide any useful guidance. A narrow characterization may result in something akin to one commentator’s detailed description: “someone who, believing that the public interest overrides the interest of the organization he [or she] serves, publicly ‘blows the whistle’ if the organization is involved in corrupt, illegal, fraudulent, or harmful activity.”\textsuperscript{18} Such a specific depiction of whistleblowers is too limited for the purposes of this article.

There exists no single, widely recognized—much less universally accepted—definition of whistleblowing.\textsuperscript{19} However, a clear and accurate definition would address four main elements: 1) to whom or to what entity a disclosure or whistleblowing report may be made;\textsuperscript{20} 2) the nature of the “wrongs” that can be reported
and qualify as whistleblowing: 21) the degree to which the whistleblower needs knowledge or evidence of the “wrongs,” 22) and 4) the whistleblower’s intent or purpose in making a report. 23 For the purposes of this article, the following definition will be utilized to describe whistleblowers: employees who, in good faith and with a reasonable belief that their assertions are accurate, report, disclose, or otherwise make known to parties internal or external to the organization any violation of law by their employers (or entities or persons under the employers’ management and control) for the purpose of exposing such wrongdoing. 24

21. The nature, or type, of “wrong” can vary greatly from vague and subjective standards such as conduct “injurious to the public” or “immoral[] or illegitimate practices” to clearer, more concrete criteria such as violations of law. See, e.g., Armour, supra note 17, at 109 (“violation of law”); Gray, supra note 20, at 227 (“injurious to the public”); Terry Morehead Dworkin, SOX and Whistleblowing, 105 Mich. L. Rev. 1757, 1760 (2007) (“illegal, immoral, or illegitimate practices”).

22. The determination or extent of the purported whistleblower’s requisite knowledge may vary from a certain level of subjective belief to actual evidence sufficient to convince a reasonable person. See, e.g., Cavico, supra note 20, at 566 (good faith, potentially including “absence of malice” and “honesty of intention”); Heyes & Kapur, supra note 20, at 159 (“evidence that would convince a reasonable person”); Rubinstein, supra note 19, at 643 (“reasonable belief”).

23. Intent or purpose may be characterized, if at all, in an infinite number of ways. Some formulations used to describe a whistleblower’s intent or purpose include the following: “motivated by notions of public interest”; “to prevent harm to others”; or “intention of making information public.” See, e.g., Roberta Ann Johnson, Whistleblowing: When It Works—and Why 3 (2003) (“intention of making information public”); Heyes & Kapur, supra note 20, at 159 (“to prevent harm to others”); Kim, supra note 20, at 241 n.1 (“motivated by notions of public interest”).

24. There are several features of this definition that are particularly noteworthy. First, it requires that alleged whistleblowers act in good faith from a subjective point of view and that they have an objectively reasonable belief that the underlying allegation is true. Next, an employee may “blow the whistle” to parties inside his or her own organization or any public entity (e.g., government actors or the media). Also, the wrongdoing being disclosed or made known must be a violation of law—a standard which is, for the most part, objectively identifiable and not subject to the whims or morality of individual employees. Finally, the “purpose” of exposing wrongdoing simply means that the ultimate goal or outcome is to make the wrongdoing known to some other party—the underlying personal reason or subjective intent for “blowing the whistle” is irrelevant. This definition is widely applicable and generally describes any bona fide whistleblower (attorney or non-attorney). However, there may be additional requirements or constraints on an in-house counsel in order to receive whistleblower protection, which effectively make the definition of an in-house counsel-whistleblower slightly narrower than the general definition employed here. See infra Part VI.D.2.
This characterization is sufficiently descriptive to exclude purported “whistleblowers” that are actually just dissenters not taking any real action and still adequately comprehensive to include all of the main groups, or “types,” of whistleblowers.\(^\text{25}\)

B. Why Protect Whistleblowers?

Commentators have hypothesized and asserted numerous policy reasons for the establishment and perpetuation of whistleblower protections. In order to fully comprehend the import of whistleblower statutes, it is essential to examine their underlying rationales. The diverse explanations can be categorized into three fundamental justifications. First, and quite intuitively, whistleblower protection promotes legal compliance by employers.\(^\text{26}\) This justification includes the altruistic perception that employers simply ought to comply with laws to which they are subjected,\(^\text{27}\) as well as the notion that whistleblowing activity encourages compliance, thereby “benefit[ing] the health, safety and welfare of the public.”\(^\text{28}\) In-house counsel frequently engage in

\(^{25}\) Jonathan Armour divided the “types” of whistleblowers into three categories: 1) passive; 2) active; and 3) embryonic. Armour, supra note 17, at 109 (discussing the “three main categories within which individual whistleblowers fall”). “Passive” whistleblowers refuse to perform or conspire in illegal activities, but fail to report such activities to any authorities (this still constitutes making the “wrong” known to an internal party). Id. “Active” whistleblowers take some “affirmative action” to challenge the impending illegal activity—such “action” may be taken within or outside the employee’s organization. Id. Finally, “embryonic” whistleblowers are employees that were terminated prior to “blowing the whistle,” but were intending to do so. Id.

\(^{26}\) Susan J. Spicer, Turning Environmental Litigation on Its E.A.R.: The Effects of Recent State Initiatives Encouraging Environmental Audits, 8 VILL. ENVTL. L.J. 1, 65 (1997) (introducing whistleblower laws and noting that one of the fundamental goals of such laws are to “promote compliance with the law by the employer”).


activities or perform duties that help ensure a company’s legal compliance.\textsuperscript{29} Therefore, whistleblower protections help promote or assist in-house attorneys in performing their jobs by providing potential safeguards for those who discover and disclose harmful information regarding noncompliance.

Whistleblowers are able to impact large and small employers alike for numerous different reasons. One explanation is that an employee stands in a “unique position” to discover and report misconduct and wrongdoing by the employer.\textsuperscript{30} In fact, in-house counsel are often in a particularly unique position—e.g., gatekeeper, business executive, compliance facilitator\textsuperscript{31}—that increases the likelihood of discovery and the need to report wrongdoing. Another possible reason for the impact of employee whistleblowing is that employees, and especially attorneys, may be able to discourage and dissuade their employers, and fellow employees, from engaging in illegal or unethical conduct in the first place—that is, before it would become necessary to “blow the whistle.”\textsuperscript{32}

The second category of justifications is premised on whistleblower protection that helps avoid alternative outcomes. If there were no whistleblowers,\textsuperscript{33} the government (and indirectly, the

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taxpayers) would be forced to expend greater resources on detecting and investigating illegal activity and corruption.\textsuperscript{34} Even if potential whistleblowers overcome some of their obstacles, they would face significant career and financial risk without whistleblower protection.\textsuperscript{35} Therefore, from a public policy standpoint, whistleblower protections help prevent at least two unfavorable consequences: 1) increased expenditures for discovering misconduct; and 2) fewer whistleblowers (or individuals with a similar mindset) to begin with.

The final rationale and many of its derivative arguments are founded on an inherent sense of unfairness and injustice that would result in the absence of whistleblower protection. Essentially, this type of reasoning hinges on the assertion that we ought not punish individuals for trying to do the right thing.\textsuperscript{36} Furthermore, it is appropriate to protect principled employees, including in-house counsel, from adverse employment actions, “coerced participation” in illegal, criminal, or unethical conduct, and “the danger caused by the underlying [illegal acts].”\textsuperscript{37} This sense of fairness, which underlies the desire to protect individuals that “do the right thing,” comports with the moral and legal complexity inherent in the job of the in-house counsel, especially with respect to the “good cop, bad cop” dichotomy.\textsuperscript{38}

C. Legal Framework for Whistleblower Protection

Numerous federal statutes provide varying forms of whistleblower protection. The Whistleblower Protection Act of 1989 (WPA)\textsuperscript{39} forbids the federal government and any of its authorized employees from:

\begin{itemize}
  \item viewpoint and social pressure).
  \item Sinzdak, supra note 27, at 1636 (“[I]nformation provided by whistleblowers can substantially reduce the cost to the public of detection and investigation of wrongdoing or corruption.”).
  \item Gray, supra note 28, at 672–73 (discussing the various rationales for whistleblower protection and the impact on employees without such protection).
  \item “[I]t is unjust to penalize individuals for reporting what they reasonably and in good faith believe to be conduct that is not only unethical and/or illegal but also sufficiently dangerous to others, physically or economically, that it must be stopped . . . .” Id. at 673.
  \item Spicer, supra note 26, at 65.
  \item See supra Part I; infra Part III.A.
\end{itemize}
tak[ing] or fail[ing] to take, or threaten[ing] to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.\(^{40}\)

In effect, the WPA proscribes adverse job actions based on any employee conduct that may be fairly characterized as whistleblowing (e.g., disclosures of illegality or danger to the public). The WPA only protects federal employees; therefore, it does not apply to employees of private organizations.\(^{41}\) However, many different federal statutes contain whistleblower provisions that apply to private employees in certain circumstances.\(^{42}\) Federal statutes protecting whistleblowers in private companies are typically limited in scope. Several of the more recent and notable congressional acts that afford whistleblowers at least some protection include the Sarbanes-Oxley Act of 2002 (SOX),\(^{43}\) the

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41. Id. § 2302.
42. Whistleblower provisions are often included as just one mechanism within greater enforcement schemes contemplated in many substantively disparate federal statutes. E.g., Toxic Substances Control Act, 15 U.S.C. § 2622(a) (2006) (protecting employees that commence or cause to be commenced, testify in, or otherwise assist or participate in an action under this Act, which pertains to reporting, testing, and other restrictions relating to chemical substances); Occupational Safety and Health Act, 29 U.S.C. § 660(c) (2006) (protecting employees that file any complaint, institute or cause to be instituted any proceeding, testify in any proceeding, or exercise a right relating to this Act, which pertains to the safety of workplace environments and known workplace hazards); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610(a) (2006) (protecting employees that provide information to the government, file, institute or cause to be filed or instituted any proceeding, or testify in any proceeding relating to this Act, which established the “Super Fund” to organize and administer hazardous waste cleanup efforts); see also The Whistleblower Protection Program, UNITED STATES DEPARTMENT OF LABOR, http://63.234.227.130/dep/oui/whistleblower/index.html (last visited Mar. 26, 2011) (explaining the Whistleblower Protection Program).
American Recovery and Reinvestment Act of 2009 (ARRA), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA). Some whistleblower provisions specifically apply to attorneys—and most often affect in-house counsel.

Almost all states have some sort of protection for private sector whistleblowers. Twenty-eight states have whistleblower statutes that, similar to the WPA, only protect “public sector,” or governmental, employees. Twenty states have whistleblower statutes that provide protection for both private and public sector employees. Forty of the states that have statutory whistleblower protection also recognize a common law claim for retaliatory discharge as an exception to the employment at-will doctrine.


48. Id.

49. Id.

50. Id. Common law rights and claims, such as retaliatory discharge, certainly supplement the statutory whistleblower protections and bolster whistleblowers’ litigation efforts against former employers. While the existence and enforcement of common law rights are very important for whistleblowers, they will not be discussed in great depth in this article. The focus of this article is on legislative recognition of whistleblower protections as codified in whistleblower statutes and
Despite widespread acknowledgment of the need to protect whistleblowers, the standards applied and the extent of their protection varies greatly. Moreover, the outcome of whistleblower cases, especially those involving attorneys, tend to be somewhat unpredictable.

Notwithstanding the diverse statutory and common law principles, all of the state approaches, and all plausible alternatives, can be classified into one of four conceptual frameworks for protecting whistleblowers and deterring employer misconduct that would necessitate whistleblowing activity. The first, and historically primary, approach has been based on “retaliation-based remedies.” Generally, this entails statutory provisions or common law rights that amount to a retaliatory discharge cause of action for the terminated employee (attorney or non-attorney). That is to say wrongful discharge claims “traditionally require the plaintiff to show that he [or she] was terminated or constructively discharged for his [or her] whistleblowing.”

Next are the “reward-based” or “incentive-based” models. Quite intuitively, the concept behind this method is to provide “financial rewards to individual whistleblowers for their disclosures,” thereby promoting the disclosure of employer misconduct. While it is relatively uncommon for statutes to expressly permit such economic incentives, a few federal statutes, most notably the False Claims Act, have been successful in encouraging and compensating whistleblowers for important disclosures. However, it is highly improbable that any common

the treatment of such statutes by the judiciary.

