Fordham Law Review

Volume 82 | Issue 6 Article 23

2014

Choosing Which Rule To Break First: An In-House Attorney Whistleblower's Choices After Discovering a Possible Federal Securities Law Violation

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CHOOSING WHICH RULE TO BREAK FIRST: AN IN-HOUSE ATTORNEY WHISTLEBLOWER'S CHOICES AFTER DISCOVERING A POSSIBLE FEDERAL SECURITIES LAW VIOLATION

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The early twenty-first century has seen several instances of large-scale federal securities law violations—such as Enron, WorldCom, and the Bernie Madoff scandal—that have garnered widespread attention and heavily impacted the global economy. In each of these cases, whistleblowers tried to expose the underlying fraud. These and other scandals led to the enactment of new laws to protect whistleblowers who seek to expose these kinds of violations.

In-house attorneys are in a special position to discover, understand, and expose their organization's federal securities violations. However, should in-house attorneys discover misconduct, and when deciding whether or not to take action, they must take into account several different and potentially conflicting governing regimes. As whistleblowers, they can be subject to various state and federal laws, each of which will require them to respond differently in order to be protected from retaliation. These laws have also been interpreted in different ways by different courts. As attorneys, they are subject to state rules of professional conduct, and perhaps other rules governing professional conduct under federal law. As in-house attorneys, they may face additional restrictions, since their employer is also their client. These different regimes can permit or even require attorneys to take conflicting actions in any given situation, making it potentially difficult for an attorney to act without breaking at least one rule or law.

This Note argues that in-house attorney whistleblowers should be expected to act in the same way across different governing regimes. In-house attorneys should be required to report federal securities violations internally first and be permitted to report externally thereafter if the violation is not resolved.

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INTRODUCTION

Imagine for a moment that you are the in-house counsel at a publicly traded corporation, and you have just discovered that your employer is involved in a potentially massive violation of federal securities law. You are aware that others have been in this position before, and that their next steps have been scrutinized closely, discussed publicly, and linked to some of the largest financial scandals in history. Ethically, what is the next step you should take? Should you alert someone within the organization, or will this lead to a cover-up? How can you act without violating the attorney-client privilege? Legally, what steps can you take to ensure that you are protected from retaliation? Even further, what steps should you take to avoid sanctions? Should you become a whistleblower?

On October 1, 2013, the U.S. Securities and Exchange Commission (SEC) announced an award of more than $14 million to an anonymous, individual whistleblower.[1] This is the largest award that the Commission has made since the 2011 establishment of its whistleblower program, the Office of the Whistleblower (OW).[2] The OW was created pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act[3] (the Dodd-Frank Act). The OW rewards whistleblowers who provide original information leading to a successful SEC enforcement action of more than $1 million in sanctions with between 10 percent to 30 percent of the money collected.[4] Prior to this award, the OW had only made two others: one in the amount of $50,000 in August 2012 and one in the amount of $125,000 in August 2013.[5] These awards pale in comparison to the one most recently

1. Press Release, SEC, SEC Awards More Than $14 Million to Whistleblower (Oct. 1, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.UoYfjo0mwl0.

2. *Id.*

3. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the 7, 12, 15, 18, 22, 31, 42 U.S.C.); *see also* Press Release, *supra* note 1.

4. *See* Press Release, *supra* note 1.

5. *Id.*

announced, most obviously in the size of the award, but also in terms of the potential long-term public impact, which the first two awards seemed to have very little.[6]

In the announcement, SEC Chair Mary Jo White stated that the Commission hopes that the award will encourage those with information to come forward.[7] At the whistleblower's request, the SEC has kept many details around the most recent award private.[8] Since the program rewards whistleblowers with between 10 to 30 percent of total money collected, however, it is possible to deduce that the total sanctions in this case were at least $47 million.[9] Although this has been the OW's largest award yet,[10] the underlying large-scale federal securities violation is by no means a recent phenomenon: the Dodd-Frank Act, which established the OW, was enacted partly in response to one of the most infamous federal securities violations in recent history, the Bernie Madoff Ponzi scheme.[11] In 2009, Madoff pleaded guilty to eleven felony counts and was imprisoned for a maximum sentence of 150 years[12] for managing a global Ponzi scheme that prosecutors valued at more than $64.8 billion.[13]

One of the most controversial issues surrounding the Madoff case was that a whistleblower, Harry Markopolos, repeatedly tried to bring the fraud to the SEC's attention for nine years and was continuously ignored.[14] In his subsequent testimony in front of the House Financial Services Committee, Markopolos accused the SEC of "investigative ineptitude" and "financial illiteracy."[15] His book[16] revealed the extent of his desperation and frustration with the situation: Markopolos had even considered the

6. *SEC Issues First Large Award in Whistleblower Program*, CLIENT ALERT (Latham & Watkins LLP, New York, N.Y.), Oct. 2, 2013, at 2, *available at* http://www.lw.com/thoughtLeadership/lw-sec-first-large-whistleblower-award ("Will this award inspire many more would-be whistleblowers to contact the SEC in hopes of getting rich? That remains to be seen. But Congress and the Commission have already bet that the answer will be yes.").

7. Press Release, *supra* note 1.

8. *SEC Issues First Large Award in Whistleblower Program*, *supra* note 6, at 1.

9. *Id.*

10. *See supra* notes 1–2 and accompanying text.

11. *See, e.g.*, Chris W. Haaf & Monica C. Platt, *2011 Sees Focus on Whistleblowing and Dodd-Frank Claims*, BUS. L. TODAY, Jan. 2012, at 1, 1.

12. United States v. Madoff, No. 09 Crim. 213(DC), 2009 WL 3347945 (S.D.N.Y. Oct. 13, 2009).

13. Martha Graybow, *Madoff Mysteries Remain As He Nears Guilty Plea*, REUTERS (Mar. 11, 2009, 4:35 PM), http://www.reuters.com/article/2009/03/11/us-madoff-idUSTRE52A5JK20090311?pageNumber=2&virtualBrandChannel=0&sp=true. The fraud was later valued lower at $13 billion, according to court documents related to Madoff's sentencing. *See Madoff Gets 150 Years; Loss Now at $13 Billion*, ANDREWS BANKR. LITIG. REP., Aug. 7, 2009, at 6, 6.

14. Robert Chew, *A Madoff Whistle-Blower Tells His Story*, TIME (Feb. 9, 2009), http://content.time.com/time/business/article/0,8599,1877181,00.html.

15. *Id.*

16. *Madoff Whistle-Blower Slams S.E.C. in New Book*, N.Y. TIMES DEALBOOK, (Feb. 26, 2010, 7:30 AM), http://dealbook.nytimes.com/2010/02/26/madoff-whistle-blower-slams-s-e-c-in-new-book/?_r=0.

possibility of killing Madoff, if personally threatened.[17] It was in the wake of this scandal, among others, that the Dodd-Frank Act was enacted to expand on the previously existing antiretaliation protections and monetary incentives afforded to whistleblowers who expose securities fraud.[18] The OW received 3,001 tips and complaints from all fifty states in 2012, its first full fiscal year of operation.[19]

Against this background of large-scale financial fraud and whistleblowing scandals, in-house attorneys may be forced to navigate a complex web of governing regimes when deciding whether or not to become whistleblowers.[20] Due to the nature of their profession, in-house counsel may be more likely to uncover federal securities violations.[21] However, attorneys may be subject to other standards, such as attorney-client confidentiality and may be expected to act differently than other whistleblowers.[22] In-house attorneys, in particular, must consider that their employer is also their client.[23]

This Note examines the choices available to in-house attorneys who suspect that their employer is violating federal securities law and must decide whether to report the misconduct, and, if so, whether to do so internally or externally. The Note explores the different choices in-house attorneys can make to protect themselves against retaliation and avoid sanctions.

Part I of this Note provides a general background to the relevant law, beginning with a discussion of who whistleblowers are, whether or not they should be protected, and how they can be protected. Next, Part I provides some of the main federal and state laws that protect whistleblowers and the special considerations in-house attorney whistleblowers may face.

Part II addresses the main conflicts that arise due to the sometimes conflicting regimes described in Part I and the resulting issues that in-house attorneys face when they become whistleblowers: whether reports should be made internally or externally and determining which law applies.[24]

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17. *Id.* ("If he contacted me and threatened me, I was going to drive down to New York and take him out. . . . The government would have forced me into it by failing to do its job, and failing to protect me. In that situation I felt I had no other options. I was going to kill him.").

18. *See infra* notes 107–14 and accompanying text.

19. SEC, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, FISCAL YEAR 2012, at 4–5 (2012) *available at* http://www.sec.gov/about/offices/owb/annual-report-2012.pdf.

20. *See infra* Part I.D.

21. *See infra* notes 209–84 and accompanying text.

22. *See infra* Part I.D.2.

23. *See infra* notes 285–93 and accompanying text.

24. The extraterritorial applications of these laws, and the additional complexities arising from conflicts with foreign laws, are beyond the scope of this Note. For a discussion of the extraterritorial application of the Sarbanes-Oxley Act of 2002, see Ian L. Schaffer, *An International Train Wreck Caused in Part by a Defective Whistle: When the Extraterritorial Application of SOX Conflicts with Foreign Laws*, 75 FORDHAM L. REV. 1829 (2006). For a discussion of the extraterritorial application of the Dodd-Frank Act, see Nicole H. Sprinzen, Asadi v. GE Energy (USA) L.L.C.*: A Case Study of the Limits of Dodd-Frank Anti-*

Additionally, Part II expands on the hypothetical scenario introduced above to demonstrate the difficulties attorney whistleblowers may face in navigating different laws.

Part III of the Note proposes that in-house attorneys should be held to a uniform standard under the various regimes that apply to them. This Part recommends that in-house attorneys should be required to report federal securities violations internally first and permitted to disclose information externally if there is no resolution.

I. ATTORNEY WHISTLEBLOWERS, THE LAWS THAT PROTECT THEM, AND THE LAWS THAT DO NOT

Part I of this Note begins with a discussion of who whistleblowers are, whether or not they should be protected, and how they can be protected. This is followed with a background of some of the main federal laws protecting whistleblowers. Because even whistleblowers who disclose federal securities violations can be protected under certain state laws, these state laws are discussed in subsequent sections. Finally, this Part explores how the laws apply to in-house attorneys and discusses the special factors that they must consider.

A. Whistleblowers: Who Are They, Should We Protect Them, and How Do We Go About It?

Part I.A provides an overview of who whistleblowers are, the different reasons for protecting them, and the different mechanisms for these protections.

1. Who Are Whistleblowers?

The term "whistleblower" is often credited to consumer activist Ralph Nader, who is said to have coined the term in the early 1970s.[25] Others have said that the term originates from police officers blowing their whistles to warn onlookers about illegal activity.[26] The U.S. Supreme Court first used the term—somewhat dismissively—in 1983, referring to "so-called whistleblowers."[27] While the term may be more commonly used today, in order to discuss whistleblowers and the scope of protection that is afforded to them, it is helpful to first define who they are.

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retaliation Protections and the Impact on Corporate Compliance Objectives, 51 AM. CRIM. L. REV. 151 (2014).

25. Geoffrey Christopher Rapp, *Four Signal Moments in Whistleblower Law: 1983–2013*, 30 HOFSTRA LAB. & EMP. L.J. 389, 389 (2013) (citing WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY (Ralph Nader et al. eds., 1972), but acknowledging that other sources have identified earlier uses of the term).

26. Geneva Campbell, *Snitch or Savior? How the Modern Cultural Acceptance of Pharmaceutical Company Employee External Whistleblowing is Reflected in Dodd-Frank and the Affordable Care Act*, 15 U. PA. J. BUS. L. 565, 568 (2013).

27. Rapp, *supra* note 25, at 389–90 (citing Bush v. Lucas, 462 U.S. 367, 385 n.25 (1983)).

There is no single, universally accepted definition of a whistleblower.[28] *Black's Law Dictionary* defines a whistleblower as "an employee who reports employer wrongdoing to a governmental or law-enforcement agency."[29] The *New Oxford American Dictionary*, on the other hand, defines the term more broadly as "a person who informs on someone engaged in an illicit activity."[30] Some definitions are even broader, categorizing "any employee who 'opposes' the conduct, actions, or decisions of his or her employer" as a whistleblower.[31] However, a definition this broad is not very useful for the purposes of this Note, because it could include any employee who expresses discontent—or even just disagrees—with his or her employer.[32]

For the purposes of this Note, a whistleblower is defined as an employee who discloses information relating to a potential violation of the law by his or her employer, to parties that are either internal or external to the organization, for the purpose of preventing the wrongdoing.[33] This definition is useful for the scope of this Note, which addresses the issues faced by in-house counsel whose employers may have violated federal securities laws and who must decide whether or not to disclose information either internally or externally. The definition includes these in-house attorneys, while being broad enough to also include other whistleblowers who may face similar issues and whose experiences are discussed in this Note.[34]

2. Should We Protect Whistleblowers?

An understanding of a whistleblower's motivations may help shape a discussion of whether—and how—a whistleblower should be protected and perhaps even incentivized for his or her actions. Before exploring the different arguments for protecting and incentivizing whistleblowers, this section explores the different motives that whistleblowers may have for their actions.

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28. Peter D. Banick, Case Note, *The "In-House" Whistleblower: Walking the Line Between "Good Cop, Bad Cop,"* 37 WM. MITCHELL L. REV. 1868, 1872 (2011).

29. BLACK'S LAW DICTIONARY 1734 (9th ed. 2009).

30. NEW OXFORD AMERICAN DICTIONARY 1971 (3d ed. 2010).

31. Banick, *supra* note 28, at 1871 (citing Jonathan W.J. Armour, *Who's Afraid of the Big, Bad Whistle?: Minnesota's Recent Trend Toward Limiting Employer Liability Under the Whistleblower Statute*, 19 HAMLINE L. REV. 107, 109 n.13 (1995)).

32. *Id.* at 1871 n.17 ("The word 'oppose' is so open and ambiguous in this context that it could arguably include employees who simply express discontent to their co-workers or any other person regarding their employer—or, even employees who internally disagree with their employers but never show any objective manifestation of their dissent.").

33. *Id.* at 1873. Here, the "purpose" of preventing wrongdoing means that the ultimate goal is to make the wrongdoing known to another party and does not refer to any personal motives for blowing the whistle. *Id.* at 1873 n.24.

34. The famed whistleblowers discussed in this section were not in-house lawyers.

a. What Incentivizes Whistleblowers?

Research shows that there are many different factors that motivate whistleblowers and that these factors may vary depending on context.[35] Generally speaking, motivations can be grouped into two categories: intrinsic or extrinsic.[36] Extrinsic motivation is linked to behavior that is motivated by external factors such as rewards and payments. Intrinsic motivation is driven by an individual's sense of moral or civic duty.[37] For example, whistleblowers may perceive the wrongdoing to run counter to the organization's stated goals, "the purposes society has for its business sector," or their own moral standards.[38]

Whether a whistleblower is motivated by intrinsic or extrinsic factors may depend on the context; for example, one experimental study has shown that monetary rewards can frequently affect the level of reporting, unless the underlying violation is perceived as morally offensive.[39] Thus, according to the study, when the whistleblower attaches an ethical significance to the act of reporting, monetary rewards are not consequential in determining his or her actions.[40] On the other hand, in the absence of a perceived moral issue, monetary rewards were shown to be decisive.[41] Interestingly, in these situations, rewards of small monetary value—compared to the absence of any reward at all—seemed to discourage reporting.[42] This phenomenon may be attributed to a "crowding-out effect,"[43] whereby the introduction of an external factor such as a reward may dampen the intrinsic motivations of those who would report wrongdoing without it.[44]

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35. Dave Ebersole, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 123, 124 (2011) (citing Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151 (2010)); *see also* Campbell, *supra* note 26, at 569 ("[E]mployees frequently have mixed motives for reporting wrongdoing.").