51. See generally id. (showing a table illustrating the great diversity of approaches to whistleblower protection adopted by various states).
52. Alex B. Long, Whistleblowing Attorneys and Ethical Infrastructures, 68 Md. L. Rev. 786, 797 (2009) (“[T]he results [of attorney-whistleblower cases] are even more unpredictable than in cases of non-lawyer whistleblowers.”).
53. Elizabeth C. Tippett, The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law, 11 EMP. RTS. & EMP. POL’Y J. 1, 4 (2007) (introducing and describing the three most common models of “protecting whistleblowers and promoting the public interest their disclosures serve” (citation omitted)).
54. Id. at 5–7.
55. Id. at 7.
56. Id. at 8. Some colloquially refer to these approaches as “bounty-hunter” models. Id. at 8–9.
57. Id. at 9.
law or statutory scheme would afford any financial reward for attorneys to “blow the whistle,” thereby providing an incentive to potentially violate professional and ethical rules (e.g., client confidentiality).

The third type of approach is an incentive-based model directed at employers. 60 Contrary to the aforementioned “reward-based” models that remunerate employees for whistleblowing, this approach rewards employers for proactively identifying and attempting to remedy wrongdoing within their own organizations. 61 The means by which organizations can be incentivized and the manner in which employers promote whistleblowing is more dynamic and less constrained than in the case of an individual whistleblower. The organizational actions most responsive to incentives are the creation or improvement of internal investigatory, compliance, and reporting mechanisms, as well as systems supporting potential and actual whistleblowers (e.g., protecting them from harassment). 62 The most prevalent “rewards” for employers may include reduced criminal penalties, availability of affirmative defenses, and reduced civil liability. 63 While in-house counsel would not be personally incentivized, attorneys would likely be involved in establishing and/or operating the internal feedback mechanisms resulting from this approach. 64

The final category consists of “punitive approaches.” 65 This subset includes an approach known as “mandatory whistleblowing,” which imposes liability or other penalties, in specified circumstances, on actors that had an opportunity to disclose illegal misconduct but failed to do so. 66 Statutes providing for such liability are “exceedingly rare,” and in many instances “uniformly opposed” as contrary to fundamental notions of liberty. 67 Moreover, compulsory disclosure would often contravene many

60. Id. at 10.
61. Id.
62. See id. at 10–11 (discussing “Employer Incentives for Investigating Wrongdoing”).
63. Id. at 10. All of the employer “rewards” are circumstantial, highly fact-sensitive, and only potentially beneficial to the employer in the proper instances—in other words, they are not guaranteed. Id. (noting the judicial uncertainty in these matters and the possible standards applied).
64. See supra notes 9, 29 and accompanying text.
65. Tippett, supra note 53, at 11.
66. Id. at 14.
67. Id. at 11–12.
professional or ethical duties of attorneys, namely client confidentiality.  

D. The Basics of a Whistleblower Claim

Before delving deeper into the legal issues implicated by in-house counsel as whistleblowers, it is useful to understand the general components of a claim for whistleblower protection by any employee (attorney or non-attorney). For illustrative purposes, consider Minnesota Statutes section 181.932 (hereinafter “Minnesota Whistleblower Statute” or “Whistleblower Statute”). The Minnesota Whistleblower Statute prohibits an employer (public or private) from discharging, disciplining, or “otherwise discriminat[ing]” against an employee because “the employee . . . in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official.” The statute, as supplemented and interpreted by the common law, has three main elements: 1) the employee made a report; 2) the employee suffered an adverse job action; and 3) there was a causal connection between the report being made and the adverse job action(s).

A “report” can generally be described as a communication in which an employee “relat[es] or present[s] concerns in an essentially official manner.” The report “must implicate a violation or suspected violation” of the law. This “violation of law” requirement precludes as a “report,” for whistleblower purposes, any communication which only implicates common law violations, internal employer policy infringements, or unethical or

68. See infra Part V.
70. Id. § 181.932, subdiv. 1(1).
72. Obst v. Microtron, Inc., 614 N.W.2d 196, 200 (Minn. 2000). The violation may be of federal law, state law, or rules promulgated pursuant to said laws. Id. at 204.
73. Nichols v. Metro. Ctr. for Indep. Living, Inc., 50 F.3d 514, 517 (8th Cir. 1995) (establishing that internal management problems or “breach” of internal policies are not violations of law).
74. Obst, 614 N.W.2d at 204 (explaining that breach of contract, a common law claim, does not implicate a violation of law).
reprehensible conduct (where there is no statute or rule to make such conduct illegal).\textsuperscript{75} Prior to the Minnesota Supreme Court’s decision in \textit{Kidwell}, a “report” could not be made by an employee in the course of his or her job duties—that is to say, there was a job duty exception.\textsuperscript{76} Finally, a purported whistleblower must act in good faith with the purpose of exposing an illegality.\textsuperscript{77} “Good faith” does not extend to protect employees who subjectively thought the conduct was unlawful or ought to be unlawful, but in fact violated no law (i.e., the facts as reported constituted lawful conduct).\textsuperscript{78} Instead, if an employee reports facts in good faith, the question becomes whether those facts, assuming their accuracy, constitute a violation of law.\textsuperscript{79}

All of the aforementioned elements of a whistleblower claim apply to the case of an in-house counsel whistleblower. However, an in-house counsel faces further legal, and ethical, issues not necessarily explicated by non-attorney whistleblower cases.

III. \textit{Kidwell} and the In-House Whistleblower Problem

A. The In-House Counsel’s Unique Dilemma

Most, if not all, whistleblowers were at one point forced to make a very difficult decision—one they likely agonized over—weighing the legal, professional, and ethical implications. In-house counsel, as attorney-employees, undoubtedly struggle with the same

75. Hedglin v. City of Willmar, 582 N.W.2d 897, 902 (Minn. 1998) (“While we find such conduct reprehensible . . . we can find no statute or rule that is violated by such conduct . . . .”).

76. Freeman v. Ace Tel. Ass’n, 404 F. Supp. 2d 1127, 1139 (D. Minn. 2005) (“A report that is presented as part of an employee’s job duties is not a report under the Act.”); Gee v. Minn. State Colls. & Univs., 700 N.W.2d 548, 556 (Minn. Ct. App. 2005) (noting that the purported whistleblowing conduct was done “to fulfill [job] responsibilities”). For a discussion of the job duty exception and its purported rejection by the \textit{Kidwell} plurality, see infra Parts III.C, IV.

77. See Obst, 614 N.W.2d at 202. For a more detailed explanation of the good faith requirement, see infra note 111 and accompanying text and Part VI.

78. Kratzer v. Welsh Cos., LLC, 771 N.W.2d 14, 22 (Minn. 2009).

79. \textit{Id.} In other words, good faith may potentially permit a whistleblower to inaccurately describe the facts or base his or her decision on facts that were not absolutely accurate (assuming those facts were obtained and reported in good faith). This good faith distinction invariably reflects a policy decision to protect whistleblowers who knew the law correctly and thought (in good faith) that he or she knew the correct facts, but not to protect purported whistleblowers who knew the correct facts and thought (even in good faith) that they constituted a violation of law.
tensions. However, by nature of the legal profession, in-house counsel face further complications and greater uncertainty than other whistleblowers.

“The lawyer for an organization . . . is both an agent and a fiduciary for the organization—and to it flow all the ethical and legal duties a lawyer owes to any client, including the duties of loyalty, confidentiality, and competence.”\(^80\) Despite the fact that an attorney’s legal duties generally mirror his or her ethical duties,\(^81\) an attorney’s decision whether to blow the whistle is riddled with complexity, to wit:

In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. While the lawyer’s primary obligation is to protect the organization, the lawyer must act with caution: [a]ny measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization.\(^82\)

Not only are numerous factors to be contemplated and arguably—if not inherently—conflicting interests weighed, but attorneys also ought to take into account “any other relevant considerations.” This unrestrictive language seems to implicate, at least potentially, one’s morals and individual principles, among other possible deliberations—that is to say, what one considers “relevant” is likely to be based upon one’s own ethical viewpoint.

While consideration of sets of factors as indicia of one outcome or another may align directly with the thought process of many attorneys, an attorney’s whistleblowing decision is not nearly as simple as tallying up all conceivable factors into neat columns

\(^{80}\) John M. Burman, Ethical Considerations when Representing Organizations, 3 WYO. L. REV. 581, 613 (2003) (providing an overview of a lawyer’s ethical duties when representing an organization).

\(^{81}\) See id. at 624–25 (“As a general matter, a lawyer owes every client an ethical duty of competence, which ‘requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.’ The legal duty is similar. A lawyer is held to the standard of ‘a reasonable, careful and prudent lawyer . . . .’” (citation omitted)).

\(^{82}\) Id. at 615 (emphasis added) (citing WYO. RULES OF PROF’L CONDUCT R. 1.13(b) (2002)).
and conducting an objective cost-benefit analysis. Instead, an in-house counsel has at least one major consideration that outside attorneys do not have in facing an ethical or legal dilemma caused by a client’s misconduct or illegal activity. This key deliberation has been called an in-house counsel’s “Hobson’s Choice”: the decision whether to “report on his client’s wrong-doing (thereby saving lives, but being fired) or keep quiet (thereby endangering lives, but retaining his job).” In-house counsel cannot simply withdraw from a case or refuse to represent a particular client and forego some attorney’s fees; rather, an in-house counsel may have to choose between his or her morals and his or her job, thereby potentially sacrificing her entire salary and livelihood.

83. “Outside attorney,” or “outside counsel,” for purposes of this article, refers to any attorney who represents his or her clients solely as an independent attorney and agent and is not an employee of any client he or she represents. For a definition of “in-house counsel,” see supra note 3.

84. A “Hobson’s choice” is defined as “an apparently free choice when there is no real alternative; the necessity of accepting one of two or more equally objectionable alternatives.” MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/hobsons+choice?show=0&t=1308532932 (last visited June 18, 2011) (defining Hobson’s Choice).

85. C. Evan Stewart, In-House Counsel as Whistleblower: A Rat with a Remedy?, in PRACTISING L. INST., ETHICS IN CONTEXT 2009 145, 148 (2009). Depending on the context of the situation and the nature and severity of the organization’s wrongdoing, a whistleblower may or may not be “saving lives.” However, it is relatively clear, and consistently asserted, that whistleblowers do, in fact, have an important role in protecting the public and “benefit[ting] the health, safety and welfare of the public.” See supra note 28 and accompanying text.

86. At-will employees deciding whether to blow the whistle deal with basically the same predicament faced by in-house counsel. Both are subject to termination by their employer and both rely on their employer as their sole (or main) source of income and benefits. See Michael P. Sheehan, Comment, Retaliatory Discharge of In-House Counsel: A Cause of Action—Ethical Obligations v. Fiduciary Duties, 45 DEPAUL L. REV. 859, 895–96 (1996) (“[In-house] counsel possess nearly all the same characteristics of the ordinary at-will employee.”). Therefore, non-attorney, at-will employees generally face the same practical and ethical dilemma as in-house counsel when confronted with a whistleblowing decision. See id. at 896. However, the main distinction between attorneys and non-attorneys in this context is that attorneys are subject to professional ethical rules which complicate the decision, make the consequences graver, and put in-house counsel in a unique position that produces a “more difficult battle.” Thomas A. Kuczajda, Note, Self Regulation, Socialization, and the Role of Model Rule 5.1, 12 GEO. J. LEGAL ETHICS 119, 137–38 (1998) (arguing for increased obligations for law firm partners in enforcing ethics).
Despite the evident complexity of a whistleblowing decision, opponents of whistleblower protection assert that in-house counsel do not even have a decision to make or a choice in the matter.\cite{87} They essentially claim that it is not even a “Hobson’s Choice” because there is no “apparently free choice.”\cite{88} Instead, attorneys simply have an obligation of utmost loyalty and faithfulness to their clients—without regard to any misconduct or illegality—unless absolutely required under professional ethical standards. They further maintain that “it would be inappropriate for the employer/client to bear the economic costs and burdens of their in-house counsel’s adhering to their ethical obligations.”\cite{89} Instead, as the argument goes, attorneys who have “willingly chosen to enter their profession[] should bear these costs and burdens.”\cite{90} Moreover, opponents rely on the history and nature of the legal profession to assert that whistleblowing is contrary to the fundamental tenets of the profession and that any whistleblowing activity represents a “further slide down the slippery slope on which [the legal] profession has been riding—away from the ideals of zealous client representation, based upon the bedrock principle of clients’ absolute confidence in their attorneys’ duty of confidentiality.”\cite{91}

However deeply rooted in history or fundamental to the legal profession, the duty of zealous advocacy is not absolute. There are express and implicit constraints to this duty. “A lawyer is not bound . . . to press for every advantage that might be realized for a client.”\cite{92} This indicates a necessity for discretion on behalf of an attorney and also implies that there are restrictions to the duty of zealous representation.\cite{93} The outer limits of permissible advocacy

\begin{enumerate}
\item \textit{E.g.}, Balla v. Gambro, 584 N.E.2d 104, 109 (Ill. 1991) (“In-house counsel do not have a choice of whether to follow their ethical obligations as attorneys licensed to practice law, or follow the illegal and unethical demands of their clients. In-house counsel must abide by the Rules of Professional Conduct.”).
\item \textit{See supra} note 84 and accompanying text.
\item \textit{Balla}, 584 N.E.2d at 110.
\item \textit{Stewart, supra} note 85, at 148.
\item \textit{Id.} at 153.
\item Unfortunately, “[t]he Model Rules do not integrate the limitation on zealous advocacy into any rule and thus fail to develop the standard of legal conduct for instances in which zealous advocacy may be inappropriate.” Henry Ordower, \textit{Toward a Multiple Party Representation Model: Moderating Power Disparity}, 64 \textit{Ohio St. L.J.} 1263, 1312 (2003) (arguing for a multiple client representation representation)\end{enumerate}
undoubtedly end where express provisions of professional rules, or other laws, govern. For example, the duty of zealous advocacy does not require, or even permit, an attorney to violate any other rules of professional conduct, commit fraud or misrepresentation, or engage in criminal acts that “reflect[] adversely on the lawyer’s . . . fitness as a lawyer . . . .” Therefore, in some circumstances, the public interest prevails over an attorney’s duty to his or her client. Similarly, in certain instances, whistleblowing by attorneys may produce a greater societal benefit where the public’s interest in obtaining information and preventing wrongdoing is stronger than the general need for ardent and diligent representation of clients.

The disparate interests at stake and varying rationales implicate personal ethics, legal rules, and professional standards—many of which consistently conflict with each other. The Minnesota Supreme Court recently grappled with these precise issues when it decided the case of Kidwell v. Sybaritic, Inc.


96. Rules of professional conduct that limit the scope of diligent representation are to some extent analogous to whistleblower statutes because both effectively limit or trump the duty of zealous advocacy. However, there is one main distinction: professional rules preclude an attorney from engaging in conduct deemed unprofessional or unethical, while whistleblower statutes permit employees (including in-house counsel) to take affirmative actions to expose illegality or wrongdoing. Refraining from certain behavior proscribed by professional rules may or may not impact a client’s decision to engage in any sort of misconduct. Therefore, whistleblower statutes go further by allowing attorneys to divulge information relating to wrongdoing, thereby increasing the likelihood that another party, internally or externally, will prevent or impede such wrongdoing. This is a good example of the complexity and ethical dilemma faced by in-house counsel serving as both “good cop” and “bad cop.” See supra Part I.

97. 784 N.W.2d 220 (Minn. 2010).
B. Kidwell Prior to the Supreme Court

*Kidwell* is the most recent case in which a state’s highest court interpreted a state whistleblower statute or any other state whistleblower protections. 98 Therefore, *Kidwell* will be used as a reference point for further analysis of matters relating to whistleblower statutes. In particular, the subsequent sections will delve into the two critical interpretation issues contemplated in *Kidwell*: 1) the job duty exception; and 2) client confidentiality. 99 In order to fully analyze these topics, alternative options, and recommended solutions or outcomes, it is first necessary to understand the *Kidwell* case.

1. Facts Giving Rise to Kidwell

Attorney Brian Kidwell served as in-house general counsel100 for Sybaritic, Inc. until his employment was terminated in May, 2005. 101 On April 24, 2005, Kidwell sent to Sybaritic’s management team an email titled “A Difficult Duty,” (hereinafter “Difficult Duty email”) in which Kidwell expressed his concern regarding the company’s “pervasive culture of dishonesty” and also identified several specific transgressions. 102 The email indicated that, if Sybaritic and its management team did not mitigate current and prevent future misconduct, it was Kidwell’s “intention to advise the

98. *Kidwell* was decided on June 24, 2010. Id. at 220. The California Supreme Court is the only state supreme court that has more recently reviewed a whistleblower case—deciding *Murray v. Alaska Airlines, Inc.* on August 23, 2010. 237 P.3d 565 (Cal. 2010). However, in *Murray*, the court interpreted a federal whistleblower statute, not a state statute or other state whistleblower protections. See id. at 569.

99. See infra Parts IV, V.

100. *Kidwell*, 784 N.W.2d at 223. As general counsel, Kidwell explained that he was “responsible for providing advice on any legal affairs of the company,” which included supervising litigation, contract assistance, and employment law issues. Id. at 221. His employment agreement with Sybaritic described Kidwell’s role quite generally: “To assist the President in assuming responsibility and decisions as to all corporate legal matters, and the general legal administration of activities at Sybaritic.” Id.

101. Id. at 223.

102. Id. at 221–22. In explicating the “pervasive culture of dishonesty,” Kidwell described several unethical and illegal acts or omissions by the company, including: 1) failure to investigate dishonest salespeople; 2) permitting an employee to engage in the unauthorized practice of medicine; 3) failure to pay certain taxes; and 4) obstruction of justice, obstruction of a court order, and potential Rule 11 sanctions for a failure to disclose “smoking gun” emails pursuant to discovery orders in pending litigation. Id. at 222.
appropriate authorities of these facts.\textsuperscript{103} Unbeknownst to the Sybaritic management team, Kidwell also sent the Difficult Duty email to his father, with whom Kidwell had discussed his “ethical dilemma.”\textsuperscript{104} On April 25, 2005, Kidwell met with members of the management team and they constructed a plan for resolving the issues raised in the Difficult Duty email.\textsuperscript{105} Three weeks later, Kidwell was terminated from his position as general counsel.\textsuperscript{106} Sybaritic maintained that Kidwell was not terminated because of the content of his Difficult Duty email or the manner in which he approached the situation. Rather, Sybaritic claimed that it “experienced a series of problems with Kidwell over the three-week period following receipt of the ‘Difficult Duty’ email” and it “could no longer trust [him],” especially after discovering the email Kidwell sent to his father.\textsuperscript{107}

2. The District Court Decision

Kidwell filed suit against Sybaritic claiming it violated the Minnesota Whistleblower Statute.\textsuperscript{108} Sybaritic filed a counterclaim alleging breach of fiduciary duty and conversion.\textsuperscript{109} After rejecting Sybaritic’s requested jury instructions, the district court instructed the jury that recovery under the Whistleblower Statute requires that: 1) an employee engaged in “protected activity;” 2) the employee suffered an adverse employment action; and 3) there was

\begin{itemize}
\item[103.] \textit{Id.} at 223.
\item[104.] \textit{Id.}
\item[105.] \textit{Id.}
\item[106.] \textit{Id.}
\item[107.] \textit{Id.} at 224. While sending the Difficult Duty email to his father was a purported factor in Kidwell’s termination, this precise event was not concentrated on by any of the Minnesota appellate courts. The fact that Kidwell sent the Difficult Duty email to his father is only directly relevant to the claim of breach of fiduciary duty. \textit{See infra} note 113. The communication to Kidwell’s father could never be construed as protected activity under the Minnesota Whistleblower Statute as his father is neither “an employer [nor] a[ ] governmental body or law enforcement official.” \textsc{Minn. Stat.} § 181.932 subdiv. 1(1) (2008). Furthermore, Chief Justice Magnuson, in his concurrence, discussed only the consequence of the breach of fiduciary duty, and not the breaching action itself. \textit{See Kidwell, 784 N.W.2d} at 232–34 (Magnuson, C.J., concurring). The courts properly focused on the Difficult Duty email Kidwell sent to Sybaritic’s management team and whether that discrete activity was protected under the Whistleblower Statute. \textit{See infra} notes 124–37, 141, and accompanying text.
\item[108.] \textit{Kidwell, 784 N.W.2d} at 221 (plurality opinion) (alleging violation of \textsc{Minn. Stat.} § 181.932 (2008)).
\item[109.] \textit{Id.}
\end{itemize}
a causal connection between the protected activity and adverse employment action. Protected activity is defined as a good faith report of a violation of law to the employer or a governmental body with the purpose of “blowing the whistle” (that is, with the purpose of exposing an illegality). The jury found that Kidwell engaged in protected activity, suffered an adverse employment action, and his reporting of illegal conduct was a “substantial motivating factor” in his termination. Therefore, the jury found in favor of Kidwell and awarded him $197,000, plus fees and costs.

3. The Court of Appeals Decision

The Minnesota Court of Appeals decided that attorneys are not per se barred from bringing a claim under Minnesota’s Whistleblower Statute, thus Kidwell was properly allowed to proceed with his case. However, the court held that “an employee does not engage in protected conduct under the whistleblower act if the employee makes a report in fulfillment of the duties of his or her job.” The court concluded that Kidwell’s

110. Id. at 224–25. The district court’s jury instructions provided, in relevant part:

To recover under the Act, Brian Kidwell must prove . . . he engaged in protected activity, he suffered an adverse employment action . . . and there was a casual [sic] connection between the protected activity and the adverse employment action.

“Protected activity” is an employee’s conduct in making a good faith report of an actual or suspected violation of a state or federal law to an employer or to any governmental body or law enforcement official.

An employee engages in a protected activity under the Act if the purpose . . . was to “blow the whistle” for the purpose of exposing an illegality . . . .

To determine whether a report was made in good faith, you must look not only at the content of the report, but also at Mr. Kidwell’s job and purpose in making the report at the time the report was made . . . .

111. Id. at 224–25, 227.
112. Id. at 225.
113. Id. With respect to Sybaritic’s counterclaims, the district court determined as a matter of law that Kidwell breached his fiduciary duty to Sybaritic (because of the email Kidwell sent to his father, an individual outside of the company), but left the determination of damages to the jury. Id. The jury found that Sybaritic suffered no damages as a result of the breach. Id. Also, the jury awarded $2,000 to Sybaritic after finding against Kidwell on the conversion claim. Id.

115. Id. at 866 (citing Grundtner v. Univ. of Minn., 730 N.W.2d 323 (Minn. Ct. App. 2007); Michaelson v. Minn. Mining & Mfg. Co., 474 N.W.2d 174 (Minn. Ct. App. 2007)).
report of noncompliance was intended “to fulfill the duties of his position” and not to “blow the whistle.” Therefore, it was not protected activity under the Whistleblower Statute and Kidwell could not recover. The court of appeals reversed the district court’s decision and found that Sybaritic was entitled to judgment as a matter of law.

C. Supreme Court: Kidwell Loses (for Two Reasons)

1. The Plurality

In an opinion written by Justice Lori Gildea, the three-justice plurality focused its analysis on statutory interpretation. The plurality quickly dismissed the appellate judges’ reasoning by holding that “[t]he whistleblower statute does not contain any limiting language that supports the blanket job duties exception the court of appeals crafted.” However, Justice Gildea noted the relevance of a purported whistleblower’s job duties in ascertaining his or her good faith, which is necessary to establish protected activity.

Justice Gildea analogized the Minnesota Whistleblower Statute to the federal WPA. Utilizing case law interpreting the

App. 1991)).