36. Feldman & Lobel, *supra* note 35, at 1178.

37. *Id.* There is ongoing debate about the relationship between intrinsic and extrinsic motivation. While some studies suggest that extrinsic factors—such as rewards—can undermine intrinsic motivation, others show that the two types of motivation can reinforce each other. Some literature suggests that when people attribute their own behavior to extrinsic factors or rewards, they discount their own intrinsic motivations for the behavior and thereby undermine the perceived effect of intrinsic factors. *Id.* at 1178–79.

38. Campbell, *supra* note 26, at 569–70 (quoting JACK BEHRMAN, ESSAYS ON ETHICS IN BUSINESS AND THE PROFESSIONS 140 (1998)).

39. Feldman & Lobel, *supra* note 35, at 1202.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. David Freeman Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*, 15 THEORETICAL INQUIRIES L. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341808. Studies have shown that people may discount the intrinsic motivations for their behavior when extrinsic factors are introduced. *See supra* note 37; *see also* Feldman & Lobel, *supra* note 35, at 1181 n.190 (citing Bruno S. Frey & Alois Stutzer, *Environmental Morale and Motivation* 14–16 (Univ. of Zurich Inst. for Empirical Research in Econ., Working Paper

A whistleblower can also be motivated by how they think others will act.[45] For example, if there is a monetary reward, the whistleblower may suspect that others will also come forward and may behave strategically to be the first to collect the reward.[46] However, potential whistleblowers may not necessarily be able to predict others' actions accurately: experiments have shown that individuals perceive themselves as more motivated by intrinsic, ethical factors than other individuals.[47]

Differing motivations may affect whether a whistleblower reports wrongdoing internally or externally.[48] For example, if employees are concerned about their colleagues' wrongdoing, they may opt to make internal reports.[49] On the other hand, if they are motivated by a desire to protect the public welfare or to stop a large-scale violation that the whole company is involved in, they may choose to report to external parties.[50]

Whistleblowers must also make their decisions about whether to report wrongdoing in light of substantial disincentives to refrain from acting: "[i]t is difficult emotionally, personally, intellectually and professionally to come forward and blow the whistle on one's employer, colleagues and friends."[51] Empirical evidence has shown that whistleblowers can suffer psychological, professional, and even physical harm as a result of their disclosures.[52]

Potential whistleblowers may be reluctant to act because of a strong fear of social ostracism.[53] This can range from receiving the "cold shoulder" or "silent treatment" from colleagues to full-blown social rejection.[54] Whistleblowers may find themselves excluded from emails, offices memos, and other communications,[55] and are often viewed as "problem

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No. 288, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900370) (noting that these situations result in the negative effect of eliminating intrinsic motivations while not introducing sufficiently strong incentives to achieve the desired behavior through extrinsic motivation).

45. Feldman & Lobel, *supra* note 35, at 1203.

46. *Id.*

47. *Id.* "These findings are generally in line with the psychological holier-than-thou effect—the general belief of individuals that they themselves are more ethically driven than others." *Id.*

48. Campbell, *supra* note 26, at 570.

49. *Id.*

50. *Id.*

51. Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 118 (2007) (quoting Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 61 (2002)).

52. 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, 16 (2007).

53. Rapp, *supra* note 51, at 120. "A century ago, William James wrote that '[n]o more fiendish punishment could be devised' than social ostracism. Ostracism threatens a basic human motivation to avoid exclusion from important social groups." *Id.*

54. *Id.*

55. *Id.* at 120–21.

employees."[56] These forms of ostracism can have a strong psychological and even physical impact on a whistleblower.[57] Psychologically, aside from the effects stemming from social ostracism, whistleblowers can suffer from "nagging doubts that their suspicions are not justified and that they may be, or may be perceived as, 'crazy.'"[58] Many whistleblower cases can drag on for years, during which time the psychological strains and doubts experienced by both the whistleblower and those closest to him or her can have severe consequences, leading many whistleblowers to lose their families.[59]

Professionally, even with antiretaliation protections, whistleblowers can find themselves without a job, since a revelation of serious fraud can destroy the corporation they work for.[60] Moreover, even if whistleblowers do not continue working for their employer, they may fear being blacklisted by the industry that they work in.[61] Whistleblowers commonly fear that they will be "boycotted" by companies—even an entire industry—and that they will have to "live their lives in misery, shunned by employers."[62] Thus, whistleblowers "often face the difficult choice between telling the truth and the risk of committing 'career suicide.'"[63] Those who rank higher in the managerial hierarchy may be more sensitive to the risk of being blacklisted, since they are more likely to have industry-specific skills.[64] This can significantly affect the amount and quality of information that is revealed, since higher-ranking employees tend to have a wider view of the organization and are likely to have better information about wrongdoing.[65]

Interestingly, the social and professional stigmas that a whistleblower may face vary depending on the perceived motivations behind the whistleblower's actions.[66] Whistleblowers acting in response to a duty to report can be viewed in a better light than those who act—or are perceived to act—in response to a monetary reward.[67] One experimental study has shown that even when the potential rewards are low, and even when they are combined with a duty to report, whistleblowers receive low levels of social respect and appreciation.[68] Conversely, when there is no monetary reward, whistleblowers seem to draw consistently higher levels of social

56. John Ashcroft et al., *Whistleblowers Cash In, Unwary Corporations Pay*, 40 HOFSTRA L. REV. 367, 407 (2011).

57. Rapp, *supra* note 51, at 121.

58. *Id.* at 123 (quoting ROBIN PAGE WEST, ADVISING THE QUI TAM WHISTLEBLOWER: FROM IDENTIFYING A CASE TO FILING UNDER THE FALSE CLAIMS ACT 30 (2001)).

59. *Id.*

60. *Id.* at 119.

61. *Id.* at 124. While antiretaliation protections can help whistleblowers keep their jobs with their original employers, future employers may discriminate against them. *Id.*

62. *Id.*

63. S. REP. NO. 111-176, at 111 (2010).

64. Engstrom, *supra* note 44.

65. *Id.*

66. Feldman & Lobel, *supra* note 35, at 1205.

67. *Id.*

68. *Id.*

admiration.[69] Thus, whistleblowers' perceived motivation can affect whether they are praised or stigmatized for their actions, and this perceived motivation is in turn affected by how whistleblowers are incentivized.[70]

Because of these different societal responses, whistleblowers may experience a range of consequences as a result of their actions. The next section explores the different ways in which society views and portrays whistleblowers, and how this ultimately shapes their experiences.

b. The Whistleblower Experience: From Rats and Snitches to Persons of the Year

This section explores varying societal attitudes toward whistleblowers and how they affect their overall experience. Additionally, this section examines the experiences of several high-profile whistleblowers in recent history. As discussed below, these individuals have been instrumental in changing the legal—and perhaps also the societal—treatment of whistleblowers.

In the past, whistleblowers have been portrayed negatively, even as "lowlife[s] who betray[] a sacred trust largely for personal gain."[71] This view seems to have shifted to the opposite extreme in recent years: whistleblowers are now often portrayed in the media as taking heroic steps that may potentially stop corrupt practices.[72] The change in society's portrayal of whistleblowers may correspond to the passage of corporate laws and regulations that "express a decidedly moral view of whistleblowers as allies in the fight against corporate fraud, bribery, and corruption."[73] Historically, policymakers openly viewed and referred to whistleblowers in negative, derogatory terms, calling them "rat[s]" and "snitches."[74] For example, in a 1998 congressional debate about the Internal Revenue Service's whistleblower program, one senator called it the "Snitch Program" and the "Reward for Rats Program."[75] A former Reagan Administration official who was in charge of the federal whistleblower program referred to whistleblowers as "malcontents."[76]

In light of this poor view of whistleblowers, it is not surprising that their disclosures were viewed negatively: one prominent example is the response to A. Ernest Fitgerald's disclosures.[77] Fitzgerald was a

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69. *Id.*
70. *Id.*
71. *Id.* at 1159 (alteration in original) (quoting TERANCE D. MIETHE, WHISTLEBLOWING AT WORK: TOUGH CHOICES IN EXPOSING FRAUD, WASTE, AND ABUSE ON THE JOB 12 (1999).
72. *Id.*
73. Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act "Bounty Hunting,"* 45 CONN. L. REV. 483, 490 (2012).
74. *Id.* at 491 (alteration in original).
75. *Id.*
76. *Id.*
77. *See* Jocelyn Patricia Bond, *Efficiency Considerations and the Use of Taxpayer Resources: An Analysis of Proposed Whistleblower Protection Act Revisions*, 19 FED. CIR. B.J. 107, 107 (2009).

management analyst with the Department of the Air Force[78] and made history in 1968 by testifying before the Joint Economic Committee regarding the Pentagon's $2 billion cost overruns on an aircraft program.[79] As a federal government employee, his public disclosures regarding government inefficiency were considered unthinkable at the time.[80] Although Fitzgerald was later hailed as "the father of all whistleblowers" for his courageous efforts in protecting American taxpayers, his initial experience was very different: "he was branded as disloyal to his country, lost his job, and sparked a firestorm of media and Congressional attention."[81]

When President Richard Nixon was questioned about Fitzgerald's dismissal at a press conference, he promised to look into the matter.[82] Some time later, in an internal memorandum addressing Fitzgerald's possible reassignment, a White House aide remarked, "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game."[83] The aide recommended that the administration "let him bleed, for a while at least."[84] Eventually—and after a lengthy court battle that reached the U.S. Supreme Court—Fitzgerald was, by court order, reinstated to a position in the executive branch.[85]

The Nixon Administration was later implicated in the Watergate scandal—another high-profile case involving a whistleblower—which eventually led to President Nixon's resignation.[86] Mark Felt, infamously known as "Deep Throat," leaked the story that President Nixon's reelection campaign had broken into the Democratic National Committee Headquarters using illegally acquired corporate funds.[87] Subsequent investigations revealed that corrupt foreign payments—in the amounts of hundreds of millions of dollars—were made by publicly traded U.S. companies.[88] Congress enacted the Foreign Corrupt Practices Act of 1977[89] (FCPA) in response to these revelations.[90] Among other things, the FCPA introduced requirements for companies registered with the SEC to have internal controls, including internal whistleblower procedures.[91]

78. Nixon v. Fitzgerald, 457 U.S. 731, 733 (1982).

79. Bond, *supra* note 77, at 107. Some of Fitzgerald's more famous disclosures included those related to the Pentagon's expenditures on $7,622 coffee pots, $670 passenger-seat arm rests, and $200 hammers. *Id.*

80. *Id.*

81. *Id.*

82. *Fitzgerald*, 457 U.S. at 735.

83. *Id.* at 735–36 (internal quotation marks omitted).

84. *Id.* at 736 (internal quotation marks omitted).

85. Bond, *supra* note 77, at 107.

86. Vega, *supra* note 73, at 493.

87. *Id.*

88. *Id.*

89. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in 15 U.S.C. §§ 78dd-1 to -3 (2012)).

90. Vega, *supra* note 73, at 494.

91. *See* 15 U.S.C. § 78m(b)(2)(B).

Therefore, whistleblower Mark Felt's actions led to the "first transformative moment for whistleblowers in corporate governance."[92]

The next transformative moment took place after Sherron Watkins and Cynthia Cooper uncovered major financial scandals: the Enron and WorldCom scandals.[93] In response, Congress passed the Sarbanes-Oxley Act of 2002[94] (SOX).[95] Among other things, SOX included the "first set of comprehensive federal whistleblower provisions protecting employees who raise concerns about a violation of any federal criminal statute."[96]

In 2001, Watkins submitted an anonymous internal memorandum to Enron Chairman Ken Lay that began with the sentence "I am incredibly nervous that we will implode in a wave of accounting scandals."[97] Watkins knew that the company's assets were artificially inflated via an elaborate accounting hoax.[98] Shortly after sending the memo, Watkins met with Lay, provided five new memoranda detailing the issues, and encouraged him to hire an independent law firm to conduct an investigation.[99] Although Watkins urged Lay not to hire the law firm that had helped structure some of the questionable deals in the first place, Lay proceeded to do so.[100] The law firm conducted a limited investigation and reported that the transactions were unproblematic.[101] Enron filed for bankruptcy three months later.[102]

After learning of Watkins's contact with Lay, Andrew Fastow—Watkins's supervisor and the company's chief financial officer—reportedly wanted to seize her computer and fire her.[103] Watkins requested a transfer to another department and her computer was returned to her, however her work assignments decreased drastically.[104] Moreover, it later emerged that when Lay instructed the law firm to investigate Watkins's concerns, he also requested that the firm assess whether Watkins could be fired without any legal repercussions.[105] Although Watkins was named one of *Time* magazine's "Persons of the Year" in 2002, she reported that she was ostracized at the company after her disclosures.[106]

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92. Vega, *supra* note 73, at 493.

93. *Id.* at 494. In 2002, Watkins and Cooper were named *Time* magazine's "Persons of the Year." *Id.* at 496.

94. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15 and 18 U.S.C.).

95. Vega, *supra* note 73, at 495.

96. *Id.*

97. Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 360 (2003).

98. *Id.* at 360–61.

99. *Id.* at 361.

100. *Id.*

101. *Id.*

102. *Id.* at 362.

103. Dan Ackman, *Sherron Watkins Had Whistle, But Blew It*, FORBES (Feb. 14, 2002, 3:50 PM), http://www.forbes.com/2002/02/14/0214watkins.html.

104. Brickey, *supra* note 97, at 362–64 & nn.28–30.

105. *Id.* at 362–63.

106. Tippett, *supra* note 52, at 17. Cynthia Cooper, who was named one of *Time* magazine's "Persons of the Year" along with Watkins, similarly discovered massive fraud

As discussed in the Introduction to this Note, the most recent major development with respect to whistleblowers and corporate governance, the Dodd-Frank Act, was passed in response to the massive fraud perpetrated by Bernie Madoff.[107] Whistleblower Harry Markopolos, who worked at a rival firm, researched Madoff's supposed trading strategy and "became convinced that [his] returns were not real."[108] Although Markopolos tried to alert the SEC at least five times,[109] he was ignored for years.[110] During this time, and until Madoff was finally in federal custody, Markopolos said he feared for his life, particularly because he believed that some of the billions of dollars at stake belonged to the Russian mafia and drug cartels and that these groups would "kill to protect their investments."[111] In his book, Markopolos revealed that he checked under the chassis and wheel wells before starting his car, walked away from shadows at night, and slept with a loaded gun nearby.[112] In February 2009, Markopolos testified before Congress's Financial Services Committee and exposed the SEC's failure to detect Madoff's fraud.[113] In July 2010, President Barack Obama signed the Dodd-Frank Act into law.[114]

These examples of whistleblowers' attempts to uncover corruption show that they often face severe professional and personal repercussions and are regularly retaliated against or ignored, even when the underlying fraud is potentially devastating. As discussed above, the various laws that were enacted in response to these whistleblowers' experiences and attempts to reveal fraud all increased whistleblower protection in some way. The next section explores some of the different reasons for providing this protection.

c. Why Should We Protect Whistleblowers?

The experiences of the high-profile whistleblowers discussed in the section above show that a whistleblower's attempts to reveal wrongdoing are not always received positively. Part I.B and Part I.C below discuss the various statutory and common law whistleblower protections that aim to counterbalance this effect. Before discussing these protections, this section explores the reasons for them: why should society protect or even encourage actions by whistleblowers? Numerous policy reasons have been

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orchestrated by WorldCom's chief financial officer and reported it to the board of directors. Vega, *supra* note 73, at 494–95.

107. *See supra* notes 11–19 and accompanying text.

108. Vanessa Castellina, *The New Financial Incentives and Expanded Anti-retaliation Protections for Whistleblowers Created by Section 922 of the Dodd-Frank Act: Actual Progress or Just Politics?*, 6 BROOK. J. CORP. FIN. & COM. L. 187, 187 (2011).