116. Id. This finding is the basis for the so-called "job duty" exception.

117. Id. at 869–70.

118. At the time of the Kidwell decision, Gildea was serving as an Associate Justice of the Minnesota Supreme Court. Gildea now serves as the Chief Justice of the Minnesota Supreme Court. See Judge Profile: Chief Justice Lorie Skjerven Gildea, MINNESOTA JUDICIAL BRANCH, http://www.mncourts.gov/?page=31&ID=30349 (last visited Feb. 18, 2011).

119. See Kidwell v. Sybaritic, Inc., 784 N.W.2d 220, 226–31 (Minn. 2010) (framing the issue as the "scope of statutorily-protected conduct" and noting that the "analysis [begins] with the language of the statute").

120. Id. at 226. The supreme court thereby expressly denied the existence of a job duty exception to the Minnesota Whistleblower Statute. Id.

121. Id. at 227; see supra note 110 and accompanying text.

122. Kidwell, 784 N.W.2d at 227–29. Since the plurality analogized the Minnesota Whistleblower Statute to the federal Whistleblower Protection Act (WPA) (which only applies to federal employees), it is noteworthy (even though no court has expressly made this analogy) that federal employees can be compared to in-house counsel because both actors play dual roles. A federal employee is both an employee and, presumably, a United States citizen, while an in-house counsel is both an employee and an attorney. In both positions, an individual has a duty to his or her employer and a “duty,” at least arguably, to the public. This dual nature causes personal moral conflict, as well as legal, professional, and ethical implications. In Garcetti v. Ceballos, the United States Supreme Court held that "when public employees make statements pursuant to
WPA, namely *Huffman v. Office of Personnel Management,* the plurality opinion stated that “an employee who has, as part of his normal duties, been assigned the task of investigating and reporting wrongdoing . . . and, in fact, reports that wrongdoing through normal channels is not engaging in protected conduct . . . .” Based on this rule, the plurality decided that Kidwell did not engage in protected activity and, therefore, was not afforded protection under the Minnesota Whistleblower Statute. The plurality reached this result by concluding that Kidwell failed the good faith requirement of the Whistleblower Statute, which was described as making a report “for the purpose of blowing the whistle, i.e. to expose an illegality.” According to Justice Gildea, Kidwell’s report was within the scope of his normal job duties; his
intent was solely to advise his client;\textsuperscript{128} and he communicated his concerns through “normal channels.”\textsuperscript{129}

1. The Concurrence

The outcome of Kidwell hinged on the concurring opinion of Chief Justice Eric Magnuson, the sole concurring justice, who decided in favor of Sybaritic.\textsuperscript{130} Notwithstanding his agreement in the result, Chief Justice Magnuson reached his conclusion on entirely different grounds than the plurality. In fact, he did not once mention the scope or tasks of Kidwell’s employment.\textsuperscript{131} Instead, his proposed holding was as follows: “[W]hen a lawyer breaches his or her fiduciary duty to the client, the client has an absolute right to terminate the attorney-client relationship. And that right cannot be burdened by any claim from the lawyer for compensation or other damages.”\textsuperscript{132} In other words, if an attorney breaches a fiduciary duty (e.g., client confidentiality), he or she should be per se barred from protection under the Minnesota Whistleblower Statute.

Chief Justice Magnuson noted that the Whistleblower Statute does not expressly provide this exception, but he argued that “the statute does not trump [the court’s] power and responsibility to regulate the bar, particularly in matters of ethics.”\textsuperscript{133} Accordingly, the concurrence asserted that upon his breach of fiduciary duty (determined as a matter of law by the district court),\textsuperscript{134} Kidwell forfeited his right to a claim under the Minnesota Whistleblower Statute, and Chief Justice Magnuson cast his vote in favor of

\begin{itemize}
\item \textsuperscript{128} Id. at 230 (relying on the Difficult Duty email, which stated that Kidwell only intended to report Sybaritic to the appropriate authorities if the company failed to remedy its illegalities, and Kidwell’s testimony, stating that it was his goal to “pull [Sybaritic] back into compliance”).
\item \textsuperscript{129} See id. (”[T]he record establishes that all of the identified recipients of the ‘Difficult Duty’ email were officials on the management team at Sybaritic with whom Kidwell had previously discussed legal matters.”).
\item \textsuperscript{130} At the time of the Kidwell decision, Chief Justice Magnuson was serving as the Chief Justice of the Minnesota Supreme Court. Chief Justice Magnuson has since resigned and returned to private practice. Biographies of the Justices of the Minnesota Supreme Court, Minnesota State Law Library, http://www.lawlibrary.state.mn.us/judgebio.html#magnuson (last visited Feb. 4, 2011).
\item \textsuperscript{131} See Kidwell, 784 N.W.2d at 231–34 (Magnuson, C.J., concurring).
\item \textsuperscript{132} Id. at 233.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} See supra note 113.
\end{itemize}
2. The Dissent

Similar to the plurality, the minority (also comprised of three justices) focused its analysis on the statutory interpretation of the Minnesota Whistleblower Statute.\(^{136}\) Despite their comparable analytical approach, the dissenting opinion not only reached a contrary conclusion, but Justice Paul Anderson scathingly rebuked the plurality’s reasoning and the outcome of its decision.\(^{137}\) The dissent rejected the plurality’s reliance on \textit{Huffman} (interpreting a statute with different language),\(^{138}\) its lack of deference to the jury in determining state of mind,\(^{139}\) and its failure to “view[] the evidence in the light most favorable to the jury’s verdict.”\(^{140}\) Under the dissent’s construction of the Minnesota Whistleblower Statute, a purported whistleblower must show 1) made in good faith; 2) made with the purpose of exposing an
illegality, or “blowing the whistle”; and 3) “not merely routine.”

IV. KIDWELL ISSUE 1: JOB DUTY EXCEPTION

A. The Issue

The plurality in Kidwell purported to refute and proscribe any per se job duty exception under the Minnesota Whistleblower Statute. However, its opinion seems to create a test that, although not categorical, will very rarely, if ever, protect employees charged with monitoring or reporting compliance or other legal issues. Several commentators have opined that the Minnesota Supreme Court found no protection for Kidwell specifically because his actions directly carried out his job duties, despite the plurality’s alleged denial of any such exception. The plurality stated that an alleged whistleblowing report that is made “outside normal channels” or “outside the scope of the employee’s normal or assigned job duties” could still be protected. The dissent very clearly opposed not only the plurality’s reasoning, but also the consequence of its decision:

141. Id. at 239 (“[E]ven when an employee has an obligation to make a report because of his job duties, that report should be protected if . . . the employee is able to prove the report was not merely routine but, instead, was made in good faith with the contemporaneous purpose of ‘blowing the whistle.’”). The dissenting opinion asserted a different standard for proving good faith because “an employee’s job duties or the particular channel through which the employee makes his report” should not be dispositive on the issue of the employee’s subjective intent (i.e., good faith). Id. at 237.

142. See supra note 120 and accompanying text.


The plurality appears to indicate that only in a very rare case would an employee who is responsible for reporting illegal conduct and who reports such conduct through normal channels, be able to prove that the report was made for the purpose of exposing an illegality. I disagree.

. . .

. . .

Even when an employee has an obligation to make a report because of his job duties, that report should be protected if, but only if, the employee is able to prove the report was not merely routine but, instead, was made in good faith with the contemporaneous purpose of “blowing the whistle.”

The polarity of viewpoints with respect to the proper analysis of the Whistleblower Statute, as well as the practical outcome, is indicative of divergent policy judgments without a clearly superior result. In fact, one commentator claims that the alleged job duty exception is “[p]erhaps the most provocative and unsettled doctrine involving whistleblowers.”

B. The Existence and Rationale of the Exception

Generally speaking, it is accepted by federal courts that a job duty exception (or, if not so labeled, an exception to the same effect) applies to the federal WPA. However, some courts have
refused to recognize the exception, even with regards to the WPA, and dismiss it claiming there is “no significant policy served by extending whistle-blower protection only to those who carry a complaint beyond the institutional wall, denying it to the employee who seeks to improve operations from within the organization.”

This dissent from some federal courts is evidence of tension in an ostensibly well-settled doctrine.

At the state level, whistleblower statutes and their respective interpretations vary greatly, despite the fact that a vast majority of states have enacted whistleblower statutes. Sixteen states have requirements regarding a whistleblower’s state of mind: ten states “[r]equire [a] good faith belief . . . that workplace conduct violates a statute, regulation, or rule” and six states “[r]equire [a] reasonable belief . . . that workplace conduct violates a statute, regulation, or rule.” These requirements relating to subjective intent are a major reason for the job duty exception (where it exists). The exception has been characterized as a presumption that an employee, based on his or her job duties, does not possess the requisite state of mind (i.e., good faith) to qualify as a whistleblower. Therefore, the job duty exception is a procedural mechanism for discarding whistleblower claims that are deemed to be meritless because of the inherent inability to prove good faith. This alleged inability is based only on the fact that the purported whistleblower reports wrongdoing and misconduct as a normal part of his or her work.

receive protection from retaliation.” (citations omitted)).

148. Marques v. Fitzgerald, 99 F.3d 1, 6 (1st Cir. 1996); see also Lobel, supra note 147, at 449 (explaining that, despite its common acceptance, “some courts and regulators have rejected the ‘job duty’ defense” (emphasis added)).

149. Rubinstein, supra note 19, at 643 (“State whistleblower laws differ on many points including the appropriate recipient of the whistleblower report, the subject of protected whistleblowing, the motive of the whistleblower, the required quality of evidence of wrongdoing, and the remedies available for the whistleblower.”).

150. See supra notes 47–52 and accompanying text.

151. Aron, supra note 47, at 297 tbl. 1.

152. Alex B. Long, Retaliatory Discharge and the Ethical Rules Governing Attorneys, 79 U. COLO. L. REV. 1043, 1045 n.10 (2008) (“Where an employee’s job duties require an employee to expose illegality, there is a presumption under Minnesota law that the employee’s purpose in making the report was to further the employer’s interest, not to expose illegality.” (emphasis added)).
“The rationale for [the job duty] rule is that when employees perform their job duties, they act to promote their employers’ best interests, rather than to expose illegality.” 153 In essence, employing the job duty rule indicates that the exception is the best manner to determine (or disprove) an employee’s good faith in engaging in whistleblowing conduct. 154 This value judgment regarding the method for establishing (or disproving) good faith reflects a court’s policy preference regarding matters such as judicial economy, 155 fairness or merit of the outcome, 156 the public good (at least, to the extent that it is impacted by the alleged violations of law), 157 and protection of potential whistleblowers who act in good faith. 158

C. The Detriments of the Exception

Courts employing the job duty exception (or reasoning akin to it) likely favor this approach to resolving state of mind issues because it provides a bright-line rule—thus, taking the conjecture

154. See Kidwell v. Sybaritic, Inc., 784 N.W.2d 220, 227 (Minn. 2010) (noting that an employee’s job duties help answer the question of the employee’s purpose in making a report, thereby also helping to resolve the issue of good faith).
155. Using an evidentiary presumption to shift the burden of proof greatly impacts judicial efficiency and speed, both of which are important considerations given scarce (or finite) judicial resources. Alberto B. Lopez, A Revaluation of Cy Pres Redux, 78 U. CIN. L. REV. 1307, 1336 (2010) (“An underlying reason for creating the presumption is to promote judicial economy.”).
156. A presumption recognizes an alleged fact before any direct evidence of that fact is produced. Therefore, utilizing a presumption suggests confidence that it accurately exhibits the “fact” attempting to be proven (in this case, that an employee’s performance of his or her job duties is indicative of his or her real or actual intent not to “blow the whistle”). Carolyn Wilkes Kaas, Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases, 37 WM. & MARY L. REV. 1045, 1100 (1996) (“Presumptions are based on the logical probability that the existence of one fact renders another fact to be true. . . . [T]he root of the presumption . . . is the nexus of probability: when one fact is true, the other usually follows.”).
157. Employing this particular presumption reflects a judgment as to the public good insofar as the presumption discourages whistleblowing and/or harms the public good that is to be protected by whistleblowers.
158. Hearing on Private Sector Whistleblowers Before the H. Comm. on Educ. and Labor and the H. Subcomm. on Workforce Prot., 110th Cong. 33 (2007) (statement of Richard E. Moberly, Associate Professor of Law, University of Nebraska College of Law) (“[I]t is simply too easy for good-faith whistleblowers to fall through the gaps created by these varied requirements . . . .”), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:35185.pdf.
out of determining good faith. However, one of the disadvantages of the job duty exception—like most bright-line rules—is that it is too broad. The definition of whistleblowing inherently necessitates a fact-sensitive inquiry regarding good faith, among other elements. Therefore, whistleblower claims are not well-suited for a broad presumption such as the job duty exception, which cannot adjust to the fact-intensive nature of the conduct at issue.

Alternatively, the job duty exception and analogous analyses are problematic because they generate an improper distinction between internal and external reporting—that is, different legal ramifications for “blowing the whistle” to parties inside or outside the organization. This distinction comports with the Kidwell plurality opinion, which affords an employee (whose job requires investigation or reporting of misconduct) whistleblower protection if reports are made “outside the normal channels” or “outside the scope of the employee’s normal or assigned job duties.” As a result, employees have incomparably greater motivation to circumvent internal reporting mechanisms entirely and “blow the whistle” directly to external entities, including governmental law enforcement agencies. This “create[s] a perverse incentive


161. Hearing on Private Sector Whistleblowers, supra note 158, at 37; see also Tenn. Valley Auth., 60 N.R.C. 160, 189 (2004) (“Whistleblower cases are, by their nature, peculiarly fact-intensive and dependent on witness credibility.”), supra note 24 and accompanying text (explaining definition of “whistleblowing” adopted for purposes of this article).


163. Jenny Mendelsohn, Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing, 8 WASH. U. GLOBAL STUD. L. REV. 723, 729 (2009) (highlighting the “perverse incentive” created by a distinction between internal and external whistleblowing); Sarah F. Suma, Note, Uncertainty and Loss in the Free Speech Right of Public Employees Under Garcetti v. Ceballos, 83 CHI.-KENT L. REV. 369, 370 (2008) (describing the same incentive for using “improper channels”); see Lobel, supra note 147, at 445–46 (noting that different jurisdictions treat the internal-external distinction disparately, and with different practical implications). Depending on the applicable whistleblower statute, the only external entities to whom an employee
whereby employees might bypass their employer-specified channels of resolution and voice their concerns in public . . . .”164

Finally, absent specific knowledge of employment, and particularly whistleblower, law and its potential ramifications, it is highly unlikely that an employee whose tasks include reporting noncompliance would ever escape a job duty exception.165 It is doubtful that such an employee would ever go “outside normal channels” (to use the Kidwell plurality’s language) because it is precisely his or her job to report “inside” the normal channels. It is equally improbable that such an employee would encounter wrongdoing “outside the scope” of his or her job as the duties explicitly entail monitoring and reporting such wrongdoing—which leaves the argument that any wrongdoing discovered is always within the scope of his or her duties.166 The latter issue is exceptionally troublesome, as was the case in Kidwell, if the purported whistleblower is in-house counsel, who is likely to be responsible for all legal problems and noncompliance that occur within a company—thereby, essentially creating a categorical rule for in-house counsel if the job duty exception is applied. Consequently, it is unduly burdensome and risky for employees—attorneys or non-attorneys—to engage in whistleblowing activity in

164. Mendelsohn, supra note 163, at 729 (internal quotation marks omitted). The job duty exception’s external reporting incentive is “perverse” because it “penalize[s] well-intentioned employees who attempt to rectify wrongdoing,” as well as promote the public good by exposing crime and facilitating law enforcement. Belline v. K-Mart Corp., 940 F.2d 184, 188–89 (7th Cir. 1991). Furthermore, internal reporting (which is disincentivized under the job duty exception) has other potential benefits besides exposing illegalities, including, but not limited to: getting to the “root” of the cause quickly; preventing wrongdoing before it harms others; and the possibility for fundamental shifts in the way businesses view compliance and self-regulation. See Sinzdak, supra note 27, at 1635–36 (“They can alert employers to problems before those problems escalate. . . . The presence of whistleblowers may also help deter misconduct in the first instance.”); see also supra Part II.B (discussing how employees can impact decisions by their employers and co-workers to engage in illegal or unethical conduct).

165. Even Kidwell, an attorney, was unable to ensure his protection after researching whistleblower law. See Kidwell, 784 N.W.2d at 223.

166. See id. at 221 (relying on evidence that Kidwell was responsible for “any legal affairs of the company” and “all corporate legal matters” to determine the report was within the scope of his job duties).

167. Id.
jurisdictions where a job duty exception exists.

D. Replacing or Modifying the Job Duty Exception

Based on the aforementioned defects, applying the job duty exception is an improper interpretation of whistleblower statutes with a flawed outcome. For jurisdictions that do not subscribe to a job duty exception, or any similar analysis, there is no problem. Similarly, there is no dilemma for jurisdictions seeking to prohibit a job duty exception (as the Kidwell plurality purported to do); they need only a “simple” common law or statutory exclusion. For jurisdictions battling with a job duties rule, there are several other ways to overcome the downfalls of the doctrine while retaining its few benefits. 168

One approach is to rely on the judiciary to rectify any problems the job duty exception has raised. Courts may interpret the exception more narrowly so as to bar fewer whistleblowers from a remedy for what they thought was, and what could very plausibly be, protected conduct. Instead of relying on an employee’s “job duties” to exclude a purported whistleblower from showing the requisite state of mind, courts could permit the finding of good faith where an employee’s whistleblowing activity is “not merely routine”169 or does not occur within his or her “essential job function.”170 Alternatively, courts may embrace the fact-sensitive nature of whistleblower cases and employ a “balancing” test that takes into account many considerations.171 The factors would certainly include an employee’s job duties, but job duties would not be dispositive, or in any way determinative, on the issue of good faith or the whistleblower claim as a whole.172

168. See supra Parts IV.B, C.

169. See Kidwell, 784 N.W.2d at 239 (Anderson, J. Paul, dissenting) (arguing that employees should be protected as whistleblowers anytime their whistleblowing activity is “not merely routine”).


171. In theory, this approach may have been advocated by the Kidwell plurality, but its opinion failed to implement this type of balancing as its analysis hinged almost exclusively on Kidwell’s job duties in determining his lack of intent to be a whistleblower. See Kidwell, 784 N.W.2d at 227–31 (plurality opinion).

172. See infra Part VI.
Another manner in which a jurisdiction could effect change regarding a disfavored job duty exception is through state or federal legislation. One “simple” option is to make whistleblower statutes more clear and explicit about what activities are and are not considered protected conduct. An example of this statutory framework exists in New Jersey, where the “Conscientious Employee Protection Act . . . defines inclusively the activities that may give rise to whistleblower protection.” 173 Conceptually, this construct is appealing because it greatly reduces ambiguity, reduces compliance costs (and risk of noncompliance), and increases predictability in the law. This approach seems simple on its face, but it will only be attained with great legislative difficulty in delineating those individuals and those activities that are statutorily deemed to be protected. However, if the barriers are overcome, this statutory method may provide legislatures greater control over whistleblowing law by allowing for less interpretation. 174

A different legislative approach is to retain or permit the common law job duty exception but obviate one of its worst policy implications—the incentive to “blow the whistle” directly to outside parties. 175 This option hinges on statutory duties to make internal reports regarding the wrongdoing or noncompliance before ever seeking to “blow the whistle” externally. Under such a statute, in order for a whistleblower to receive protection, he or she must report wrongdoing inside the organization and give it an opportunity to correct the misconduct. 176

As is evident, there are sufficiently diverse means by which courts and legislatures can define whistleblower protections, exclude meritless claims, and retain the desired flexibility without resorting to a broad and unnecessary job duty exception.

174. However, this framework results in a statutory version of a bright-line rule, which could create some problems, notwithstanding the clarity and attempted precision. See supra note 160 and accompanying text.
175. See supra notes 163–176 and accompanying text.
176. Ten states currently have similar statutes that require internal reporting and an opportunity to correct noncompliance or wrongdoing. Aron, supra note 47, at 297 tbl.1 (Arizona, California, Florida, Illinois, Louisiana, Maine, New Hampshire, New Jersey, New York, and Ohio).
V. **Kidwell Issue 2: Client Confidentiality**

A. The Issue

In Kidwell, the issue of client confidentiality seemed more like a footnote to the Minnesota Supreme Court’s decision, as both the plurality and dissent focused almost exclusively on statutory interpretation and the role of the purported whistleblower’s job duties. However, Chief Justice Magnuson’s concurrence decided the outcome of the case, thereby determining whether the plurality or dissenting views would “win” the job duties debate. More significantly though, the concurrence raised another issue of particular importance: the relevance and consequences of client confidentiality for attorney-whistleblowers.

177. *Kidwell*, 784 N.W.2d at 221. The ethical rule at issue in *Kidwell*, and all attorney-whistleblower cases, is Model Rule 1.6, which states: “A lawyer shall not reveal information relating to the representation of a client” except in limited prescribed circumstances. *Model Rules of Prof’l Conduct* R. 1.6 (2007). That is to say, the issue is one of client confidentiality, not attorney-client privilege. While both doctrines have similar policy underpinnings, and often similar results, they are discrete principles with correspondingly disparate scopes and functions. Jason Popp, Current Development, *The Cost of Attorney-Client Confidentiality in Post 9/11 America*, 20 Geo. J. Legal Ethics 875, 876–77 (2007) (explicating the distinctions between the duty of confidentiality and the attorney-client privilege). It is important to note the distinction because they “often are used interchangeably” and the “confusion is perpetuated by the courts and attorneys.” Kristi Belt, Proceedings of the Conference on Emerging Professional Responsibility Issues in Litigation, *Recommendations of the Working Group on Confidentiality and the Limits of Attorney-Client Privilege*, 41 S. Tex. L. Rev. 33, 33 (1999) (presenting solutions to address problems of confidentiality and the attorney-client privilege); Irving D. Labovitz & William J. Labovitz, *Attorney-Client Privilege in Individual Bankruptcy Cases ... An Emerging Oxymoron?*, 104 Com. L.J. 301, 302 (1999) (discussing attorney-client privilege in bankruptcy cases). The duty of confidentiality is a professional ethical rule that prohibits an attorney from disclosing to others any information related to the representation of a client—a broad scope. Popp, *supra* note 177, at 876 (citing *Model Rules of Prof’l Conduct* R. 1.6 cmt. 3 (2007)). On the other hand, attorney-client privilege is a rule of evidence that applies in the case of “compelled testimony”—which is a narrower scope—and only protects confidential communications between an attorney and client. *Id.* at 876–77. Since there is no issue of compelled testimony in Kidwell, or most other whistleblower cases, and the matter relates only to client information, this article focuses on the duty of client confidentiality.

B. The Existence and Rationale of Confidentiality

The notion that client information should not be disclosed and ought to be protected as confidential has existed for hundreds of years. However, the actual duty of client confidentiality was not contemplated until close to the mid-1800s. In 1908, the American Bar Association (ABA) adopted its Canons of Professional Ethics, which provided that attorneys had an obligation “not to divulge [a client’s] secrets or confidences.” When the ABA approved its Model Code of Professional Responsibility in 1969, it continued to recognize the “ethical obligation of a lawyer to hold inviolate the confidences and secrets of his [or her] client.” The most commonly asserted rationale for attorney-client confidentiality has been succinctly stated in a “three-step syllogism”:

First, for the adversary system to operate, citizens must use lawyers to resolve disputes and the lawyers must be able to represent clients effectively. Second, attorneys can be effective only if they have all the relevant facts at their disposal. Third, clients will not employ lawyers, or at least will not provide them with adequate information, unless all aspects of the attorney-client relationship remain secret. Thus, the systemic argument goes, attorney-client confidentiality is the foundation of orderly and effective adversarial justice.

179. Patricia M. Worthy, The Impact of New and Emerging Telecommunications Technologies: A Call to the Rescue of the Attorney-Client Privilege, 39 HOW. L.J. 437, 455 (1996) (explaining that doctrines related to attorney-client privilege arose during the 1500s out of “consideration for the oath and the honor of the attorney”); Popp, supra note 177, at 876 n.8 (noting that the attorney-client privilege originated at least as early as 1654).