109. *Id.*

110. *Id.* at 188; *see also supra* notes 14–17 and accompanying text.

111. Harry Markopolos, *Excerpt: 'No One Would Listen,'* NPR (Mar. 2, 2010, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=124208012.

112. *Id.*

113. Castellina, *supra* note 108, at 188.

114. *Id.*

put forward to answer this question.[115] These justifications can be organized into three broad categories, discussed below.[116]

First, protecting whistleblowers encourages legal compliance by their employers, which in turn benefits public welfare.[117] By playing a prominent role in discovering and exposing misconduct, whistleblowers incentivize organizations to prevent or stop illegal activity, which is "a valuable service to both their employers and the public at large."[118] Moreover, if organizations account for the possibility of employees becoming whistleblowers, this can deter misconduct in the first instance.[119] According to this justification, because whistleblowers face inherent risks for their actions, they should be incentivized to "break the code of silence in corrupt organizations."[120]

The second popular justification for protection is related to efficiency: whistleblowers partially lighten the burden on government regulators.[121] Without whistleblowers, government regulators would need to dedicate more resources to detecting and investigating illegal activity.[122] In other words, whistleblowers can play a helpful law enforcement role in revealing wrongdoing.[123] Some have gone so far as to say that "[t]he primary goal of many federal statutes, therefore, is not protection of the whistleblower. Rather, provisions protective of whistleblowers were included primarily as tools by which to advance the objectives of the legislation."[124] According to this theory, as regulatory agents' budgets shrink, whistleblowers play an increasingly important law enforcement role.[125]

Finally, the third broad category of justifying protection for whistleblowers is related to fairness and justice.[126] Justifications in this category argue that because whistleblowers are "trying to do the right thing,"[127] society should not punish them, and in fact, should try to protect them.[128]

Having discussed who whistleblowers are and the different justifications for protecting them, the next section discusses the main mechanisms for doing so.

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115. Banick, *supra* note 28, at 1874.
116. *Id.*
117. *Id.*
118. Gerard Sinzdak, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1635 (2008).
119. *Id.* at 1636.
120. Feldman & Lobel, *supra* note 35, at 1159.
121. Banick, *supra* note 28, at 1875–76.
122. *Id.*
123. Tippett, *supra* note 52, at 21–22.
124. *Id.* at 22 (alteration in original) (quoting Trystan Phifer O'Leary, *Silencing the Whistleblower: The Gap Between Federal and State Retaliatory Discharge*, 85 IOWA L. REV. 663, 663 (2000)).
125. *Id.*
126. Banick, *supra* note 28, at 1876.
127. *Id.*
128. *Id.*

3. How Can We Protect Whistleblowers?

In order to examine existing whistleblower protection regimes (and their gaps) it is useful to first discuss the different available mechanisms for protection. Providing whistleblowers with incentives, protection, or both—the ultimate goals—can be approached in different ways. There are four different ways that whistleblower protection laws generally work: (1) remedies focused on retaliation against whistleblowers, (2) remedies that reward whistleblowers, (3) remedies that reward employers for investigating wrongdoing and protecting whistleblowers, and (4) remedies that punish inaction by would-be whistleblowers.[129]

a. Remedies Focused on Retaliation

Antiretaliation protection—and its application to in-house attorney whistleblowers—is a central issue in this Note. Retaliation-based remedies are the primary way by which state and federal laws have sought to protect whistleblowers.[130] Many antiretaliation protections were developed in response to scandals such as Enron and WorldCom, where many employees stayed silent due to fear of retribution.[131] These remedies afford whistleblowers a cause of action in the event that their employer retaliates against them for blowing the whistle.[132] Although state and federal whistleblower protection statutes vary considerably, almost all of them include an antiretaliation element.[133] Typically, state and federal statutes bar employers from either discharging or otherwise discriminating against a whistleblower for their disclosure.[134] Retaliation that "might dissuade a reasonable employee from blowing the whistle" is generally prohibited.[135]

Remedies focused on retaliation also exist in common law.[136] Employees who bring tort claims for wrongful discharge in violation of public policy must show that their employer retaliated against or terminated them because of their disclosure.[137] Thus, even in areas where no statute provides antiretaliation protection, courts have devised a tort-based cause of action by holding that employees cannot be terminated for reporting legal

129. Tippett, *supra* note 52, at 4–15.

130. *Id.* at 4. "The first, and historically primary, approach has been based on 'retaliation-based remedies.'" Banick, *supra* note 28, at 1879.

131. Feldman & Lobel, *supra* note 35, at 1161. Even celebrated Enron whistleblower, Sherron Watkins, waited until after chief executive officer Jeffrey Skilling resigned before she approached Chairman Ken Lay. Watkins feared she would be fired; in fact, the company treasurer, Jeff McMahon, was transferred after complaining to Skilling about the "veil of secrecy" surrounding the company's accounting. Michael Duffy, *By the Sign of the Crooked E*, TIME (Jan. 19, 2002), http://content.time.com/time/business/article/0,8599,195268,00.html.

132. Tippett, *supra* note 52, at 4.

133. *Id.* at 6.

134. *Id.*

135. *Id.*

136. *Id.* at 7.

137. *Id.*

violations.[138] However, courts vary in the extent to which they extend antiretaliation protections to "different channels of reporting, different types of reported misconducts, and different categories of workers."[139]

b. Remedies That Reward Whistleblowers

Another type of remedy incentivizes employees to report misconduct by providing financial rewards for certain disclosures.[140] This reward-based type of remedy is available under both federal and state statutes.[141] The Dodd-Frank Act, discussed further in Part II.B.3, is one example of this type of remedy.[142]

Reward-based incentives are not as prevalent as antiretaliation protection and are both controversial and understudied.[143] Scholars have noted the success of reward-based remedies in recovering government funds and rewarding whistleblowers.[144] On the other hand, critics of reward-based whistleblower remedies point out that they can be unsavory to the public, lead to a backlash against whistleblowers, and motivate frivolous claims.[145] With respect to attorneys in particular, it may be undesirable for them to be rewarded for reporting misconduct, since this could potentially incentivize them to violate professional and ethical rules such as attorney-client confidentiality.[146]

c. Remedies That Reward Employers

A third method to protect whistleblowers and promote their actions is to provide their employers with incentives to support them.[147] This remedy emerged in reaction to both the "federal corporate sentencing guidelines, which provide for reduced penalties for organizations that attempt to detect and address wrongdoing,"[148] and the Supreme Court ruling in *Faragher v.*

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138. Feldman & Lobel, *supra* note 35, at 1162.

139. *Id.* at 1163. For a discussion of wrongful discharge claims, see *infra* Part II.C.2.

140. Tippett, *supra* note 52, at 8–9.

141. *Id.* at 9.

142. *See infra* Part II.B.3.

143. Feldman & Lobel, *supra* note 35, at 1168.

144. *See, e.g.*, Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 101 (2000); James Fisher et al., *Privatizing Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries*, 19 DICK. J. INT'L L. 117, 138 n.55 (2000); *see also* Tippett, *supra* note 52, at 9.

145. Tippett, *supra* note 52, at 10. Even a small monetary reward can cause a negative reaction toward the whistleblower. *See supra* notes 67–70 and accompanying text.

146. Banick, *supra* note 28, at 1879–80. This Note focuses on the antiretaliation protections afforded to attorney whistleblowers. Whether or not attorneys should be able to take advantage of whistleblower rewards is beyond the scope of this Note. For a discussion of this topic, see Joan C. Rogers, *Ethics Rules Stop Most Corporate Lawyers from Seeking Federal Whistle-Blower Bounty*, 29 Laws. Man. on Prof. Conduct (ABA/BNA) 677 (Oct. 23, 2013).

147. Tippett, *supra* note 52, at 10.

148. *Id.*

City of Boca Raton,[149] which "provides employers with an affirmative defense in harassment cases where the employer takes reasonable measures to prevent and address harassment."[150] Under the corporate sentencing guidelines, employers may be able to take advantage of reduced liability if they are able to demonstrate that they had procedures to protect whistleblowers.[151] Meanwhile, the "*Faragher* defense"[152] is becoming more popular in situations involving whistleblowers.[153]

Generally, there are arguments supporting a shift from an emphasis on external to internal whistleblower reporting.[154] The goal of this shift is to incentivize the organization to stop misconduct earlier and perhaps completely, rather than focusing on punishing organizations that fail to stop misconduct.[155] Shifting the primary focus away from the need to punish organizations saves government funds.[156] Proponents of this type of remedy argue that by incentivizing employers to improve internal reporting structures, disclosure is more likely to be made internally, which results in less harm to both the whistleblower and the employer.[157] Internal reporting can also be considered to be more ethical than external reporting.[158]

On the other hand, opponents argue that incentivizing employers to improve internal reporting mechanisms will cause employers to invest less in remedying the underlying wrongdoing.[159] Additionally, courts may not have the appropriate expertise to evaluate internal reporting and compliance structures,[160] which can make this remedy difficult to enforce or encourage. The different arguments for and against both internal and external reporting are discussed further in Part II.A.

d. Remedies That Compel Whistleblowing

The legislation that followed the early twenty-first century financial scandals included a range of affirmative duties.[161] Affirmative duties—which, in effect, require mandatory whistleblowing—are usually limited to senior corporate officers and members of select professions, such as

149. 524 U.S. 775 (1998).
150. *Id.* at 807–08; *see also* Tippett, *supra* note 52, at 10.
151. Tippett, *supra* note 52, at 10–11.
152. *Id.* at 11.
153. *Id.*
154. Terry Morehead Dworkin, *Whistleblowing, MNCs, and Peace*, 35 VAND. J. TRANSNAT'L L. 457, 463 (2002).
155. Tippett, *supra* note 52, at 11.
156. Dworkin, *supra* note 154, at 463; *see also supra* notes 121–25 and accompanying text.
157. Tippett, *supra* note 52, at 11.
158. Dworkin, *supra* note 154, at 463.
159. Tippett, *supra* note 52, at 11.
160. *Id.*
161. Feldman & Lobel, *supra* note 35, at 1164 ("For example, the affirmative reporting duties imposed under SOX extend to both attorneys and executives of public companies subject to SEC proceedings or investigations.").

attorneys.[162] Usually, these duties are limited to situations where either the victim of potential misconduct is especially vulnerable or where the resulting harm will be widespread.[163]

Many affirmative duties impose civil and criminal liabilities in the event of a failure to report.[164] In their most extreme form of criticism, these forms of mandatory whistleblowing or punitive whistleblowing remedies have been seen "as an affront to civil liberties and have been compared to Nazi Germany, Stalinist Russia, and McCarthyism."[165] However, some statutes still do mandate whistleblowing in limited situations.[166] For example, New Jersey and Florida rules require lawyers to disclose a client's intent to commit a future crime.[167]

A leading example of a punitive approach to whistleblowing, and one that is prominently featured in this Note, is SOX, discussed further in Part II.B.2. Although some parts of SOX still require corporate actors to report misconduct in specific situations,[168] the SEC initially intended the Act to have more stringent mandatory whistleblowing requirements.[169] Originally, the SEC proposed regulations that mandated attorneys to withdraw representation from public companies that failed to respond adequately to corporate fraud allegations and to alert the SEC of their withdrawal.[170] This "noisy withdrawal" requirement was vehemently opposed and was eventually dropped from the final regulation.[171]

While SOX does not require corporate actors to directly report violations to government regulators, it does require them to make internal disclosures or investigations in certain situations.[172] However, the positive reporting obligations in SOX are limited to the most senior ranks of the corporation, thereby narrowing the affirmative duty to report to those that are able to prevent violations early on.[173] Since SOX does not reward disclosure but does punish inaction,[174] it is an example of a punitive approach to promoting whistleblowing.

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162. *Id.* at 1163.
163. *Id.*
164. *Id.*
165. Tippett, *supra* note 52, at 12.
166. *Id.*
167. *Id.*; *see also* FLA. RULES OF PROF'L CONDUCT R. 4-1.6(b)(1) ("A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary: . . . to prevent a client from committing a crime . . . . "); N.J. CT. R. 1.6(b) ("A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person . . . from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another . . . .").
168. Tippett, *supra* note 52, at 13.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 14.
173. Feldman & Lobel, *supra* note 35, at 1164.
174. Tippett, *supra* note 52, at 13–14.

Having discussed who whistleblowers are, why they should be protected, and the different mechanisms for protecting them, the next two sections of this Note explore some existing whistleblower protection regimes that are relevant to federal securities violations.

B. The Federal Securities Laws Protecting Whistleblowers

Part I.B gives an overview of the main protections afforded to whistleblowers at a federal level, particularly with respect to whistleblowers who report federal securities law violations.

1. General Federal Whistleblower Protections

Laws protecting federal employees who become whistleblowers have existed for more than three decades.[175] The Whistleblower Protection Act of 1989[176] (WPA) forbids federal government employers from retaliating against employees for whistleblowing[177] and is currently the primary federal statute that encourages and protects whistleblowers who are federal employees.[178] However, the WPA does not protect employees of private organizations.[179] Therefore, employees of private organizations may have to look to other federal statutes, or remedies under state law, for whistleblower protection.[180] However, many whistleblower protection provisions are included as "one mechanism within greater enforcement schemes" in various federal statutes.[181] These statutes can be limited in scope in that they protect disclosures within specific industries.[182]

In contrast to the WPA, which protects only federal employees, whistleblower protections under the False Claims Act[183] (FCA) cover disclosures that reveal attempts to defraud the federal government.[184] Although the FCA covers a wide range of activities relating to the federal government,[185] and is one of the most well-known statutes offering whistleblower awards, it is aimed at recovering government funds.[186] Since the FCA only provides whistleblower protection for those who make

175. Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 WM. & MARY POL'Y REV. 184, 185 (2012) ("Whistleblower protection laws have been on the books for over thirty years, encouraging United States Government employees to report fraud, waste, and abuse, while promising to protect them from retaliation.").

176. Pub. L. No. 101-12, 103 Stat. 16 (codified in scattered sections of 5 U.S.C.).

177. Banick, *supra* note 28, at 1876–77.

178. McCarthy, *supra* note 175, at 186.

179. Banick, *supra* note 28, at 1877.

180. *Id.* at 1877–78.

181. *Id.* at 1877 n.42.

182. *Id.* For example, the Toxic Substances Control Act, 15 U.S.C. § 2622(a) (2012), protects employees who commence, testify in, assist, or participate in actions related to the reporting and testing of chemical substances. *Id.*

183. 31 U.S.C. §§ 3729–3733.

184. *See generally* Douglas K. Rosenblum & John A. Schwab, *FCA 101: A Practitioner's Guide to the False Claims Act*, 26 CRIM. JUST. 26 (2011).

185. *Id.* at 27.

186. Tippett, *supra* note 52, at 9.

disclosures about fraud against the federal government,[187] whistleblowers who make disclosures about fraud against private parties will have to look elsewhere for protection.

In the realm of federal securities law, whistleblowers who are private employees, or who make disclosures about private organizations, may find protection under SOX or the Dodd-Frank Act. These are discussed in turn below.

2. The Sarbanes-Oxley Act

As mentioned in Part I.A.3, SOX was signed into law predominantly in response to large-scale corporate scandals such as Enron and WorldCom.[188] The legislation, which at least in the past has been called "the gold standard" of whistleblower protection,[189] aimed to boost confidence in financial markets by regulating financial market reporting and improving protection for whistleblowers that report suspected wrongdoing.[190]

By enacting SOX, Congress introduced federal whistleblower protection to corporate America.[191] Public companies are prohibited from demoting, suspending, threatening, harassing, or discriminating against employees who engage in protected activities.[192] Under SOX, employees can disclose information relating to what they reasonably believe is a violation of federal securities law.[193] Thus, while some whistleblower protection provisions *require* a violation to have actually occurred for a whistleblower to be protected, under SOX an employee only needs to *reasonably believe* that it did.[194] Finally, whistleblowers are generally protected if they disclose information either internally, to a supervisor or to someone who has authority to investigate misconduct, or externally, to federal regulatory or law enforcement agencies or a member of Congress.[195]

The Occupational Safety and Health Administration (OSHA) enforces SOX's whistleblower antiretaliation provisions by conducting an

187. *Id.*

188. Chinyere Ajanwachuku, *An In-House Counsel's Decision To Whistleblow*, 25 GEO. J. LEGAL ETHICS 379, 381 (2012); Castellina, *supra* note 108, at 189; Sarah L. Reid & Serena B. David, *The Evolution of the SEC Whistleblower: From Sarbanes-Oxley to Dodd-Frank*, 129 BANKING L.J. 907, 908 (2012); Kevin Rubinstein, *Internal Whistleblowing and Sarbanes-Oxley Section 806: Balancing the Interests of Employee and Employer*, 52 N.Y.L. SCH. L. REV. 637, 638 (2008).

189. Feldman & Lobel, *supra* note 35, at 1161 (citing Cynthia Eastland, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 376 (2005)).

190. Castellina, *supra* note 108, at 195.

191. Rubinstein, *supra* note 188, at 646 ("The anti-retaliation provision applies to companies whose securities are registered under Section 12 of the Securities Exchange Act of 1934 . . . or companies that are required to file reports under Section 15(d) of the . . . Exchange Act.").

192. 18 U.S.C. § 1514A (2012). In November 2013, the U.S. Supreme Court extended this protection to employees of private contractors and subcontractors that serve public companies. Lawson v. FMR LLC, 134 S. Ct. 1158 (2013).

193. Rubinstein, *supra* note 188, at 647.

194. *Id.*

195. 18 U.S.C. § 1514A(a)(1)(A)–(C).

administrative proceeding after a whistleblower files a complaint.[196] An employee who has faced adverse treatment from an employer for reporting misconduct has ninety days from the date of the discrimination to bring a claim to OSHA.[197] If there is no decision within 180 days, the whistleblower can bring the claim in a federal district court for de novo review.[198] Furthermore, if OSHA does issue a final order, an aggrieved party has the option of filing an appeal in a federal district court.[199]

By protecting private employees who disclose potential federal securities violations, the passage of SOX increased awareness of the need for corporate governance structures.[200] The passage of the Dodd-Frank Act was "a step farther on that continuum," both by providing financial incentives for whistleblowers to come forward and by providing enhanced whistleblower protections.[201]

3. The Dodd-Frank Act

As discussed in the Introduction to this Note, in July 2010, in response to the 2008 financial crisis, Congress enacted the Dodd-Frank Act to bolster accountability and transparency within the U.S. financial system.[202] One of the ways in which Congress intended to achieve this goal was to incentivize whistleblowers to share their information with the government.[203] Partly prompted by the Madoff scandal,[204] the Dodd-Frank Act amended the Securities Exchange Act of 1934 by protecting and rewarding those who help the SEC enforce securities law.[205] In addition to providing financial incentives for whistleblowers, the Dodd-Frank Act "strengthens the anti-retaliation provisions of SOX."[206]

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196. Rubinstein, *supra* note 188, at 648.

197. 18 U.S.C. § 1514A(b)(2)(D).

198. *Id.* § 1514A(b)(1)(B).

199. 29 C.F.R. § 1980.112(a) (2013).

200. Ashcroft et al., *supra* note 56, at 373.

201. Mark J. Oberti, *New Wave of Employment Retaliation and Whistleblowing*, 38 T. MARSHALL L. REV. 43, 86–87 (2012) (quoting JOHN S. ADLER ET AL., THE LITTLER REPORT, DODD-FRANK AND THE SEC FINAL RULE: FROM PROTECTED EMPLOYEE TO BOUNTY HUNTER 1 (2011), *available at* http://www.littler.com/files/press/pdf/LittlerReportDoddFrankAndTheSECFinalRule.pdf).

202. Dodd-Frank Wall Street and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered titles of the 7, 12, 15, 18, 22, 31, and 42 U.S.C.); Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 622–23 (5th Cir. 2013).

203. Recent Legislation, *Dodd-Frank Act, Pub. L. No. 111-203, § 922, 134 Stat. 1376, 1841–49 (2010) (to be codified at 15 U.S.C. § 78u-6)*, 124 HARV. L. REV. 1829, 1829–30 (2011).

204. *See supra* notes 107–14 and accompanying text.

205. *Potential Circuit Split Creates an Uncertain Future for Whistleblower Protection of Internal Reporting*, CLIENT ALERT (White & Case LLP, New York, N.Y.), July 2013, at 1, *available at* http://www.whitecase.com/files/Publication/3751dc20-7b59-4509-a63a-44b10080182d/Presentation/PublicationAttachment/1c96e6b5-0741-4ddb-85b2-4bebfa027176/alert-whistleblower-protection-internal-reporting.pdf.

206. Castellina, *supra* note 108, at 199.

The securities whistleblower incentives and protections provisions of the Dodd-Frank Act encourage whistleblowers to report possible violations by requiring the SEC to pay monetary awards to those who provide information that leads to a successful enforcement action related to a federal securities violation.[207] Whistleblowers who provide the SEC with original information that leads to a successful enforcement are awarded between 10 to 30 percent of the recovered funds.[208]

The Dodd-Frank Act also provides a private cause of action for whistleblowers who allege that an employer has retaliated against them for making a protected disclosure.[209] Therefore, in contrast to whistleblowers who must file antiretaliation claims with OSHA for protection under SOX,[210] under the Dodd-Frank Act, they can file actions directly in federal courts.[211] Additionally, the Dodd-Frank Act increases the statute of limitations to either "six years from the date of the violation, or three years after the employee knew or should have known the material facts relating to the violation."[212] This provides an extended time period for whistleblowers and their ability to bring retaliation claims, compared to the ninety-day window provided under SOX.[213]

The securities whistleblower incentives and protections section of the Dodd-Frank Act initially defines the term "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."[214] This definition "expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower'" under the Dodd-Frank Act.[215] Therefore, those who report violations internally generally do not qualify as whistleblowers under this definition.

However, the antiretaliation section of the Dodd-Frank Act separately outlines protections for whistleblowers who make "disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission."[216]

One interpretation of this provision is that it "establishes a narrow exception to . . . [the] definition of 'whistleblower,' and protects an

207. 15 U.S.C. § 78u-6 (2012).
208. *Id.* § 78u-6(b)(1). Therefore, the Dodd-Frank Act includes a reward-based remedy to incentivize whistleblowers to come forward with information.
209. *Id.* § 78u-6(h)(1)(B)(i).
210. *See supra* notes 196–99 and accompanying text.
211. 15 U.S.C. § 78u-6(h)(1)(B)(i).
212. *Id.*
213. *See supra* note 197 and accompanying text.
214. 15 U.S.C. § 78u-6(a)(6).
215. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 623 (5th Cir. 2013).
216. 15 U.S.C. § 78u-6(h)(1)(A)(iii).

employee who makes any of that provision's enumerated disclosures."[217] Under this reading of the provision, those who disclose violations within these exceptions can still be afforded antiretaliation protection, even if they do not report directly to the SEC.[218] As a result of this ambiguity, courts in the Second, Fifth, Sixth, and Tenth Circuits have disagreed on how to reconcile the whistleblower definition and antiretaliation provisions of the Dodd-Frank Act.[219] This has resulted in an extra layer of ambiguity regarding how in-house attorney whistleblowers are expected to respond to potential federal securities violations.[220]

Under the authority delegated to it by Congress, the SEC promulgated a final rule in August 2011 to implement the Dodd-Frank Act.[221] The regulations clarify the relationship between the provisions of the Dodd-Frank Act that define the term "whistleblower" and those that provide antiretaliation protections.[222] In its comments to the rule, the SEC explained that the antiretaliation protections apply to "individuals who report to persons or governmental authorities *other than the Commission*."[223] Moreover, the rule went a step further by providing additional incentives for whistleblowers to make internal disclosures.[224] By voluntarily using the organization's internal reporting structure, whistleblowers may be eligible for a higher reward, should a successful enforcement action ever take place.[225] Additionally, if a whistleblower internally reports misconduct that is later shared with the SEC by another party, such as the organization, the information will still be attributed to the whistleblower and he or she will still be eligible for an award.[226] Finally,

217. Murray v. UBS Sec., LLC, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *3 (S.D.N.Y. May 21, 2013).

218. *Id.*

219. *Compare Asadi*, 720 F.3d at 623 (denying antiretaliation protection to whistleblowers who do not report directly to the SEC), *with* Rosenblum v. Thomson Reuters (Markets) LLC, No. 13 Civ. 2219(SAS), 2013 WL 5780775 (S.D.N.Y. Oct. 25, 2013) (allowing antiretaliation protection for whistleblowers who do not report directly to the SEC), Ellington v. Giacoumakis, No. 13–11791–RGS, 2013 WL 5631046 (D. Mass. Oct. 16, 2013) (same), *Murray*, 2013 WL 2190084 (same), Genberg v. Porter, No. 11-cv-02434-WYD-MEH, 2013 WL 1222056 (D. Colo. Mar. 25, 2013) (same), Kramer v. Trans-Lux Corp., No. 3:11cv1424 (SRU), 2012 WL 4444820 (D. Conn. Sept. 25, 2012) (same), Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986 (M.D. Tenn. 2012) (same), *and* Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *3 (S.D.N.Y. May 4, 2011) (same).

220. The different steps that in-house counsel must take under different regimes are outlined in Part I.D and the resulting conflict is discussed in Part II.

221. 17 C.F.R. § 240.21F-2 (2014).

222. *Id.*

223. *Id.*; Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,301 (June 13, 2011) (emphasis added). As recently as October 2013, former SEC officials have noted that "Dodd-Frank and its implementing rules permit whistleblowers to report violations internally before or simultaneous with any reporting to the SEC." Brief of Former SEC Officials As Amici Curiae in Support of Respondents at 13, Lawson v. FMR LLC, 133 S. Ct. 2387 (2013) (No. 12-3), 2013 WL 5553459.

224. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,300–01.

225. 17 C.F.R. § 240.21F-6(a)(2).

226. *Id.* § 240.21F-4(b)(5).

should the whistleblower report information internally on a certain date, it can be treated as if he or she had reported the information to the SEC on that date.[227]

In *Murray v. UBS Securities, LLC*,[228] the Southern District of New York followed the SEC's interpretation described above. The plaintiff whistleblower sued his former employer under the Dodd-Frank Act for allegedly firing him in retaliation for his internal disclosures.[229] Murray was dismissed after he complained to his supervisors that he was, in violation of federal securities laws, being forced to produce misleading reports.[230] His former employer argued that whistleblowers who report information internally are not protected under the Dodd-Frank Act's antiretaliation provisions.[231]

The court applied the two-step analysis from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[232] to decide whether the SEC's interpretation of the Dodd-Frank Act warranted deference.[233] Noting that the tension between the definition and antiretaliation provisions of the Dodd-Frank Act results in an ambiguity,[234] the court moved to the second step of the *Chevron* analysis. At the second step, the court argued that the SEC's interpretation is reasonable, and that it therefore warrants deference.[235] The court also noted that the SEC's interpretation is consistent with the interpretations of four other district courts from the Second, Sixth, and Tenth Circuits.[236]

In October 2013, the Southern District of New York repeated this reasoning in *Rosenblum v. Thomson Reuters (Markets) LLC*.[237] Mark

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227. *Id.* § 240.21F-4(b)(7).
This can help cover whistleblowers who may otherwise fall outside the statute of limitations under the Dodd-Frank Act.

228. No. 12 Civ. 5914(JMF), 2013 WL 2190084 (S.D.N.Y. May 21, 2013).

229. *Id.* at *1–2.

230. *Id.*

231. *Id.* at *1.

232. *Id.* at *4. This analysis is used to determine whether or not a court must defer to an agency's interpretation of a statute—in this case, the SEC's interpretation of the Dodd-Frank Act. According to the Supreme Court,

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

233. *Murray*, 2013 WL 2190084, at *4.

234. *Id.*

235. *Id.* at *5.

236. *Id.*

237. No. 13 Civ. 2219(SAS), 2013 WL 5780775 (S.D.N.Y. Oct. 25, 2013).

Rosenblum suspected that his employer, Thomson Reuters, through one of its products, was releasing financial information to certain subscribers before others.[238] He suspected that this constituted insider trading and attempted to raise the issue with higher authorities.[239] After being discouraged more than once and being told to "stop trying to figure out what Thomson [was] doing wrong, and close more business," Rosenblum disclosed his concerns to the Federal Bureau of Investigation.[240] Some weeks after the disclosure, he was fired and subsequently brought an action against Thomson under the antiretaliation provisions of the Dodd-Frank Act.[241]

The defendant argued that the court should follow the Fifth Circuit's ruling in *Asadi v. G.E. Energy (USA), L.L.C.*,[242] decided a few months prior[243] in order to deny the plaintiff whistleblower antiretaliation protection under the Dodd-Frank Act.[244] Again, the court found the statute to be ambiguous and deferred to the SEC's interpretation, which it found reasonable.[245] The defendant's motion to dismiss (on this and other grounds) was denied,[246] and the plaintiff was allowed to proceed with his claim even though he did not report the violation in question directly to the SEC.[247]

Some months prior to *Rosenblum*, in July 2013, the Fifth Circuit ruled differently and dismissed an antiretaliation claim where the violation was reported internally, finding that the employee was not protected under the Dodd-Frank Act because he did not report the violation directly to the SEC.[248] In *Asadi*, Khaled Asadi brought suit against his former employer, G.E. Energy, claiming that he was dismissed after internally reporting to his supervisors that the company was violating the FCPA.[249]

The court addressed the opposing case law and the SEC regulation and determined that the "perceived conflict" between the definition and antiretaliation provisions of the Dodd-Frank Act "rests on a misreading of the operative provisions."[250] According to the court, the antiretaliation provisions of the Dodd-Frank Act "represent the protected activity in a whistleblower-protection claim. They do not, however, define which individuals qualify as whistleblowers."[251] Under this interpretation, the antiretaliation provisions protect whistleblowers from retaliation against

238. *Id.* at *1.
239. *Id.* at *1–2.
240. *Id.* at *2 (internal quotation marks omitted).
241. *Id.* at *1–2.
242. 720 F.3d 620 (5th Cir. 2013).
243. *See infra* notes 248–53 and accompanying text.
244. *Rosenblum*, 2013 WL 5780775, at *4.
245. *Id.* at *5.
246. *Id.* at *6.
247. *Id.* at *3.
248. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013).
249. *Id.* at 621.
250. *Id.* at 624–25.
251. *Id.* at 625.

any subsequent action or disclosure "that follows on the heels of the information initially provided to the SEC."[252] Thus, a whistleblower would be protected under Dodd-Frank against retaliation for disclosures under SOX, even if they were made internally, only *after* an initial disclosure to the SEC.[253]

The court in *Asadi* concluded that the SEC's regulation interpreted the term "whistleblower" too broadly and created an exception that conflicted with Congress's intent as demonstrated by the plain language of the Dodd-Frank Act.[254] This Fifth Circuit decision, along with the related uncertainty over the extent to which whistleblowers in general and attorneys in particular are protected under the Dodd-Frank Act, is discussed further in Part I.D.6.

Before exploring the ways in which different federal whistleblower protections apply to attorneys, the next section will discuss the different state laws that protect whistleblowers and why these can still be relevant to those who report federal securities violations.