180. FREEDMAN & SMITH, supra note 5, at 129 & n.8.

181. Id. at 130; see also Charles M. Bennett, Frontiers in Ethics: The Estate Lawyer’s Duty of Loyalty and Confidentiality to the Fiduciary Client, 33 OHIO N.U. L. REV. 807, 815–16 (2007) (reprinting and discussing several canons that relate to client confidentiality). The Canons were amended in 1928 to expressly include a “duty to preserve his client’s confidences.” FREEDMAN & SMITH, supra note 5, at 130.

182. Bennett, supra note 181, at 820. The ABA continues to appreciate the fact that “full knowledge of the facts by the lawyer is essential to proper representation.” FREEDMAN & SMITH, supra note 5, at 133 (internal quotation marks omitted).

The temporal longevity alone indicates the significance of the doctrine in the legal profession generally. However, “[c]onfidentiality in an advisory setting is extremely important in the corporate atmosphere.”\textsuperscript{184} For in-house attorneys, the significance (and almost sanctity) of confidentiality seems to directly conflict with the fact that attorneys are strictly prohibited from engaging or assisting in client misconduct.\textsuperscript{185} Some courts interpret this tension as producing a single “choice” for in-house attorneys: withdraw from representation of the client (i.e., resign his or her position within the company).\textsuperscript{186} The existence and extent of the duty of confidentiality would not be problematic if in-house attorneys had an actual “choice,” which included the possibility of whistleblowing with subsequent protection. Yet, extending whistleblower protection to in-house counsel presents its own set of unique problems. “The most notable of these problems involves the divulgence of client confidences . . .”\textsuperscript{187}

It is precisely this divulgence, or breach of client confidentiality, that the \textit{Kidwell} concurrence attempted to safeguard against. In the concurrence, Chief Justice Magnuson argued for the “traditional” approach to attorney-whistleblowers—that is to say, there is no protection.\textsuperscript{188} This approach is generally premised on two policy justifications: 1) whistleblower protection would directly undermine client confidentiality and interfere with candid communications (the fundamental reason for protection of

\begin{itemize}
\item \textsuperscript{185} \textit{MODEL RULES OF PROF'L CONDUCT} R. 1.2(d) (2007) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .”); see also Stephen C. Dillard, \textit{When Principles Clash: The In-House Counsel as Renegade or Whistleblower}, 63 DEF. COUNS. J. 206, 210 (1996) (“[L]awyers are bound by ethical codes not to participate in client misconduct . . . .”); \textit{supra} text accompanying note 95.
\item \textsuperscript{186} See Dillard, \textit{supra} note 185, at 210–11 (describing several decisions where courts have disallowed whistleblower protection for attorneys).
\item \textsuperscript{187} Brett Lane, Comment, \textit{Blowing the Whistle on Balla v. Gambro: The Emergence of an In-House Counsel’s Cause of Action in Tort for Retaliatory Discharge}, 29 J. LEGAL PROF. 235, 236 (2004–05) (discussing the problems of extending the tort of retaliatory discharge to in-house counsel).
\item \textsuperscript{188} Chief Justice Magnuson introduced his analysis with a quote from Justice Cardozo stating that “[m]embership in the bar is a privilege burdened with conditions.” \textit{Kidwell} v. Sybaritic, Inc., 784 N.W.2d 220, 232 (Minn. 2010) (Magnuson, C.J., concurring) (alteration in original).
\end{itemize}
client confidences); and 2) whistleblower protection is simply unnecessary because attorneys are already bound by the ethical duties of their profession, which adequately protect the public interest.\footnote{Kim T. Vu, Note, Conscripting Attorneys to Battle Corporate Fraud Without Shields or Armor? Reconsidering Retaliatory Discharge in Light of Sarbanes-Oxley, 105 Mich. L. Rev. 209, 216 (2006) ("[I]f courts grant in-house attorneys the right to sue their employers for retaliatory discharge, employers might be less forthright and candid with their attorneys. . . . [A]n attorney’s professional rules of conduct adequately safeguard the public policy of protecting the public interest.").}

Chief Justice Magnuson based his argument on the relative importance of the policy underpinnings of client confidentiality: “[s]ound public policy principles underlie the whistleblower statute, but those public policy principles do not trump the public policy behind the fiduciary obligations [including the duty of confidentiality] that lawyers owe to clients.”\footnote{Kidwell, 784 N.W.2d at 232.}

The concurrence further reasoned that because clients have an “absolute right to terminate the attorney-client relationship” under Minnesota law—regardless of any actual damage or breach of fiduciary obligations—an attorney has no right to compensation, no claims for other legal recourse, and no right to breach client confidences upon termination of said relationship.\footnote{Id. at 233–34.}

Therefore, it would be inappropriate to offer attorney-whistleblowers any statutory or common law protection when “blowing the whistle” violates client confidentiality. In fact, the concurrence claimed that, based on ethical rules, any attorney who breaches such fiduciary obligations “forfeit[s] any right” to recover any damages or compensation.\footnote{Id. at 233.}

Finally, the concurrence argued that a contrary holding would simply be “a further slide down the slippery slope” degrading the attorney-client relationship and its concomitant confidentiality.\footnote{Id. at 234. This “slippery slope” is, in part, related to the historical importance of the attorney-client confidentiality. See supra text accompanying notes 179–181.}

Despite any alleged trend eroding fundamental tenets of the attorney-client relationship, there has always been, and will continue to be, a consideration of the public interest—which was the basis for professional rules in the first place. An attorney’s duty to his or her client is not unfettered by the public interest and an attorney’s duty to the public as a whole.\footnote{One commentator keenly observed:} Whistleblower statutes,
in general, are a recognition that in certain instances the public interest must prevail over an employee’s duty of loyalty (e.g., confidentiality) to his or her employer. Similarly, there are likely to be instances in which the public interest overrides even the in-house counsel’s duty of confidentiality to his or her client and employer.

C. The Proper Impact of Confidentiality

The Kidwell dissent refuted Chief Justice Magnuson’s concurrence mainly on grounds of statutory interpretation—namely, that it failed to interpret the plain language of the Whistleblower Statute, which contains no provision excepting attorneys from protection. The merits of the dissent’s argument, although interesting, are less important than the underlying questions: whether the claims of the Kidwell concurrence are grounded in sound legal reasoning and, in turn, whether attorney-whistleblowers ought to be afforded legal protection.

As previously discussed, there are always problems with categorical or bright-line rules. This per se bar for attorney-whistleblowers who, in the purported act of whistleblowing, breach client confidences is no different.

The Kidwell concurrence based most of its analysis on the ethical obligations of attorneys, including the duty to refrain from disclosure of confidential information. Yet, Chief Justice

This obligation to the public, although perhaps not articulated as clearly as the obligation to a client, is present in the codes of ethics that govern attorneys and judges. Furthermore, the idea that attorneys have a duty to the public that may be just as important as the duty to zealously defend their clients’ interests gains currency within the profession every day. Katherine Sullivan, Letting the Sunshine In: Ethical Implications of the Sunshine in Litigation Act, 23 GEO. J. LEGAL ETHICS 923, 931 (2010) (describing duties that attorneys owe to the public at large); see also Patrick T. Casey & Richard S. Dennison, The Revision to ABA Rule 1.6 and the Conflicting Duties of the Lawyer to Both the Client and Society, 16 GEO. J. LEGAL ETHICS 569, 582 (2003) (“[T]he legal profession places great emphasis on both the attorney’s duty to the client and to society.”). For another example of the interaction between the public interest and professional rules, see supra notes 92–96 and accompanying text (discussing the relationship between whistleblowing and the duty of zealous advocacy).

195. See Cavico, supra note 20, at 635 (asserting that the "general duty" of loyalty and confidentiality "can be superseded by special circumstances," due in part to moral or ethical constraints).


197. See supra note 160 and accompanying text.

198. See Kidwell, 784 N.W.2d at 232–33 (Magnuson, C.J., concurring).
Magnuson noted: “The [ABA] Committee on Ethics and Professional Responsibility has expressed its opinion that a lawyer may disclose confidences in order to establish a whistleblower claim against a former client.”

The concurrence subsequently downplayed—and arguably ignored—this statement, asserting only that it does not provide attorneys “complete freedom” to reveal client confidences. However, the lack of “complete freedom” to disclose confidential information certainly (and logically) does not foreclose the possibility of whistleblower protection which is expressly permitted by ABA ethical rules. This analysis relates only to the disclosure of confidential information in the course of establishing a whistleblower claim, but does not directly determine the underlying issue of whether an attorney is barred from even bringing a claim if said attorney first breaches client confidentiality. While this issue is not directly resolved by the ABA allowance of attorney-whistleblower claims, the result is implied. In order to “blow the whistle,” an attorney inherently has to breach, to some extent, the required confidentiality. Therefore, permitting a whistleblower claim is impliedly allowing such a claim following a breach of client confidences. Any contrary conclusion would negate the explicit language and intent of the ABA with respect to authorization of attorney-whistleblower claims.

Chief Justice Magnuson’s other primary argument was that whistleblower law should not “trump” ethical rules of the legal profession. The concurrence further explained that whistleblower doctrines and ethical duties were both founded on sound public policy principles. This explanation is clear evidence of conflicting policy interests. Where a conflict exists between two or more crucial public policies, there should be no per se rules—or, in the words of Chief Justice Magnuson, one should not categorically “trump” the other. As a supplementary policy argument, it has been asserted that “[c]ourts declining to extend [whistleblower protection] to attorneys on the theory that

199. Id.
200. Id. at 233. Attorney-whistleblowers lack “complete freedom” because, according to the ABA, they can only “reveal information to the extent necessary to establish [a] claim” and must take “reasonable affirmative steps . . . to avoid unnecessary disclosure and limit the information revealed.” ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 01-424 (2001).
201. See supra text accompanying notes 133, 190.
202. See supra text accompanying note 190.
203. See supra text accompanying notes 133, 190.
[it] would undermine attorney-client confidentiality may be failing to see the obvious. It is possible that extending [whistleblower protection] to in-house counsel could actually encourage corporations to conduct their affairs ethically and in accordance with the law.

A major shortcoming of Chief Justice Magnuson’s argument for the “traditional” view of attorney-whistleblowers is that it completely failed to acknowledge any distinction between in-house counsel and outside attorneys. The interactions between in-house counsel and their clients cannot be characterized solely as an attorney-client relationship, but must be viewed as an employer-employee relationship as well. The latter relationship is so prevalent that “the elements of client trust and attorney autonomy are less likely to be implicated.” The employment context of in-house counsel is sufficiently different to question not only whether, in certain circumstances, a breach of confidentiality may be permitted under ethical rules, but also whether in-house counsel start with a reduced standard of confidentiality. Consequently,

204. Lane, supra note 187, at 241. This analysis goes one step further: [Courts] recognize[] that lawyers are governed by ethical standards which “are . . . linked by their nature and goals to important values affecting the public interest at large.” Accordingly, though counsel’s claim for [whistleblower protection] may be tangentially beneficial to counsel, it serves as the necessary encouragement to advance the fundamental public policies inherent in an attorney’s adherence to his ethical code as opposed to his silent conformance with illegitimate employer demands. Id. at 242 (quoting Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487, 498 (Cal. 1994)).

205. See Kidwell v. Sybaritic, Inc., 784 N.W.2d 220, 231–34 (Minn. 2010) (Magnuson, C.J., concurring); see also supra Part III.A (discussing the unique circumstances of an in-house counsel and how the role is distinguished from outside attorneys).

206. Christopher G. Senior, Does New York’s Code of Professional Responsibility Force Lawyers to Put Their Jobs on the Line? A Critical Look at Wieder v. Skala, 9 HOFSTRA LAB. L.J. 417, 442–43 (1992) (discussing a prior Minnesota Supreme Court case and quoting the court: “[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-client relationship.” (quoting Nordling v. N. States Power Co., 478 N.W.2d 498, 502 (Minn. 1991)) (alteration in original)).


208. Sally R. Weaver, Client Confidences in Disputes Between In-House Attorneys and Their Employer-Clients: Much Ado About Nothing—or Something?, 30 U.C. DAVIS L. REV.
in-house counsel do not fit into the “typical” attorney-client paradigm. However, Chief Justice Magnuson’s concurrence assumed the contrary—a supposition that resulted in an inferior analysis and result.