C. The State Laws Protecting Whistleblowers

Although this Note addresses the conflicts experienced by in-house attorney whistleblowers who report *federal* securities violations, *state* laws can still be relevant. Even if a whistleblower is retaliated against for reporting a federal securities violation, he or she may still be able to pursue antiretaliation protection under a state whistleblower statute.[255] Moreover, if the retaliation is in the form of dismissal, the whistleblower may have a tort-based wrongful discharge cause of action under common law.[256] The sections below explain these two remedies.

1. State Whistleblower Statutes

All states now have whistleblower statutes,[257] and they all include some form of antiretaliation protection.[258] However, the protection of whistleblowers under state law still varies widely, both in the extent of protection provided under the statutes and in the judicial interpretations of the statutes.[259] For example, most states protect public employee whistleblowers, while a minority protects private employees as well.[260] Some state statutes limit protection depending on the type of violation that the whistleblower aimed to expose; for example, New York only protects whistleblowers who reveal violations that pose a "substantial and specific

252. *Id.* (citing 15 U.S.C. § 78u-6(h)(1)(A)(ii) (2012)).
253. *Id.*
254. *Id.* at 629–30.
255. *See infra* Part I.C.1.
256. *See infra* Part I.C.2.
257. Sinzdak, *supra* note 118, at 1641.
258. Rubinstein, *supra* note 188, at 643.
259. *Id.*
260. *Id.*

danger to public health or safety."[261] New Hampshire, on the other hand, extends protection to whistleblowers who, with reasonable belief, report a potential violation of any state law.[262] Overall, the major areas of distinction among state whistleblower protections include: which employees are protected, who the whistleblower should report to in order to be protected, what type of activity the whistleblower reports, whether or not the underlying violation must be actual or can be suspected, and what kind of remedies are available.[263]

The biggest division among states is to whom a whistleblower can report wrongdoing in order to be protected.[264] Several state statutes extend whistleblower protection only to employees who disclose misconduct externally to government bodies.[265] A few states *require* employees to first report suspected wrongdoing internally, to their employers, in order to benefit from whistleblower protection.[266] A handful of states are more flexible, allowing whistleblowers to make either internal or external reports.[267]

Therefore, whether or not a whistleblower is protected under a state statute may depend on what state they happen to be in. Even if a whistleblower is not protected under a state statute, the next section explores possible antiretaliation protections under common law.

2. Common Law Wrongful Discharge Tort Claims

Aside from statutory antiretaliation provisions, most states now recognize a cause of action under the common law tort of wrongful discharge.[268] Similar to statutory protections, state-by-state variations exist on the elements of a wrongful discharge claim.[269] Some of the differences are similar to the differences among state whistleblower protections; for example, there are state variations on wrongful discharge claims depending on whether the employee reports internally or externally, or on what type of violation the employee reports.[270] Some states do not provide a remedy under wrongful discharge if the whistleblower reports a federal law violation and only extend this protection if it was a state law violation.[271] Furthermore, in some states the state whistleblower statute has been

261. N.Y. LAB. LAW § 740(2)(a) (McKinney 2006).
262. N.H. REV. STAT. ANN. § 275-E:2 (2007).
263. Rubinstein, *supra* note 188, at 643; Sinzdak, *supra* note 118, at 1641–42.
264. Sinzdak, *supra* note 118, at 1633, 1642.
265. *Id.*
266. *Id.* at 1634.
267. *Id.* at 1642–43.
268. *Id.* at 1643 ("Around forty states recognize the common law tort of wrongful discharge in violation of public policy.").
269. *Id.*
270. *Id.*
271. *Id.*

interpreted to preempt a wrongful discharge claim for whistleblowers, while other states have allowed both remedies to coexist.[272]

One example of a state court interpretation of a wrongful discharge claim is *Nordling v. Northern States Power Co.*, where an in-house attorney brought a wrongful discharge tort claim against his former employer.[273] Nordling had complained to his superiors about what he believed was the unjustified surveillance of employees and the resulting invasion of the employees' privacy.[274] In response, Nordling's phone calls were monitored and he was accused of spending time on personal matters during the workday and of spending too much time outside of the office.[275] He was dismissed shortly thereafter.[276]

The Supreme Court of Minnesota dismissed Nordling's claim on the basis that the underlying misconduct for which he claimed to have been wrongfully discharged was not illegal under either federal or state law.[277] Although the surveillance "seem[ed] distasteful" and "ill-advised," the court reasoned, it was not illegal.[278] Therefore, his dismissal for complaining about the surveillance was not sufficient for the purposes of a wrongful discharge tort claim.[279]

Although the court in *Nordling* analyzed the wrongful discharge claim in terms of the legality of the violation that was reported, other courts have applied a completely different analysis to wrongful discharge claims brought by in-house attorney whistleblowers.[280]

D. Attorney Whistleblowers

Part I.D explores the special considerations of attorney whistleblowers and how they are treated under the various applicable whistleblower regimes. First, this Part discusses why attorneys in general, and in-house counsel in particular, face special considerations as whistleblowers. Next, it explores how whistleblower attorneys are expected to act under the various regimes that apply to them in the federal securities law context.

1. Why Do Attorney Whistleblowers Matter?

By nature of their professions, attorneys are especially well placed to act as whistleblowers.[281] Within their roles and due to their expertise, attorneys may already be responsible for leading corporate investigations

272. *Id.*
273. Nordling v. N. States Power Co., 478 N.W.2d 498, 500 (Minn. 1991).
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.* at 504.
278. *Id.*
279. *Id.*
280. *See infra* Part I.D.3 (discussing how state courts have treated the interplay between whistleblower protection laws and state rules of professional conduct).
281. Tippett, *supra* note 52, at 37.

into allegations of misconduct.[282] Moreover, attorneys are able to analyze "grey areas of fact and law to determine whether or not the alleged conduct is in fact illegal and whether the evidence supports the allegations."[283] In short, attorneys are better qualified to recognize wrongdoing, both because of their professional responsibilities and because of their expertise.[284]

Furthermore, when placed in a position where they have to make the decision of whether or not to report organizational misconduct, in-house attorneys are in a unique position of being both a lawyer for, and an employee of, the organization.[285] The relationship between an in-house attorney and his or her client "cannot be characterized solely as an attorney-client relationship, but must be viewed as an employer-employee relationship as well."[286] Unlike outside counsel, in-house attorneys cannot make the relatively simpler decision to withdraw representation.[287] Since the corporation is the in-house attorney's only client, withdrawal of representation can be an inadequate solution.[288] Additionally, unlike outside counsel, in-house attorneys are increasingly occupying managerial and supervisory roles within corporations.[289] Because they increasingly have "administrative, managerial, and compliance responsibilities that are outside the direct scope of their legal roles,"[290] in-house attorneys are even more likely to discover information about corporate misconduct. While it may be possible for an in-house attorney to bring the misconduct to his or her employer's attention and resolve it internally, it is possible that the "employer's vision of what is right in any given situation conflicts with the *Model Code of Professional Responsibility*, the lawyer's personal ethical beliefs, and/or the well being of the community."[291] Whistleblower cases involving in-house counsel must take into account the conflicting public policies of ensuring the employer complies with the law, while protecting the attorney-client privilege that the employer is entitled to as the client.[292] Thus, in addition to ethical and legal considerations, in-house counsel must consider the possibility of losing his or her job and livelihood.[293]

Having touched on some of the special conflicts faced by in-house attorneys, the next few sections explore how they are expected to act under

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282. *Id.* at 37–38.

283. *Id.* at 38.

284. Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1264–65 (2009).

285. Banick, *supra* note 28, at 1882–83 (citing John M. Burman, *Ethical Considerations When Representing Organizations*, 3 WYO. L. REV. 581, 613 (2003)).

286. *Id.* at 1908.

287. *Id.* at 1884.

288. John Jacob Kobus, Jr., *Establishing Corporate Counsel's Right To Sue for Retaliatory Discharge*, 29 VAL. U. L. REV. 1343, 1378 (1995).

289. Lobel, *supra* note 284, at 1262.

290. *Id.*

291. Nancy Kubasek et al., *The Social Obligation of Corporate Counsel: A Communitarian Justification for Allowing In-House Counsel to Sue for Retaliatory Discharge*, 11 GEO. J. LEGAL ETHICS 665, 666 (1998).

292. Kobus, *supra* note 288, at 1364.

293. Banick, *supra* note 28, at 1884.

different regimes when deciding whether or not to report potential federal securities law violations.

2. The ABA Model Rules of Professional Conduct

In 1977, the American Bar Association (ABA) began a six-year study of the legal profession that resulted in the Model Rules of Professional Conduct.[294] The Model Rules were adopted by the ABA in 1983 and were amended on fourteen different occasions before 2002.[295] In 2003, the ABA made amendments to Rules 1.6 and 1.13 in response to "shaken confidence in the effectiveness of the governance and disclosure systems applicable to public companies in the United States" in the aftermath of Enron, WorldCom, and other similar scandals.[296] While the Model Rules are not directly enforceable through professional discipline,[297] they aim to set baseline standards of legal ethics and professional responsibility for states to adopt through their own bar associations.

Three ABA Model Rules are particularly relevant to in-house attorney whistleblowers: Rules 4.1, 1.13, and 1.6.

a. Truthfulness in Statements to Others: Rule 4.1

Under the first part of Rule 4.1, a lawyer should not, in the course of representing a client, knowingly make a false statement of material fact or law to a third party.[298] The second part of the rule provides that a lawyer should not knowingly fail to disclose a material fact that is "necessary to avoid assisting a criminal or fraudulent act by a client."[299]

While the ABA Model Rules prohibit lawyers from assisting or counseling clients with criminal conduct,[300] Rule 4.1 sets forth a specific application of this principle. Generally, a lawyer may withdraw representation to avoid assisting with criminal conduct.[301] However, as stated in the comments to Rule 4.1, "Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. . . . If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then . . . the lawyer is required to do so."[302]

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294. ELLEN J. BENNETT, ELIZABETH J. COHEN & MARTIN WHITTAKER, ANNOTATED MODEL RULES OF PROF'L CONDUCT, at vii (7th ed. 2011).
295. *Id.*
296. *Id.*
297. Barry R. Temkin & Ben Moskovits, *Lawyers As Whistleblowers Under the Dodd-Frank Wall Street Reform Act: Ethical Conflicts Under the Rules of Professional Conduct and SEC Rules*, N.Y. ST. B. ASS'N J., July/Aug. 2012, at 10, 12.
298. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2013).
299. *Id.*
300. *Id.* R. 1.2(d).
301. *Id.* R. 4.1 cmt 3.
302. *Id.*

To the limited extent that this rule allows lawyers to disclose information, it is relevant to attorney whistleblowers who may wish to avoid assisting criminal conduct. Importantly, however, Rule 4.1 permits lawyers to disclose such information "unless the disclosure is prohibited by Rule 1.6."[303] Therefore, Rule 4.1 is only available to attorney whistleblowers if Rule 1.6 allows for it.[304]

b. Confidentiality of Information: Rule 1.6

The attorney's duty to protect his or her client's confidential information is outlined in Rule 1.6,[305] which has been adopted in some form by the District of Columbia and all states except California.[306] This rule generally requires that lawyers maintain client confidentiality but permits disclosure in six circumstances, two of which were specifically added in 2003 in response to the Enron and WorldCom scandals.[307] Prior to the addition of these two exceptions, the ABA Model Rules prohibited disclosure of confidential client information even when the disclosure was made in order to prevent criminal fraud.[308] Since most states at the time already allowed disclosure under those circumstances, and in an effort to align the Model Rules with newly enacted SEC rules, the ABA added the two additional exceptions to the confidentiality duty.[309]

As a result of the amendment, in addition to preexisting exceptions, lawyers are allowed to disclose confidential information if they believe disclosure is reasonably necessary to prevent crime or fraud "that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services," or "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."[310]

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303. *Id.*

304. *Id.*

305. *Id.* R. 1.6.

306. *Attorneys As SEC Whistleblowers: Can an Attorney Blow the Whistle on a Client and Get a Monetary Award?* CLIENT ALERT (Latham & Watkins LLP, New York, N.Y.), May 2013, at 6, [hereinafter, *Attorneys As SEC Whistleblowers*], *available at* http://www.lw.com/thoughtLeadership/SEC-whistleblowers.

307. Temkin & Moskovits, *supra* note 297, at 16; *see also* BENNETT, COHEN & WHITTAKER, *supra* note 294, at viii.

308. *See Attorneys As SEC Whistleblowers*, *supra* note 306, at 2.

309. *Id.*

310. MODEL RULES OF PROF'L CONDUCT R. 1.6 (b)(2)–(3) (2013). The other exceptions are:

> to prevent reasonably certain death or substantial bodily harm . . . to secure legal advice about the lawyer's compliance with these Rules . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client . . . to comply with other law or a court order . . . [and] to detect and resolve conflicts of interest

However, when considering whether or not to report violations, an in-house attorney whistleblower must also consider Rule 1.13 (and its state rule equivalent in his or her jurisdiction).

c. Organization As Client: Rule 1.13

Generally speaking, the Model Rules allow a lawyer to withdraw from representing a client in various situations, such as in order to avoid assisting with "crime or fraud."[311] An in-house lawyer, however, may be subject to special considerations that arise from being in an employer-employee relationship with his or her client: the ABA Model Rules refer to this situation in Rule 1.13.

Rule 1.13 provides that an in-house lawyer should report a potential legal violation that is likely to result in substantial injury to the organization to the highest authority in the organization, unless the lawyer reasonably believes that it is not in the organization's best interest to do so.[312] Therefore, the ABA Model Rules require in-house lawyers to report "up-the-ladder." As stated by the comments to Rule 1.13, "Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization."[313]

The lawyer is permitted to disclose confidential information to outside sources only if the lawyer reports the violation to the higher authority who refuses to act or delays action, and the lawyer believes that the violation is reasonably certain to result in substantial injury to the organization.[314] Although in this situation the lawyer may disclose information regardless of whether or not Rule 1.6 permits it, disclosure is limited to situations in which "the lawyer reasonably believes [it is] necessary to prevent substantial injury to the organization."[315] Moreover, this part of the rule is merely permissive—it allows lawyers to choose to disclose information externally, but does not require them to do so.

Rule 1.13 also provides that lawyers who believe they have been discharged because of the actions described above, or who withdraw under these circumstances, should take steps as reasonably necessary to ensure that "the organization's highest authority is informed of the [lawyer's] discharge or withdrawal."[316] This provision does not mention, however, an external remedy if the organization retaliates against the lawyer.[317]

> arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Id.

311. *Id.* R. 1.16 (b)(3).
312. *Id.* R. 1.13.
313. *Id.* R. 1.13 cmt. 4.
314. *Id.* R. 1.13 (c)(2).
315. *Id.*
316. *Id.* R. 1.13 (e).
317. *Id.*

The ABA Model Rules only provide baseline standards of legal ethics and professional responsibility.[318] The next section examines how some states' rules of professional conduct, which lawyers can be held liable for violating, are applied to in-house attorney whistleblowers.

3. State Rules of Professional Conduct and Whistleblower Protection

As discussed in Part I.C above, state laws protect whistleblowers through whistleblower protection statutes, tort-based wrongful discharge causes of action, or both.[319] Whether or not a whistleblower is protected in a given situation varies from state to state.[320] Furthermore, there are state variations in attorney-client confidentiality rules as well. For example, under New York's version of Rule 1.6, lawyers are permitted—but not required—to disclose confidential client information in order to prevent a crime.[321] In contrast, the equivalent rule in New Jersey *requires* lawyers to make the disclosure.[322] To complicate matters further, state rules of professional conduct can clash with other regimes governing professional conduct, such as SEC Part 205.[323] This section examines how courts have treated the interplay between whistleblower protection and state rules of professional conduct.

a. Attorney-Client Confidentiality

Balla v. Gambro, Inc.[324] was a landmark case addressing the interplay between whistleblower protection, under a tort-based wrongful discharge cause of action, and attorney-client confidentiality.[325] Balla, the in-house counsel at Gambro, Inc., was dismissed after he informed his employer that he would do "whatever necessary" to stop the sale of defective kidney dialyzers.[326] The Illinois Supreme Court held that Balla had no cause of action under a common law wrongful termination claim.[327] The court reasoned that allowing in-house attorneys to pursue wrongful termination claims would compromise the attorney-client privilege.[328] According to the court, "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

318. *See supra* note 297 and accompanying text.
319. *See supra* Part I.C.
320. *See supra* Part I.C.
321. N.Y. JOINT APPELLATE RULES GOVERNING ATTORNEYS R. 1.6(b)(2) (2014); *see also* Temkin & Moskovits, *supra* note 297, at 16.
322. N.J. CT. R. 1.6(b); *see also* Temkin & Moskovits, *supra* note 297, at 16.
323. *See infra* Part II.B.
324. 584 N.E.2d 104 (Ill. 1991).
325. *Id.*; *see also* Lobel, *supra* note 284, at 1257–60.
326. *Balla*, 584 N.E.2d at 106. Balla was concerned that the dialyzers could cause death or serious bodily harm to patients who used them. *Id.* at 107.
327. *Id.* at 113.
328. *Id.* at 111.

Rules of Professional Conduct."[329] Looking to Rule 1.6 of the Illinois Rules of Professional Conduct,[330] the court stated that Balla had a duty to report the confidential information because the client was about to commit an act that would result in death or serious bodily injury.[331] At the same time, the court held that in-house counsel should not be protected by wrongful discharge claims, as this would "have a chilling effect on the communications between the employer/client and the in-house counsel."[332] Thus, according to the court, Balla was required to report the confidential information even if he lost his job as a result of the disclosure, but he was not entitled to wrongful discharge protection as an in-house attorney.[333]

In contrast, in *General Dynamics Corp. v. Superior Court*,[334] the California Supreme Court allowed an in-house attorney to proceed with a wrongful termination cause of action, finding that there was no particular reason to prevent the claim as long as it could be established without breaching the attorney-client privilege.[335] Thus, if the lawyer could prove his claim without violating attorney-client privilege, he could have a valid wrongful discharge cause of action.[336]

In *Willy v. Coastal Corp.*,[337] an in-house lawyer brought a wrongful discharge action against his former employer.[338] Willy claimed that he was dismissed for insisting that his employer comply with state and federal environmental and securities laws.[339] The Southern District of Texas dismissed the claim[340] because of the state's code of professional responsibility.[341] The court held that, under the state rules, if an attorney believes his client is pursuing an illegal act, he or she may "voluntarily withdraw" from representation.[342] Should the attorney choose not to withdraw "and not to follow the client's wishes, he should not be surprised that his client no longer desires his services."[343] However, if the client chose not to end the relationship, the attorney would then be *required* to withdraw representation.[344] The court also saw no reason to distinguish between in-house and outside counsel in this regard.[345]

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329. *Id.* at 109.
330. ILL. SUP. CT. R. 1.6(b).
331. *Balla*, 584 N.E.2d at 109.
332. *Id.* at 110.
333. *Id.* at 109.
334. 876 P.2d 487 (Cal. 1994).
335. *Id.* at 490.
336. *Id.*
337. 647 F. Supp. 116, 117 (S.D. Tex. 1986), *rev'd on other grounds*, 855 F.2d 1160 (5th Cir. 1988).
338. *Id.*
339. *Id.*
340. *Id.* at 119.
341. *Id.* at 118.
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.* at 118–19. While outside counsel may withdraw representation from a client, in-house counsel are effectively giving up their jobs when they do so.

The manner in which courts vary in their application of state rules governing attorney-client confidentiality is one factor that in-house attorney whistleblowers must take into account when deciding whether to disclose information. Another factor that these whistleblowers must consider is the job duty exception.

b. The Job Duty Exception

In *Kidwell v. Sybaritic, Inc.*, the Minnesota Supreme Court confronted the job duty exception.[346] Brian Kidwell was the in-house counsel for Sybaritic, Inc. when he sent an email entitled "A Difficult Duty" to the management team.[347] In the email, Kidwell expressed concern regarding the organization's "pervasive culture of dishonesty,"[348] identified specific violations,[349] and indicated that if the organization did not react appropriately to the allegations, he would alert the "appropriate authorities."[350] Additionally, Kidwell discussed the situation with, and sent a copy of the email to, his father, although the management team was not aware of this at the time.[351]

The day after he sent the email, the management team met with Kidwell to discuss the issues he had addressed.[352] Although the team created a plan to resolve these issues, Kidwell was discharged a few weeks later.[353] According to Sybaritic, Kidwell was terminated because of a series of difficulties that made the organization unable to trust him, particularly after becoming aware that Kidwell had sent the email to his father.[354] Kidwell, however, filed suit against the organization claiming that they had retaliated against him in violation of the state's whistleblower statute.[355]

Kidwell prevailed in the District Court of Minnesota.[356] The Minnesota Court of Appeals, however, 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."[357] Since Kidwell's email was sent *in the scope of his job* and not with the intent to disclose misconduct, the court concluded, it was not protected under the state's whistleblower protection statute.[358]

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346. Kidwell v. Sybaritic, Inc., 784 N.W.2d 220 (Minn. 2010) (plurality opinion).
347. *Id.* at 221.
348. *Id.* at 222.
349. *Id.*
350. *Id.* at 223.
351. *Id.*
352. *Id.*
353. *Id.* at 224.
354. *Id.*
355. *Id.* at 221.
356. *Id.* at 225; *see also* Kidwell v. Sybaritic, Inc., No. 05-13989, 2007 WL 1303946 (Minn. Dist. Ct. Feb. 2, 2007), *rev'd*, 749 N.W.2d 855, 866 (Minn. Ct. App. 2008), *aff'd*, 784 N.W.2d 220.
357. *Kidwell*, 749 N.W.2d at 866 (citing Grundtner v. Univ. of Minn., 730 N.W.2d 323 (Minn. Ct. App. 2007)).
358. *Id.* at 869–70.

The Minnesota Supreme Court also denied Kidwell's claim but for different reasons.[359] The opinion explicitly rejected the appellate judges' view that the state whistleblower statute created a blanket exception for disclosures made in the scope of job duties.[360] Yet, the Supreme Court decided the case on very similar grounds: the majority 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 . . . ."[361] In this case, because Kidwell's *intent* in sending the email was to advise his client, and not to blow the whistle, the state whistleblower statute did not protect his disclosure.[362] Effectively, there was no protection for Kidwell "specifically *because* his actions directly carried out his job duties, despite the plurality's alleged denial of any such exception."[363]

According to the plurality, however, "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."[364]

Ultimately, the outcome of the case hinged on a concurring opinion, which was analyzed on completely different grounds.[365] Instead of job duties, the concurrence focused on traditional notions of client confidentiality.[366] "[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."[367] Even though the state whistleblower protection statute provided no such exception, the concurring opinion stressed that "the statute does not trump [the court's] power and responsibility to regulate the bar, particularly in matters of ethics."[368] Therefore, according to the concurring opinion in *Kidwell*, the confidentiality requirements surrounding attorney-client relationships preempt the protection provided to attorney whistleblowers by applicable whistleblower protection statutes.[369]

In addition to state rules of professional responsibility, in-house attorney whistleblowers who wish to disclose federal securities violations must consider special rules that apply to attorneys who appear before the SEC.

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359. *Kidwell*, 784 N.W.2d at 226, 230–31.
360. *Id.* at 226.
361. *Id.* at 228 (quoting Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1352 (Fed. Cir. 2001)).
362. *Id.* at 228–29; *see also* Banick, *supra* note 28, at 1891.
363. Banick, *supra* note 28, at 1894 (citing FREDERICK T. GOLDER & DAVID R. GOLDER, LABOR AND EMPLOYMENT LAW: COMPLIANCE AND LITIGATION § 1:149 (3d ed. 2010)).
364. *Kidwell*, 784 N.W.2d at 238–39 (Anderson, J., dissenting) (emphasis added).
365. Banick, *supra* note 28, at 1892.
366. *Id.*; *see also Kidwell*, 784 N.W.2d at 233 (Magnuson, C.J., concurring).
367. *Kidwell*, 784 N.W.2d at 233.
368. *Id.*
369. *Id.*; *see also* Banick, *supra* note 28, at 1892.

4. The SEC's Attorney Conduct Rules: Part 205

In 2003, pursuant to SOX, the SEC promulgated Rule 205,[370] which sets standards for attorney professional responsibility.[371] These rules, also referred to as "Part 205,"[372] provide the minimum standards of professional conduct that apply to attorneys who practice and appear before the SEC on behalf of an issuer.[373] "Appearing and practicing" is broadly defined in this context; for example, it can include a lawyer who merely advises on U.S. securities law with respect to a document he or she knows will be filed with the SEC.[374] Similarly, "issuer" is broadly defined and even include "any person controlled by an issuer."[375]

Under Part 205, an in-house attorney is permitted to disclose certain confidential information (in violation of client-attorney privilege) outside of the organization.[376] However, attorneys are required first to report the information to the company's chief legal officer, who must in turn report up the corporate ladder.[377] Only if internal reporting fails (and reporting would prevent harm to the corporation or to the investors) may the attorney disclose confidential client information outside the organization.[378] Thus, in order to comply with SOX and its whistleblower protection provisions, attorneys must first report any suspected wrongdoing internally.[379]

Part 205 does not require lawyers to report violations to the SEC or to any other external organization.[380] It does, however, *permit* attorneys to disclose confidential information—without the consent of the issuer or client—when reporting violations to the SEC in three circumstances.[381] The lawyer can report out to the SEC if he or she believes disclosure is necessary to: (1) prevent the issuer from committing a violation that is likely to cause substantial injury to either the financial interest or property of the issuer or the investors; (2) prevent the issuer from committing perjury or perpetrating a fraud in a Commission investigation or administrative proceeding; or (3) rectify the consequences of a violation by the issuer that has caused or may cause substantial injury to either the financial interest or

370. 17 C.F.R. pt. 205 (2014).
371. *See* Temkin & Moskovits, *supra* note 297, at 14.
372. *See Attorneys As SEC Whistleblowers*, *supra* note 306, at 5.
373. *Id.* Attorneys who appear before the SEC and are found in violation of Part 205 can be sanctioned by the SEC. 17 C.F.R. § 205.6.
374. *Attorneys As SEC Whistleblowers*, *supra* note 306, at 5.
375. *Id.* Part 205 refers to section 3 of the Securities Exchange Act of 1934 (Exchange Act) to define the term "issuer." *See* 17 C.F.R. § 205.2(h). Under the Exchange Act, "any person who issues or proposes to issue any security" is an issuer. 15 U.S.C. § 78c(a)(8) (2012).
376. Temkin & Moskovits, *supra* note 297, at 14.
377. *Id.*
378. *Id.*
379. *Id.*
380. *Attorneys As SEC Whistleblowers*, *supra* note 306, at 5.
381. *Id.*

property of the issuer or the investors, for which the lawyer's services were used.[382]

Thus, Part 205 allows—in limited circumstances—for attorneys to disclose confidential client information to the SEC without the client's consent, and thereby to qualify as protected whistleblowers.[383]

5. How Attorneys Are Expected To Act Under SOX

As discussed above, Part 205 mandates that under SOX, while attorneys are *required* initially to report federal securities violations internally,[384] they are later *permitted* to disclose information to the SEC in order to prevent "a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors."[385] Therefore, under SOX, attorneys are required to "report up" but have no obligation to "report out."[386]

In *Van Asdale v. International Game Technology*, the plaintiffs were in-house attorneys that sued their former employer under the SOX antiretaliation provisions.[387] The organization, a publicly traded slot machine distributor, was in the process of merging with another company.[388] The in-house counsel discovered that one of the acquired company's major assets was tied in a patent infringement claim and that the underlying patent was probably invalid.[389] They also found that the high-ranking officers in the acquired company may have known about the invalidity of the patent and therefore that the public disclosure about the upcoming merger was potentially misleading.[390] The attorneys brought these issues to the attention of their employer and were fired shortly thereafter.[391]

Because this kind of misleading public disclosure can fall under securities fraud, the attorneys filed a wrongful discharge suit under SOX.[392] Their former employer moved to dismiss the case on grounds that the attorneys could not prove their case without breaching attorney-client confidentiality.[393] The Ninth Circuit noted, however, that because there is nothing in SOX to indicate "that in-house attorneys are not also protected from retaliation under this section," a lawyer that reports misconduct and experiences retaliation may bring a claim under SOX.[394] The court

382. *Id.*
383. *Id.*
384. *See* Temkin & Moskovits, *supra* note 297, at 14.
385. 17 C.F.R. § 205.3(d)(2) (2014).
386. *See* Temkin & Moskovits, *supra* note 297, at 14.
387. Van Asdale v. Int'l Game Tech., 577 F.3d 989, 992 (9th Cir. 2009).
388. *Id.* at 991–92.
389. *Id.* at 992–93.
390. *Id.*
391. *Id.* at 993.
392. *Id.* at 994.
393. *Id.* at 994–95.
394. *Id.* at 996.

reasoned that by taking precautions to balance the attorneys' claim against the company's right to preserve confidentiality, the case could proceed.[395]

6. How Attorneys Are Expected To Act Under the Dodd-Frank Act

As described above, for in-house attorneys who decide to report misconduct, SOX and Part 205 generally *require* them to report information internally as a first step in order to be protected by the whistleblower antiretaliation provisions.[396] Similarly, courts have extended antiretaliation protection to whistleblowers who report misconduct internally under the Dodd-Frank Act.[397]

The Fifth Circuit's recent ruling in *Asadi*, however, requires the opposite.[398] The court in *Asadi* held that whistleblowers must report misconduct externally and directly to the SEC in order to be protected under the Dodd-Frank Act.[399] As a result of the Fifth Circuit's decision (and existing opposing case law from district courts in three other circuits),[400] the interpretation of the Dodd-Frank Act's whistleblower protection regime, and particularly its antiretaliation provisions, is ripe for a circuit split. This creates uncertainty over the extent of protection the Dodd-Frank Act provides to employees who report violations of federal securities law internally or to other government entities rather than directly to the SEC.

Moreover, under the Fifth Circuit's interpretation, attorneys who choose to report misconduct may find it particularly difficult to act in compliance with both the Dodd-Frank Act and other governing regimes. By only extending antiretaliation protection to whistleblowers who report first and directly to the SEC, the Fifth Circuit ruling has created a conflict between how lawyers must act under the Dodd-Frank Act as opposed to SOX and Part 205.[401] This means that attorney whistleblowers who act in compliance with SOX and Part 205, and make an internal report, may find themselves without recourse for retaliation under the Dodd-Frank Act.[402] Although lawyers may still bring an antiretaliation claim under SOX, they

395. *Id.* at 995–96. This is in direct contrast with *Balla*, where the court held that in-house attorneys could not bring a wrongful discharge claim even if they were required to report wrongdoing externally. *See supra* notes 324–33 and accompanying text.

396. *See supra* notes 337–79 and accompanying text.

397. *See supra* notes 228–47 and accompanying text.

398. *See supra* notes 248–53 and accompanying text.

399. *See supra* notes 248–53 and accompanying text.

400. *See supra* note 219 and accompanying text.

401. Under SOX and Part 205, attorneys are first required to report misconduct internally, whereas the Fifth Circuit ruling requires attorneys to report to the SEC in order to be afforded whistleblower protection under Dodd-Frank. *See supra* notes 248–53, 384–86 and accompanying text.