D. Whistleblowers Not Barred by a Breach

Compelling public policy interests underlying whistleblower protection, permission to bring whistleblower claims under ABA ethical standards, and the unique circumstances of in-house counsel make improper a categorical prohibition against protection for attorney-whistleblowers who breach fiduciary obligations, such as client confidences. “At a minimum . . . attorneys should not be treated less favorably than non-attorneys in similar jurisdictions for purposes of [whistleblower protection].” Instead of treating the breach of confidentiality as a dispositive finding of fact which determines the outcome, courts should use a breach of confidentiality as a factor to contemplate in the greater whistleblower claim.

VI. BALANCING TEST FOR IN-HOUSE COUNSEL

There is no question as to whether an attorney, including in-house counsel, can be a whistleblower—at least in some instances—and receive the attendant protections. The Kidwell plurality explicitly stated that an employee whose job duties include investigating and reporting wrongdoing could be a whistleblower, thereby providing a possibility for protected conduct even within a job duty analysis. Moreover, the ABA has shown its approval of

483, 528–29 (1997) (explaining that outside lawyers may try to convince clients that sensitive matters should be referred outside the company because of “the possibility that in-house attorneys may not be held to the same standards of professional conduct as outside lawyers”; noting that there may be “a problem for in-house clients [as to] whether they are going to use in-house counsel for anything sensitive”).

209. All of the case law cited in the Kidwell concurrence to support Chief Justice Magnuson’s legal analysis and arguments involved outside attorneys, not in-house counsel. Kidwell, 784 N.W.2d at 232–34.

210. See supra Part II.B.

211. See supra notes 198–199 and accompanying text.


213. Kidwell, 784 N.W.2d at 228 (plurality opinion). However, the Kidwell plurality’s possibility for protection for employees charged with such job duties is quite narrow. It would only protect such employees if they made a report “outside
protection for attorney-whistleblowers. Therefore, the crucial question is: under what circumstances can an in-house counsel be a whistleblower?

A. Problems with Bright-Line Tests

Notwithstanding its purported rejection of a job duty exception, the Kidwell plurality focused its analysis almost exclusively on the scope and nature of Kidwell’s job duties. In the Kidwell concurrence, Chief Justice Magnuson concentrated entirely on Kidwell’s breach of client confidentiality. Consequently, both the plurality and concurrence essentially reduced the whistleblower claim—which requires a necessarily complex set of questions—into a single inquiry (job scope and fiduciary duties, respectively). Instead, the Minnesota Supreme Court should have employed a balancing test that took into account all, or most, of the relevant evidence, facts, and circumstances to determine the critical issue of good faith. Such a test would have undoubtedly included consideration of Kidwell’s job duties and fiduciary duties. This type of test allows for a more nuanced analysis, especially with respect to statutory interpretation and professional responsibility, and, in turn, better legal decisions.

When facing a statutory whistleblower claim, a court’s main objective should be to interpret the statute and apply the law to the facts in the case. As a result, a court should base its analysis in the language, requirements, and constraints of the applicable statute.

normal channels” or outside the scope of their “normal or assigned job duties.” Id. at 228–29. Nevertheless, the plurality recognized the possibility, albeit limited, for attorney-whistleblowers to engage in protected conduct. Id.

214. See supra notes 205–206 and accompanying text.
215. See supra note 120 and accompanying text.
216. See supra note 124 and accompanying text.
217. See supra text accompanying notes 130–139.
218. A whistleblower claim necessitates a complex set of questions because, according to Minnesota Whistleblower Statute and the definition adopted for purposes of this article, there are numerous elements relating to the purported whistleblower’s conduct and state of mind (i.e., good faith), as well as professional duties in the context of attorney-whistleblowers. See supra notes 24, 70–79, and accompanying text.
219. See Mathew Paulose Jr., Note, United States v. McDougald: The Anathema to 18 U.S.C. 1956 and National Efforts Against Money Laundering, 21 FORDHAM INT’L L.J. 253, 301 (1997) (“The first rule of statutory interpretation is for a court to give effect to the plain meaning of a statute’s language.”); see also MINN. STAT. § 645.08(1) (2010) (explaining that “words and phrases are construed according to rules of grammar and according to their common and approved usage”).
Under the Minnesota Whistleblower Statute, once the basic elements of the whistleblower claim are proven (e.g., a “report” was made which caused an adverse employment action), the threshold issue becomes the purported whistleblower’s state of mind—that is, whether the report was made in good faith with the purpose of exposing an illegality. 220

As discussed above, the analyses utilized by the Kidwell plurality and the Kidwell concurrence both hinge on one major factor. The plurality adopted a relatively bright-line rule to ascertain a purported whistleblower’s state of mind (i.e., good faith), 221 while the concurrence created a categorical rule that obviates the need to consider state of mind altogether. 222 Each approach presents a fundamental problem. The Kidwell plurality’s reliance on job scope and communication channels did not effectively determine good faith. It used two potential indicators without inquiring into either Kidwell’s subjective state of mind or what state of mind could be reasonably (objectively) inferred given the facts. Therefore, the plurality was unsuccessful in fully revealing Kidwell’s good faith (or lack of good faith), and accordingly failed to properly apply the Whistleblower Statute. On the other hand, the Kidwell concurrence completely ignored the statutory language and circumvented the need to discuss the threshold issue of good faith by excepting attorneys who breach fiduciary duties (e.g., client confidentiality) from the statute’s purview, without any statutory grounds to do so. 223 Consequently, the concurrence also failed to properly apply the Whistleblower Statute.

220. See Kidwell v. Sybaritic, Inc., 784 N.W.2d 220, 227 (Minn. 2010) (identifying the issues of good faith and purpose as the “central question”); supra notes 111, 126 and accompanying text; see also Obst v. Microtron, Inc., 614 N.W.2d 196, 202 (Minn. 2000) (requiring a good faith report made with the purpose of exposing an illegality). The issue may be considered “threshold” to the extent that it is, at this point in the analysis, likely the only remaining issue between a successful claim (i.e., whistleblower protection) and an unsuccessful one.

221. See supra text accompanying note 126.

222. See supra text accompanying note 133.

223. See supra text accompanying note 196.
B. Value of a Balancing Test

Unfortunately, presumptions and categorical rules are unfit for determining state of mind. The Kidwell plurality effectively presumed a lack of good faith based on job duties and/or communication channels and the concurrence created a per se bar from whistleblower protection based on a breach of fiduciary duty. Therefore, both opinions failed to answer the central question regarding Kidwell’s good faith and, as a consequence, did not properly determine the outcome in Kidwell. If the Minnesota Supreme Court had instead applied a test whereby it balanced numerous factors to determine Kidwell’s state of mind, it would have reached a more appropriate conclusion—regardless of whether that conclusion would have been the same or different.

A balancing test would account for the complexity of an in-house counsel’s role in the organization, the difficulty and ambiguity of an in-house counsel’s decision to “blow the whistle,” and the fact-sensitive nature of whistleblower claims generally. Also, the perverse effect of a bright-line rule regarding scope of job duties and communication channels may be ameliorated by a factors-based test that provides more leniency and flexibility based on the individual circumstances of the case. Furthermore, the main advantage of a bright-line rule is to infuse predictability into the law in order to permit attorneys and non-attorneys alike to conduct themselves in a manner that is consistent with the law. Because whistleblower claims by nature are somewhat unpredictable, utilizing a balancing test will not unduly reduce the predictability (or lack thereof) in whistleblower cases. Moreover, an in-house counsel whistleblower claim is not a

224. Ronald J. Offenkrantz, Negotiating and Drafting the Agreement to Arbitrate in 2003: Insuring Against a Failure of Professional Responsibility, 8 HARV. NEGOT. L. REV. 271, 275 (2003) (emphasizing that when courts apply presumptions to determine intent there is an “obvious risk that the court’s presumptions could be an inaccurate portrayal of, or even adverse to, the parties’ original intent”); Michael P. Van Alstine, Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law, 37 VA. J. INT’L L. 1, 63 (1996) (noting the risk of inaccuracy in determinations of intent when relying on presumptions).

225. The Minnesota Supreme Court’s failure to take into account all of the necessary evidence to determine Kidwell’s good faith, as needed to apply the Minnesota Whistleblower Statute, does not necessarily mean that it reached the wrong result, but merely that its analyses were not nearly as effective or convincing as they could have otherwise been.

226. See supra note 52.
problem that implicates only the rights of two private parties (where categorical rules are stronger), as an attorney owes duties not only to his or her client, but to the public as well.\footnote{227} Finally, it is inappropriate to use bright-line or categorical rules where there are closely competing public policy interests, such as those implicated by in-house counsel whistleblower claims.\footnote{228} In his concurrence, Chief Justice Magnuson made it clear that no area of law or public policy should “trump” another with respect to an in-house counsel whistleblower.\footnote{229}

C. Balancing Factors to Determine Good Faith

Having discussed the relative value of a balancing test generally, it is appropriate to contemplate some of the factors which ought to be balanced. It is necessary to reiterate that these factors should only be considered in making a determination regarding the threshold issue of good faith. The other elements of a whistleblower claim are more straightforward and less critical—thus, the balancing test is just one part of the overall analysis in a whistleblower case.\footnote{230} Consideration of good faith is likely to occur after all of the basic elements (e.g., report, adverse employment action, and causation) have already been proven.

Conceptually, the good faith question has two distinguishable components: 1) whether the purported whistleblower made the report with the purpose of exposing an illegality (which is necessary, but not sufficient, to satisfy the good faith requirement); and 2) the broader issue of good faith (which includes, among other things, the whistleblower’s purpose).\footnote{231} However, analytically, these two components can be contemplated at the same time and with the same evidence because both good faith and the purpose of

\footnote{227. See supra notes 92–96, 194 and accompanying text.}
\footnote{228. Competing policy interests include, but are not limited to, upholding the employment-at-will doctrine, protecting private organizations’ proprietary information, safeguarding against public harm, promoting employees to represent the public interest (and potentially their individual morality), and sustaining the structure and significance of the attorney-client relationship.}
\footnote{229. See Kidwell v. Sybaritic, Inc., 784 N.W.2d 220, 232–33 (Minn. 2010) (Magnuson, C.J., concurring); see also supra text accompanying notes 201–203 (explaining that whistleblower law should not trump ethical rules).}
\footnote{230. However, the balancing test ought to be a focal point in a whistleblower claim because state of mind is so fundamental in the character of the claim; yet, it does not supersede or replace the overall whistleblower analysis.}
\footnote{231. See supra notes 111, 126, 220 and accompanying text.}
exposing an illegality are matters of state of mind—that is, determining the whistleblower’s subjective goal in “blowing the whistle.” They are best analyzed using a balancing test—utilizing, among others, the factors described below—to determine whether the purported whistleblower acted *in good faith with the purpose of exposing an illegality*.

The factors taken into account, and their relative weight, will likely vary on a case-by-case basis depending on the specific facts and circumstances at issue. Nevertheless, it is possible to identify some discrete factors among the multitude of plausible considerations. The following table contains a non-exhaustive list of possible factors that may contribute to a court’s finding that a report was made in good faith with the purpose of exposing an illegality.