402. The court in *Asadi* did not provide the plaintiff anti-retaliation protection under Dodd-Frank, because he first reported the misconduct internally. *See supra* notes 248–53 and accompanying text.

will need to consider shorter statutory periods and restrictions on where the claim can be brought.[403]

II. UP OR OUT? STATE OR FEDERAL LAWS? THE DILEMMA ATTORNEY WHISTLEBLOWERS FACE IN CHOOSING WHERE TO REPORT

As described in Part I, various different laws govern the protections available to whistleblowers in general and attorney whistleblowers in particular. These different laws not only provide different levels of protection, but may require different responses by the whistleblower in order for him or her to be eligible for protection. This is especially true for attorney whistleblowers.[404] With this in mind, the next Part explores how the different laws interact with each other, and when a given law applies over another.

A. Internal Reporting, External Reporting, and a Flexible Middle Ground

A recurring issue—for whistleblowers in general and attorney whistleblowers in particular—is whether to report misconduct internally or externally. Part II.A discusses some of the advantages and disadvantages of required internal and external reporting, as well as a flexible approach. Because whistleblower protections have developed as somewhat of a patchwork, they vary in their scope and application, particularly with respect to reporting requirements.[405] Most whistleblower protections under state statutes and common law tend to protect only external reporting, whereas federal whistleblower protections also include internal reporting.[406] Because the starting point for whether or not different regimes protect attorney whistleblowers is often where they report wrongdoing, this section provides some justifications for each side.

Studies show that whistleblowers choose where to report—either internally or externally—based on a wide variety of factors.[407] These include the whistleblower's status in the organization, the status of the alleged wrongdoer, organizational culture, and how significant the misconduct is.[408] For example, whistleblowers may seek to report wrongdoing internally if their aim is to stop a colleague's unlawful activity, whereas they may report externally if they are motivated by a desire to stop large-scale organizational misconduct or to protect public welfare.[409]

Some regimes *require* whistleblowers in general—and attorney whistleblowers in particular—to report violations internally in order to be

403. *See supra* notes 209–13 and accompanying text.
404. *See supra* Part I.D.
405. Lobel, *supra* note 284, at 1249.
406. *Id.* at 1249–50.
407. Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 162–63 (1994).
408. *Id.*
409. Campbell, *supra* note 26, at 570.

protected.[410] Proponents of internal reporting point out that it provides employers with an opportunity to rectify the violation before authorities are involved.[411] Internal reporting can help maintain the "corporate chain of command," avoid negative publicity, and promote employee loyalty.[412] Moreover, it may be more efficient for employers, rather than governmental bodies, to try and rectify the problem.[413] With respect to the whistleblower's own preferences, employees tend to prefer to report violations internally first.[414]

Opponents argue that internal reporting requirements lead to cover-ups and retaliation by employers.[415] Additionally, in some situations, employees may prefer to report externally; for example, when the whistleblower's supervisor is involved in the misconduct, when the employer has ignored other complaints, or when the organizational culture does not allow dissent.[416]

Some regimes, on the other hand, require *external* reporting in order for a whistleblower to be protected.[417] Supporters of external reporting point out that violations should be publicized and investigated to ensure compliance with the law.[418] Some argue that involving authorities reduces the cost of investigation.[419] Finally, in cases where the violation is criminal, proponents argue that external reporting allows for the quick involvement of the criminal justice system, which is necessary for deterrence and retribution purposes.[420]

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410. Examples of such regimes include the rules applicable to attorneys under SOX and Part 205. *See supra* Part I.D.4.

411. Sinzdak, *supra* note 118, at 1654; *see also* Campbell, *supra* note 26, at 570 ("For this reason, consumer protection activist Ralph Nader believes that '[f]ormal channels for bringing a situation to the attention of top management should be pursued first,' to offer companies an opportunity to investigate illegalities and remedy situations before financial and reputational damage occurs from outside exposure." (alteration in original)).

412. Sinzdak, *supra* note 118, at 1654; *see also* David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA LAB. L.J. 109, 133–34 (1995); Laura Simoff, *Confusion and Deterrence: The Problems that Arise from a Deficiency in Uniform Laws and Procedures for Environmental "Whistleblowers,"* 8 DICK. J. ENVTL. L. & POL'Y 325, 338–39 (1999).

413. Sinzdak, *supra* note 118, at 1655.

414. *Id.* at 1652 n.162 ("[W]histleblowers typically disclose their concerns externally only after they have received no corrective response internally, and only after much agonizing" (quoting John A. Gray, *The Scope of Whistleblower Protection in the State of Maryland: A Comprehensive Statute Is Needed*, 33 U. BALT. L. REV. 225, 226–27 (2004)) (internal quotation mark omitted)).

415. *Id.* at 1655.

416. *Id.* Additionally, as discussed above, whistleblowers may prefer to report externally because they are motivated by a desire to stop large-scale organizational misconduct rather than to stop one colleague's behavior. *See supra* notes 48–50 and accompanying text.

417. An example of this is the Fifth Circuit's interpretation of the Dodd-Frank Act antiretaliation provisions in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013). *See supra* Part I.B.3.

418. *See* Sinzdak, *supra* note 118, at 1651.

419. *Id.*

420. *Id.*

Those who challenge external reporting requirements say that it ignores a practical reality: whistleblowers generally tend to report internally first.[421] Additionally, opponents argue that not all violations deserve the public's attention, time, and money, and internal reporting is therefore more efficient.[422] For example, "incompetent or inadequately performing employees" may forgo the opportunity to make an internal report in order to make a premature external report so that they can "attain celebrity" or receive an award.[423] Moreover, critics argue that because organizations will not be given the opportunity to investigate the allegations, false or inaccurate reports may increase.[424] External reporting requirements can also cause organizations to mistrust their employees, undermining the "mutually beneficial reliance" in an employer-employee relationship.[425] Finally, opponents argue that external reporting requirements can shift some of the regulatory burden from desirable regulators—such as elected and appointed government officials—to employees, who may be ill prepared or have questionable motives.[426]

Internal reporting has traditionally been considered more culturally acceptable than external reporting.[427] However, there has been a gradual shift in the public's opinion of whistleblowers that report wrongdoing externally.[428] Historically, whistleblowers who reported misconduct externally were perceived to threaten an organization's "structure, cohesiveness, and public image," which in turn threatened societal prosperity.[429] Whistleblowers' motivations were questioned, and they were thought to violate the cultural notion of employer-employee loyalty.[430] Furthermore, it was thought that external whistleblowing was not necessary to deter misconduct.[431]

However, a "cultural shift from reverence to distrust of large companies" starting in the second half of the twentieth century led to a corresponding change in the public perception of whistleblowers who expose corporate

421. *Id.* at 1652 (citing Gray, *supra* note 414, at 226–27; Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 281 n.71 (1991)).

422. *Id.* at 1654.

423. Campbell, *supra* note 26, at 595–96.

424. *Id.* at 596 (citing WHISTLEBLOWING: IN DEFENSE OF PROPER ACTION 53 (Marek Arszulowicz & Wojciech W. Gasparski eds., 2011); Ebersole, *supra* note 35, at 127; *The Dodd-Frank Whistleblower Provisions: Considerations for Effectively Preparing for and Responding to Whistleblowers*, CLIENTS & FRIENDS MEMO (Cadwalader, Wickersham & Taft LLP, New York, N.Y.), May 26, 2011, at 2, *available at* http://www.cadwalader.com/uploads/cfmemos/80b476693cd5c2e25ea0246747b6ef36.pdf).

425. *Id.*

426. *Id.* at 596–97.

427. *Id.* at 570.

428. *Id.*

429. *Id.* at 570–71 (internal quotation mark omitted).

430. *Id.* at 571–72.

431. *Id.* at 573 ("Even recently, the indispensability of external whistleblowing has been doubted by then-Representative Johnny Isakson when he stated, 'I would submit to my colleague it would not have taken a whistle-blower at Enron to blow it sky high.'").

wrongdoing, particularly externally.[432] Over time, notions of employer-employee loyalty started to change, encouraging loyalty toward other individuals who work for the organization rather than to the organization itself.[433] Moreover, mistrust of whistleblowers and their motives decreased as mistrust of large corporations and *their* motives increased.[434] External reporting, which was once doubted and thought unnecessary, started to be viewed as not only necessary, but also essential.[435] The law developed to accommodate this cultural shift: whistleblower statutes have also evolved to accept or even promote external reporting.[436]

While these cultural changes have led to an acceptance of external reporting alongside internal reporting, a third approach proposes a flexible standard towards reporting requirements.[437] This approach suggests that whistleblower laws should allow flexibility on where whistleblowers should report violations and protect them regardless of whether they report internally or externally.[438] Under this approach, whistleblowers who may be misinformed or uneducated about where they should report, but who have acted in good faith, are not penalized for their attempts to uncover misconduct.[439]

A flexible approach to reporting requirements may protect a wider range of whistleblowers and their different situations.[440] Such an approach could potentially encourage whistleblowers to come forward, by counterbalancing the confusion produced by different requirements under different laws.[441] Since some whistleblowers can be deterred by the uncertainty of whether or not they will be protected, this approach could help diminish such an effect by offering greater protection.[442]

However, a flexible approach to reporting can have two major drawbacks.[443] First, since it provides whistleblowers with the freedom of deciding where to report, whistleblowers may decide to report to a suboptimal party.[444] There may be certain inherent advantages to reporting to a particular entity, and since a flexible approach does not incentivize whistleblowers to report to any particular party, they may choose a less desirable route.[445]

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432. *Id.* at 573–74.
433. *Id.* at 575.
434. *Id.* at 575–76.
435. *Id.* at 576.
436. *Id.* at 579–30.
437. Sinzdak, *supra* note 118, at 1660–61.
438. *Id.*
439. *Id.* at 1661–62.
440. *Id.* at 1662.
441. *Id.* at 1663.
442. *Id.*
443. *Id.*
444. *Id.*
445. *Id.*

A second drawback to a flexible approach is that it may undesirably increase the number of whistleblower lawsuits or prolong existing suits.[446] With a flexible approach to reporting requirements, cases are less likely to be dismissed at an early stage for failing to meet the standards required for protection.[447]

These justifications—for internal reporting, external reporting, and a flexible approach—are important for an attorney whistleblower because they can determine whether he or she is protected against retaliation.

B. State Laws Versus Federal Laws

As explored in Part I.D, in-house attorney whistleblowers that report federal securities violations are subject to various regimes and can be expected to act differently under each one. This section discusses the choice of law issues that can determine which regime is applicable.

1. Choice of Law: State Versus State

Putting aside the issue of whether or not federal law preempts state law via Part 205,[448] attorneys may still have to consider choice-of-law issues with respect to different states. Whether or not a particular situation permits or even requires an attorney to report a violation externally depends on what jurisdiction he or she is operating in.[449] Moreover, some lawyers may be licensed to practice in different jurisdictions, and a lawyer's conduct may even "involve significant contacts with more than one jurisdiction."[450]

ABA Model Rule 8.5 addresses these issues.[451] The first part of this rule provides that lawyers are subject to the disciplinary authority of both the jurisdiction in which they are licensed, and the jurisdiction in which they provide or offer services (whether or not they are licensed in that jurisdiction).[452] The second part addresses choice of law issues.[453] According to this second part, the professional rules of the jurisdiction in which a tribunal sits will govern matters pending before the tribunal, unless the tribunal provides otherwise.[454] For other matters, the lawyer is subject to the professional rules of the jurisdiction in which the underlying conduct occurred, or where the predominant effect of the conduct was.[455] Interestingly, if a lawyer "reasonably believes" the predominant effect of

446. *Id.*
447. *Id.*
448. *See infra* Part II.B.2.
449. For example, lawyers in New York are permitted to break attorney-client confidentiality to prevent a crime, whereas lawyers in New Jersey are required to do so. *See supra* notes 321–22 and accompanying text; *see also Attorneys As SEC Whistleblowers*, *supra* note 306, at 17.
450. *Attorneys As SEC Whistleblowers*, *supra* note 306, at 17.
451. MODEL RULES OF PROF'L CONDUCT R. 8.5 (2013).
452. *Id.* R. 8.5(a).
453. *Id.* R. 8.5(b).
454. *Id.*
455. *Id.*

his or her conduct occurs in a particular jurisdiction, and the conduct in question conforms to the rules of that jurisdiction, the lawyer will not be subject to discipline.[456]

Although ABA Model Rule 8.5 aims to provide some guidance in this area, in practice the Rule is complex and can be uncertain in application.[457] Furthermore, not all states have adopted it: as of May 2013, twenty-seven states had adopted the most recent version, nine states had adopted a modified version, two states still used an earlier version, one state used a modified version of an earlier rule, and twelve states had adopted no version of the rule at all.[458] Therefore, despite the existence of ABA Model Rule 8.5, there can still be a significant lack of clarity as to which state's professional rules apply to an attorney whistleblower.

2. Choice of Law: Federal Versus State

In order to provide attorneys with the whistleblower protections of the Dodd-Frank Act and SOX, the SEC must examine his or her conduct under their professional rules as provided by Part 205.[459] However, the appropriate response by an attorney to a potential violation may differ under Part 205 and a given state's own professional rules: for example, while Part 205 may permit the disclosure of confidential information to the SEC without the client's consent, it is possible that the state in the attorney's jurisdiction may prohibit such disclosure.[460] Thus, an attorney must consider whether federal or state law applies in order to determine not only the whistleblower protections available but also whether or not he or she will be at risk of professional disciplinary action for disclosing confidential information.[461]

Part 205 only applies to attorneys who appear or practice before the SEC on behalf of an issuer.[462] Therefore, this conflict (between federal and state professional rules) in the context of attorney whistleblowers of federal securities violations only applies to attorneys who appear or practice before the SEC in representation of an issuer.[463]

Since Part 205 sets forth "minimum standards of professional conduct," it acts as a "one-way ratchet in favor of disclosure without client consent."[464]

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456. *Id.*

457. *Attorneys As SEC Whistleblowers*, *supra* note 306, at 17.

458. *Id.*

459. *See supra* notes 370–83 and accompanying text.

460. The Southern District of Texas dismissed the in-house lawyer's antiretaliation claim in *Willy v. Coastal Corp.* because the state's code of professional responsibility prohibited such disclosures. *See supra* notes 337–45 and accompanying text.

461. Since attorneys are licensed and regulated by states, they must account for the state ethics rules even if they are considering federal claims. *See infra* note 295 and accompanying text.

462. *See supra* notes 372–75 and accompanying text.

463. *See supra* notes 372–75 and accompanying text. Since Part 205 only applies to this category of attorneys, other attorneys will only need to consider state professional rules.

464. *Attorneys As SEC Whistleblowers*, *supra* note 306, at 6.

Thus, if the state professional rules in a jurisdiction forbid disclosure of confidential client information to external organizations, but Part 205 permits disclosure—for example, where the attorney reasonably believes that the client is a continuing bad actor—the SEC claims that Part 205 governs, and disclosure is permitted.[465] In situations where a jurisdiction requires the lawyer to disclose the confidential information pertaining to a violation,[466] however, state rules will govern and Part 205 will take a back seat.[467] Therefore, the attorney will be required to disclose the confidential information.[468] Of course, in a situation where neither Part 205 nor the state permits disclosure of confidential client information, the lawyer will be prohibited from doing so and cannot seek whistleblower protection.[469]

The SEC claims that, if necessary, Part 205 will trump state professional rules as the minimum standard for professional conduct. However this issue is far from settled, and several state associations have publicly voiced their disagreement.

The first state challenge to the SEC's rules for attorney conduct came from the Washington State Bar Association (WSBA) less than six months after Part 205 was adopted.[470] The WSBA issued a proposed interim opinion disagreeing with the SEC's claim that Part 205 preempted state ethics rules.[471] The SEC's general counsel responded with a comment letter that, among other things, pointed out that the WSBA's position was "inconsistent with prevailing Supreme Court precedent. The Court has consistently upheld the authority of federal agencies to implement rules of conduct that diverge from and supersede state laws that address the same conduct."[472] Nevertheless, the WSBA adopted the interim opinion.[473]

The State Bar of California, which has the strictest attorney confidentiality rules of all the states,[474] also wrote a letter to the SEC during the same time period.[475] The letter stated that it was unclear whether the SEC had the authority to promulgate rules that preempted states rules, and that the State Bar of California did not have the power to refuse to enforce state statutes "on the basis of federal preemption unless an appellate court has so ruled."[476] In 2004, the association followed up with a letter stating

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465. *Id.* at 7.

466. For example, professional conduct rules in New Jersey require an attorney to disclose information to stop a crime. *See supra* note 322 and accompanying text.

467. *Attorneys As SEC Whistleblowers*, *supra* note 306, at 7.

468. *Id.*

469. *Id.* at 6.

470. *Will Award-Seeking Whistleblower Lawyers Be Caught Between Conflicting SEC and State Ethics Rules?* CLIENT ALERT (Latham & Watkins LLP, New York, N.Y.), Oct. 21, 2013, at 3, *available at* http://www.lw.com/thoughtLeadership/SEC-whistleblower-ethics-conflict.

471. *Id.*

472. *Id.*

473. *Id.* at 4.

474. *Id.*

475. *Id.*

476. *Id.*

that "California attorneys disclosing client confidences to the SEC could potentially be subject to State Bar discipline and/or breach of fiduciary duty claims. . . . California attorneys cannot presume there is a safe harbor if they disclose client confidences to the SEC."[477]

The SEC's general counsel reiterated the SEC's position in an April 2004 speech, stating that "where a federal rule says you may do something and a state rule says you may not, there is a conflict and the federal rule should prevail."[478] The general counsel went further and hinted that the SEC would support lawyers who were caught in the tension between state rules and Part 205.[479] Eight months later, the California State Bar published a sixty-three-page article extensively analyzing the conflict from the states' point of view and reiterating that Part 205 does not trump California state law.[480]

The Part 205 preemption issue was not widely discussed between 2004 and 2013, even though the SEC's 2011 rules implementing the whistleblower provisions of the Dodd-Frank Act incorporated Part 205 in considering attorney whistleblowers.[481]

Then, in October 2013, New York became the third state to oppose the SEC's federal preemption position.[482] The Committee on Professional Ethics of the New York County Lawyers' Association (NYCLA) issued a formal opinion addressing the preemption issue.[483] The opinion stated that New York rules allow attorneys to disclose "confidential information in different, more limited circumstances than the SEC rules."[484]

The preemption issue is controversial because although it can be acceptable for the SEC to sanction an attorney for unprofessional conduct in an SEC proceeding,[485] "it is quite another for the federal government to seek to regulate attorney-client confidential communications. The Constitution does not give the federal government the right to license or regulate the practice of law."[486] After all, even federal prosecutors are subject to state rules governing professional conduct.[487] Therefore, state professional conduct rules also govern lawyers who work for the SEC.[488] In light of this, it can be controversial for SEC lawyers to be bound by state ethics rules but to allow federal securities laws to "trump" state ethics rules

477. *Id.*
478. *Id.*
479. *Id.*
480. *Id.* at 4–5; *see also* Corps. Comm. of the Bus. Law Section of the Cal. State Bar, *Conflicting Currents: The Obligation To Maintain Inviolate Client Confidences and the New SEC Attorney Rules*, 32 PEPP. L. REV. 89, 148–50 (2004).
481. *Will Award-Seeking Whistleblower Lawyers Be Caught Between Conflicting SEC and State Ethics Rules?*, *supra* note 470, at 4–5.
482. *Id.*
483. *Id.*
484. *Id.*
485. *See* Temkin & Moskovits, *supra* note 297, at 19.
486. *Id.*
487. *Id.*
488. *Id.*

governing client confidentiality in other cases.[489] It is therefore not surprising that thus far, no court has directly found that SEC regulations preempt state ethics rules that govern attorney-client confidentiality.[490] However, states vary on how deferentially they have treated SEC rules.[491] And since it is the states, and not the federal government, that provide plenary law licenses, attorneys must account for state ethics rules even if they are considering federal claims.[492]

C. A Hypothetical Scenario: Which Law Should an Attorney Whistleblower Break First?

Having discussed the various applicable issues affecting in-house attorney whistleblowers throughout this Note, this section revisits the hypothetical scenario posed in the Introduction.

Imagine that as the in-house counsel to a publicly traded corporation, you have discovered that your employer is violating federal securities law and must decide what to do next. Assume that you are licensed to practice and have substantial contacts in both the states of Texas and New Jersey. You practice before the SEC and believe your employer's federal securities violations are criminal in nature. How should you act in order to prevent yourself from retaliation and avoid sanctions?

First, you might consider the antiretaliation protection afforded under the Dodd-Frank Act.[493] You are in Texas, and after looking at the recent Fifth Circuit ruling in *Asadi*,[494] you understand that you *must* report directly to the SEC in order to be protected from retaliation under the Dodd-Frank Act.[495] However, the moment you do so, you have just violated SOX and Part 205: these regimes *require* you to first report your findings internally.[496] In fact, you may now be facing SEC sanctions, since you failed to make the appropriate internal disclosures.[497] On top of this, you may have just violated the Texas rules for professional conduct: under the district court's ruling in *Willy v. Coastal Corp.*, you should have either reported the violation internally or resigned.[498] Therefore, you do not have a cause of action for wrongful termination under state law,[499] and in fact, you may face state bar association sanctions or even disbarment.[500]

Perhaps, to avoid this situation, you choose to report the violation internally. By doing this, you are in compliance with SOX and Part 205,

489. *See id.*
490. *Id.*
491. *See id.* at 20.
492. *Id.* at 19.
493. *See supra* notes 209–13 and accompanying text.
494. *See supra* notes 248–53 and accompanying text.
495. *See supra* notes 248–53 and accompanying text.
496. *See supra* notes 384–86 and accompanying text.
497. *See supra* note 373.
498. *See supra* notes 337–45 and accompanying text.
499. *See supra* notes 337–45 and accompanying text.
500. *See supra* notes 461, 492 and accompanying text.

which require you to make an internal disclosure.[501] However, if you are fired, the antiretaliation provisions under Dodd-Frank Act may not protect you.[502] Additionally, although you have acted in compliance with the Texas state rules of professional conduct, you do not have a wrongful termination cause of action.[503] Nevertheless, you are still protected by the antiretaliation provisions in SOX and should file a claim with OSHA within the next ninety days to benefit from protection.[504]

However, since you are also licensed in and have substantial contacts with New Jersey, you may be subject to other laws and rules.[505] Since ABA Model Rule 8.5 can be uncertain in application, you are not sure what state's rules for professional conduct you will be held accountable to.[506] Because you have now made an internal report and failed to alert the authorities about a criminal federal securities law violation, you may have violated the New Jersey rules for professional conduct.[507] If so, you may face sanctions and potentially be disbarred.[508] On the other hand, you have acted in accordance with the rules under Part 205, which require you to make an initial internal report.[509] Even further, you cannot be sure whether Part 205 will trump New Jersey's rules of professional conduct.[510]

This hypothetical shows the dilemma an in-house whistleblower can face at a very basic level. Aside from the issues discussed here, a whistleblower must also consider the nonlegal repercussions at social, professional, and personal levels. Even without considering those factors, and as this hypothetical example demonstrates, in-house whistleblowers can find themselves in a situation where their decision boils down to deciding which law or rule to violate first.

III. A STANDARDIZED EXPECTATION FOR IN-HOUSE ATTORNEY WHISTLEBLOWERS: REPORT UP, THEN OUT

As discussed in Parts I and II, whistleblowers in general—and attorney whistleblowers in particular—need to consider a number of different factors under various and sometimes conflicting laws to understand whether or not they will be protected against retaliation. The hypothetical scenario outlined in Part II.C demonstrated how in-house attorney whistleblowers may be in violation of at least one governing rule or law, no matter how they act or where they report. This Part proposes that in-house attorneys

501. *See supra* notes 394–86 and accompanying text.
502. *See supra* notes 398–403 and accompanying text.
503. In *Willy v. Coastal Corp.*, the Southern District of Texas denied antiretaliation protection to an in-house lawyer who was fired after insisting that his employer comply with state and federal laws. *See supra* notes 337–45 and accompanying text.
504. *See supra* notes 197, 403 and accompanying text.
505. *See supra* notes 449–56 and accompanying text.
506. *See supra* notes 457–69 and accompanying text.
507. *See supra* note 322 and accompanying text.
508. *See supra* notes 461, 492 and accompanying text.
509. *See supra* notes 384–86 and accompanying text.
510. *See supra* Part II.B.2.

should be uniformly held to a two-tiered reporting standard, similar to the standards proposed by SOX and Part 205.[511] In-house attorneys should be—with some qualified exceptions—*required* to report internally first and *permitted* to report externally if the underlying violation is not resolved.[512] By imposing a uniform standard, attorney whistleblowers can expose misconduct, potentially protecting both organizational and societal welfare, without being at risk of violating rules or laws no matter what they do.[513]

Whistleblowers can be valuable to both the organization and the public at large because they help discover and expose misconduct.[514] Whistleblowers should be protected because they face inherent risks for their actions,[515] and they increase efficiency by lightening the burden on government regulators.[516] Moreover, whistleblowers should be protected for reasons related to fairness and justice.[517] By virtue of their professions, in-house attorneys are particularly likely to recognize potential misconduct.[518] In-house attorneys have the necessary legal expertise to spot violations and are often privy to this information, because they are in managerial roles within corporations.[519] Organizations can be incentivized to deter misconduct by taking into account the possibility that their employees will become whistleblowers.[520] Since in-house attorneys may have better access to information and may better understand it,[521] enhancing protections for attorney whistleblowers can provide a further incentive for an organization to stop misconduct.

Whistleblowers' motivations may affect where they will report wrongdoing,[522] and allowing attorneys to report misconduct both internally and externally can therefore maximize the benefits of whistleblower protection discussed above. Although whistleblowers may generally wish to report internally,[523] they may sometimes prefer to report externally, particularly if the underlying violation is large in scale or if it affects the whole organization.[524] Thus, requiring attorney whistleblowers to report internally but permitting them to report externally if there is no resolution protects them regardless of the type of violation. This can prevent a situation where an attorney may opt to stay silent—and refrain from exposing large-scale fraud or unlawful behavior—because he or she

511. *See supra* notes 376–95 and accompanying text.
512. *See supra* notes 376–95 and accompanying text.
513. *See supra* Part II.C.
514. *See supra* Part I.A.2.
515. *See supra* note 120 and accompanying text.
516. *See supra* notes 121–25 and accompanying text.
517. *See supra* notes 126–28 and accompanying text.
518. *See supra* notes 281–90 and accompanying text.
519. *See supra* notes 281–90 and accompanying text.
520. *See supra* note 119 and accompanying text.
521. *See supra* notes 281–90 and accompanying text.
522. *See supra* notes 48–50 and accompanying text.
523. *See supra* notes 414, 421 and accompanying text.
524. *See supra* note 50 and accompanying text.

believes that nothing will be done internally and he or she will not be protected if the report is made externally.

Requiring in-house counsel to report violations internally allows misconduct to be investigated and perhaps rectified by the employer,[525] while still allowing attorneys to abide by the attorney-client confidentiality rules imposed by their state bar associations.[526] Moreover, whistleblowers tend to prefer to report internally,[527] and whistleblowers who have a duty to report may face less social stigma than those who report voluntarily.[528] Incentivizing whistleblowers to utilize internal reporting procedures protects the "corporate chain of command," can avoid potentially unnecessary and unavoidable negative publicity, and can help promote employees' loyalty to the organization.[529] Additionally, because internal reporting can lead to the problem being resolved without government involvement, it can be more efficient for all parties involved.[530] This is particularly relevant in cases involving attorney whistleblowers since they are likely to have a better understanding of the legal repercussions of the violation and be in the managerial position to stop it.[531]

Although allowing a more flexible two-tiered approach may protect a wider range of whistleblowers,[532] attorney whistleblowers are, as a group, less likely to be misinformed or uneducated about the laws that apply to them.[533] Thus, rather than protecting whistleblowers who are confused about where to report, this two-tiered approach—as applied to attorney whistleblowers—can protect those who have good reason to make an external report. As long as in-house attorneys are held to a uniform standard across state laws, federal laws, and rules of professional conduct—a requirement to report internally first and subsequent permission to report externally under certain conditions—attorneys can reasonably be expected to comply. Such an approach does not provide total freedom for where attorneys should first report violations, which could lead them to report to a suboptimal entity.[534] As applied to attorney whistleblowers in this manner, a two-tiered reporting approach is also unlikely to lead to an undesirable increase in whistleblower lawsuits,[535] since they will be required to follow the procedure of first reporting internally and then considering reporting externally. It is thus reasonable, if not desirable, to allow attorneys the flexibility to use external reporting channels if they are unsuccessful with their initial internal reporting attempts.

525. *See supra* notes 411–14 and accompanying text.
526. *See supra* Part I.D.3.
527. *See supra* notes 414, 421 and accompanying text.
528. *See supra* notes 66–70 and accompanying text.
529. *See supra* note 412 and accompanying text.
530. *See supra* note 413 and accompanying text.
531. *See supra* notes 281–90 and accompanying text.
532. *See supra* note 440 and accompanying text.
533. *See supra* note 441 and accompanying text.
534. *See supra* notes 441–45 and accompanying text.
535. *See supra* notes 446–47 and accompanying text.

Permitting external reporting under certain conditions, and as a last resort,[536] ensures that violations that are not rectified are eventually publicized and brought to the attention of the proper authorities.[537] While supporters of external reporting say that illegal activity should be publicized *in order* to ensure compliance,[538] a two-tiered approach may provide the benefit of governmental involvement for larger, more important violations that the organization was not able to stop after the initial internal report. In such a situation, permitting attorneys to report misconduct externally will allow involvement of the criminal justice system, which may be necessary in some cases and can fulfill deterrence and retributive purposes.[539] Although some state bar associations already include similar exceptions that allow external reporting in their attorney-client confidentiality rules,[540] a uniform approach would allow attorneys more freedom to bring potentially massive federal securities fraud to light, while avoiding the erosion of the attorney-client privilege. Cultural and statutory attitudes to whistleblower reporting have changed over time, from accepting only internal reporting to also accepting and even encouraging external reporting.[541] Laws and rules governing attorney whistleblowers should follow this trend while taking into account attorney-client confidentiality by requiring an initial internal report and permitting later external recourse if necessary.

CONCLUSION

The massive financial fraud and whistleblower scandals in recent history have led to widespread and devastating financial crises. The dramatic and sometimes unsuccessful experiences of whistleblowers in some of the notable cases demonstrate that whistleblowers should be encouraged to report misconduct and protected from retaliation when they do so. In-house attorneys, in particular, may be in the best position to uncover fraud. However, the current whistleblower protection legal landscape has evolved as a patchwork of laws. In-house attorneys have to navigate a complex web of governing regimes and may find themselves in violation of at least one law no matter what they do. A uniform approach to reporting standards can resolve this conflict. In-house attorney whistleblowers should be required to report federal securities violations internally first, and permitted to report them externally if they are not resolved. Requiring in-house attorneys to report misconduct internally allows organizations the chance to rectify potentially devastating federal securities violations, while allowing the attorney-client privilege to be maintained. Finally, permitting external reporting as a last resort allows in-house counsel to involve the proper

536. *See supra* notes 376–82 and accompanying text.
537. *See supra* notes 376–82 and accompanying text.
538. *See supra* note 418 and accompanying text.
539. *See supra* note 420 and accompanying text.
540. *See supra* note 321 and accompanying text.
541. *See supra* notes 427–36 and accompanying text.

authorities when the employer is unwilling or unable to rectify the violation.