<table>
<thead>
<tr>
<th>Factors militating in favor of a report made in good faith with the purpose of exposing an illegality</th>
<th>Factors militating in favor of a report NOT made in good faith with the purpose of exposing an illegality</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Employee’s job duties</strong></td>
<td><strong>Report itself was outside the normal scope of job responsibilities; manner in which report was investigated, created, or communicated was not ordinary or routine; report was a one-time task or event</strong></td>
</tr>
<tr>
<td><strong>To whom the report was provided</strong></td>
<td><strong>Outside normal channels of communication; outside normal chain of command; reported to more and/or different superiors than ordinary matter</strong></td>
</tr>
</tbody>
</table>

232. Abstractly speaking, the standard “in good faith with the purpose of exposing an illegality” would answer the question posed in the first paragraph of Part VI: Under what circumstances can an in-house counsel be a whistleblower? Practically speaking, however, the actual circumstances would be determined by employing the balancing test and factors described in this Part.
<table>
<thead>
<tr>
<th>Content of the report</th>
<th>Clearly implicated a violation of law</th>
<th>Alluded to, but did not expressly implicate, a violation of law or discussed only a potential illegality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Timing of the report</td>
<td>Timing was of no particular consequence</td>
<td>Timing itself caused a material benefit to the whistleblower or a substantial detriment to the organization</td>
</tr>
<tr>
<td>Impetus for “blowing the whistle”</td>
<td>Motivation based on individual morality, service to the public good, innate sense of fairness, or any other motive that does not directly benefit the whistleblower</td>
<td>Ulterior motivation highly plausible (e.g., threatening management, negotiating buyout)</td>
</tr>
<tr>
<td>Egregiousness of alleged illegality</td>
<td>More egregious illegal activities may necessitate greater flexibility or leniency for the whistleblower because the public’s interest in stopping or preventing such conduct increases</td>
<td>Less egregious illegal activities may not merit any flexibility or leniency for the whistleblower, and may indicate an ulterior motivation or bad faith by the whistleblower</td>
</tr>
<tr>
<td>Likelihood another employee would have “blown the whistle”</td>
<td>If it is unlikely other employees knew of the illegality or were unlikely to report the illegality, it may necessitate greater flexibility or leniency for the whistleblower because of his or her unique position</td>
<td>If it is likely that other employees knew of the illegality or were likely to report the illegality, it may not merit any flexibility or leniency for the whistleblower because he or she was not in a particularly unique position</td>
</tr>
<tr>
<td>Extent to which whistleblower attempted to remedy the situation prior to his or her termination (or other discrimination)</td>
<td>Moderate to significant efforts by the whistleblower to internally avert, mitigate, or otherwise prevent any harm resulting from illegal activity (before and/or externally)</td>
<td>Little or no effort to remedy the illegality internally before “blowing the whistle” (internally or externally)</td>
</tr>
</tbody>
</table>
Under this balancing framework, both the job duties and breach of fiduciary duty analyses—which the Kidwell plurality and concurrence relied on, respectively—would be subsumed into a broader analysis of good faith, where neither factor would be dispositive or unduly determinative. The more comprehensive analysis can more appropriately determine the purported whistleblower’s state of mind—a threshold issue—and therefore can more accurately interpret and apply the language of the Minnesota Whistleblower Statute.

D. Application of the Balancing Test

1. Applying the Test in Kidwell

Kidwell’s claim satisfied all of the basic elements required for whistleblower protection. The email certainly constituted a “report,” Kidwell was terminated (an adverse action), and the jury decided there was a casual connection between the two events. Therefore, as the plurality noted, the fundamental issue in Kidwell was whether Kidwell acted in good faith with the purpose of

233. Kidwell, 784 N.W.2d at 220, 225.
exposing an illegality.\textsuperscript{234} At this point, it is necessary to employ the balancing test to determine the critical state of mind issues, and ultimately the appropriate outcome in the case.

There are good arguments that Kidwell’s report was made as part of his job duties—namely, that he was charged with providing advice on any or all legal matters.\textsuperscript{235} But there is a legitimate retort that it was outside his job duties—reporting the noncompliance with discovery orders was a duty of the outside counsel, which Kidwell voluntarily assumed.\textsuperscript{236} Sybaritic would also argue that Kidwell made the report within the normal channels of communication and inside the ordinary chain of command as he sent the Difficult Duty email to most of the management team, with whom Kidwell worked closely. However, Kidwell would point out that he had never before notified the \textit{entire} management team about any legal issue, but rather typically communicated with one or two individuals.\textsuperscript{237} Therefore, the report was outside the normal channels of communication and chain of command. Sybaritic may assert that the Difficult Duty email did not implicate a violation of law as its main goal was to alert the management of the “pervasive culture of dishonesty.”\textsuperscript{238} However, this particular argument will fail because, while the whole email did not implicate violations of law, several specific allegations of illegality were contained in the email. There was no issue regarding the timing of the Difficult Duty email nor was there any evidence of an ulterior motive besides Kidwell’s desire to comply with his moral and professional obligations.\textsuperscript{239}

While Sybaritic’s alleged illegalities caused no resounding harm to the public, false allegations in pleadings, noncompliance with discovery orders, and charges of obstruction of justice can hardly be considered “minor” offenses. Moreover, Kidwell learned of these violations in his position as in-house counsel, so it is unlikely any other employees would have a sufficient basis to “blow the whistle.”\textsuperscript{240} Therefore, Kidwell was in a unique position

\begin{footnotesize}
\begin{itemize}
\item[234.] \textit{Id.} at 227.
\item[235.] \textit{See id.} at 221.
\item[236.] \textit{Id.} at 241–42 (Anderson, J. Paul, dissenting).
\item[237.] \textit{Id.} at 223 (plurality opinion).
\item[238.] \textit{Id.} at 240 (Anderson, J. Paul, dissenting).
\item[239.] \textit{See id.} at 221–22 (plurality opinion) (noting Kidwell’s “deep regret” for having to write the email in accordance with his personal and professional duties).
\item[240.] Although unlikely, Sybaritic could conceivably argue the outside counsel knew, or suspected, the illegality. \textit{Id.} at 241 (Anderson, J. Paul, dissenting). However, if this argument was raised, it would fail because the outside counsel
\end{itemize}
\end{footnotesize}
amidst his fellow employees. Although Kidwell threatened to alert the “appropriate authorities” of the illegalities, it was clear that he was attempting to remedy the problem internally as he first sent the Difficult Duty email to the management team (before disclosing the illegalities to the authorities) and met with the management to establish an action plan to resolve the legal problems.\footnote{Kidwell had strong evidence of the illegality and it was based on his personal knowledge and interactions within his position as in-house counsel.} Finally, Kidwell did, in fact, breach his fiduciary duty to Sybaritic; however, the jury determined that no damages were caused by the breach.\footnote{Kidwell did, in fact, breach his fiduciary duty to Sybaritic; however, the jury determined that no damages were caused by the breach.}

Upon considering the aforementioned factors, the court should have found that Kidwell possessed the proper state of mind to receive whistleblower protection—that is to say, Kidwell made the report in good faith with the purpose of exposing an illegality. The arguments relating to job duties and communication channels were roughly equal on both sides, or, at least, neither materially outweighed the other. The breach of fiduciary duty, although not causing any damage, militates in favor of a lack of good faith due to the seriousness of any such breach. However, almost all of the remaining factors weigh heavily in favor of a finding of good faith. Because the purpose of the balancing test is to take into account the specific facts and totality of the circumstances (although, not necessarily with equal weight), it is evident that under such an approach Kidwell would have been deemed to have acted with the requisite state of mind. Since his good faith was the sole remaining issue in the case, Kidwell would have succeeded in his overall claim and been afforded protection under the Minnesota Whistleblower Statute.

2. \textit{In-House Counsel, Generally}

While the goal of the balancing test is to account for a wide variety of highly diverse sets of facts, there are some generalizations that can be made as to the applicability of whistleblower protections in the context of in-house counsel. When applied to could not be a whistleblower because he or she was not an employee, so that knowledge does not impact the factor relating to the likelihood of another whistleblower within the organization.

\footnote{Id. at 223.}

\footnote{Id. at 225.}
in-house counsel, the balancing test will generally produce a smaller subset of whistleblowers than the definition provided for purposes of this article.245 That is to say, the circumstances under which an in-house counsel will likely have the requisite state of mind (i.e., good faith) to satisfy a whistleblower statute is narrower than the group of individuals that would otherwise fall into the category labeled “whistleblowers” for general purposes in this article.

Typically, an in-house counsel would need to “blow the whistle” internally—at least initially. If terminated upon an internal report or upon a later external report, the in-house counsel may be eligible for whistleblower protection.244 This probable requirement recognizes the importance of the attorney-client relationship, and client confidentiality more specifically. This process would permit an in-house counsel to first look after the client’s interests while fulfilling his or her professional duties, and then serve the public interest if, or when, any alleged illegalities fail to be rectified. Furthermore, an in-house counsel would likely fail to receive protection if he or she “blew the whistle” and disclosed client confidences to the media because that would be an egregious breach of confidentiality likely to result in significant undue harm to the client. Therefore, an in-house counsel would ultimately have to inform a relevant governmental actor if the legal problems persisted.245

Generally, the allegations of wrongdoing would have to be a violation of law. Permitting an in-house counsel to breach his or her fiduciary duties to the client (without giving up whistleblower protection) for anything less than a violation of law (e.g., merely “immoral conduct”) would disproportionately favor the public’s interest in preventing the specific harm, as compared to the public’s interest in maintaining a strong attorney-client relationship. Since an in-house counsel is a trained attorney, he or

243. *See supra* note 24 and accompanying text.

244. The obvious issue is how long an in-house counsel must wait after an internal report before he or she could justifiably “blow the whistle” externally and still maintain whistleblower protections. The period of time would likely be that which is reasonable under the circumstances. Beyond that likely standard, it would be a factual question.

245. However, an in-house counsel would likely lose any whistleblower protection if he or she informed a governmental actor of illegality before “blowing the whistle” inside his or her own organization or taking any other steps to remedy known or suspected violations of law.
she may be likely to be held to a slightly higher standard of knowledge of the law. In effect, good faith may not mean merely making a good faith report of the facts, but also a good faith effort to ascertain the applicability and avert the consequences of any alleged illegalities. Finally, like all whistleblowers, an in-house counsel must intend to make known or expose the violation of law. Notwithstanding the aforementioned generalities, courts would apply the balancing test and contemplate the impact of all of the factors to determine the critical issue of good faith. No single factor would be either determinative as to the protection afforded or a categorical bar to protection. The previously discussed generalizations oversimplify the considerations, but provide a sense of “weight” that may be attributed to certain particularly germane factors.

VII. CONCLUSION

Whistleblower statutes, and whistleblower law more generally, are intended to promote legal compliance, thus benefiting the public interest by providing protection for employees that risk their reputation and livelihoods to “blow the whistle.” However, this public policy goal is complicated by the unique circumstances and concerns of in-house counsel who operate within a “good cop, bad cop” dichotomy that exists in the nature of their roles within their organizations. An internally divisive paradigm exists not only in relation to an in-house counsel’s company, but also with respect to an attorney’s duty to the public at large. That is to say, conduct that may be beneficial to an individual in-house counsel (e.g., keeping one’s job) may be detrimental to society (e.g., permitting perpetuation of public harms by failing to “blow the whistle”), with

246. Cf. supra note 79 and accompanying text (explaining that in a non-attorney whistleblower case, “good faith” may not require that the facts be entirely accurate, but rather that the purported whistleblower—knowing the appropriate law—thought the facts constituted a violation of law and made a good faith report). Once again, the standard may be one of reasonableness—likely, the knowledge and prudence of a reasonable attorney under the circumstances. Therefore, if under this standard, an in-house counsel was simply wrong about the law or failed to appropriately apply the law to the facts, he or she would not be likely to satisfy the “elevated good faith” requirement, and consequently would not obtain whistleblower protection.
247. See supra Part II.
248. See supra Parts I, III.A.
249. See supra notes 92-96, 194 and accompanying text.
the converse likely being true as well. Kidwell illustrated the difficult decisions made by in-house attorneys, and the equally difficult judgments required by courts interpreting whistleblower statutes as they relate to in-house counsel.  

By analyzing the legal reasoning and policy arguments, it becomes clear that the job duty exception to whistleblower statutes is unwarranted and unnecessary as other methods exist to better determine valid claims without the negative policy implications. Furthermore, breach of client confidentiality should not result in a categorical bar to attorney-whistleblower claims because a proper analysis would show due respect and deference to conflicting public policy judgments and appropriate statutory interpretation. Issues relating to both job duties and breach of client confidences ought to be decided as part of a more comprehensive balancing, or factor-based, test used to determine the state of mind of in-house attorney-whistleblowers. Flexible, fact-sensitive inquiries are far more appropriate than categorical rules due to the complexity of the considerations and practical implications for in-house counsel faced with a potential decision to “blow the whistle.” The application of a balancing test would assist in thorough statutory interpretation by more accurately determining good faith, thereby producing superior legal and practical outcomes.

250. See supra Part III.B–C.
251. See supra Part IV.
252. See supra Part V.
253. See supra Part VI.