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How the Fifth Circuit Freed Willy and Harpooned Corporate Ability to Shield Retaliation Suits: A Critique Twenty Years in the Making

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NOTES

How the Fifth Circuit Freed *Willy* and Harpooned Corporate Ability to Shield Retaliation Suits: A Critique Twenty Years in the Making

I. Introduction

Societal interests and public policy demand that offensive claims be allowed by in-house counsel when the attorney has been wrongfully discharged. Furthermore, these claims should be upheld even when an attorney may have to introduce evidence that would otherwise be protected by the attorney-client privilege. In fact, allowing privilege waiver by in-house counsel to bring offensive actions may "encourage corporations to conduct their affairs ethically and in accordance with the law,"[1] which is essentially the purpose of the attorney-client privilege.

Most legal systems have accepted the attorney-client privilege for centuries,[2] with modern acceptance premised on the belief that protecting communication between attorney and client will "encourage clients to make full disclosures to their attorneys."[3] Theoretically, promoting full disclosure allows attorneys to understand the totality of the situation and to give the client sound advice, which further encourages compliance with the law.[4] Communication that facilitates a crime or fraud is clearly not a desired result and not protected by privilege. Therefore, compliance with the law must be considered the principal reason for maintaining the attorney-client privilege. Consequently, allowing a corporation to wrongfully discharge in-house counsel and avoid liability by asserting the attorney-client privilege is against the spirit and purpose of the privilege.

Extension of the tort of retaliatory discharge to in-house counsel will advance the public policy reasons of the tort, which is designed to protect society from

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1. Brett Lane, Comment, *Blowing the Whistle on* Balla v. Gambro*: The Emergence of an In-House Counsel's Cause of Action in Tort for Retaliatory Discharge*, 29 J. LEGAL PROF. 235, 241 (2005).

2. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 1.04, at 1-4 (3d ed. 2000) (tracing the roots of the attorney-client privilege to early Roman times while finding modern rationale for the privilege originating in the eighteenth century).

3. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)).

4. *See id.* at 390-92; *Fisher*, 425 U.S. at 403 (noting that the attorney-client privilege encourages candid questioning by clients and compliance with a complicated legal system).

corporate impropriety.[5] An attorney has an ethical duty to report corporate misconduct that might place an individual or society as a whole in a serious threat of imminent danger.[6] An attorney, however, is undeniably placed in a difficult situation when forced to choose between ethical duties and the threat of losing his or her livelihood.[7] Allowing an attorney the opportunity to recover in tort like other whistleblowers would not only add incentive to report corporate misconduct, but also provide a level of protection that is afforded to other employees.

This note will analyze the Fifth Circuit opinion in *Willy v. Administrative Review Board*,[8] which allowed in-house counsel to waive the attorney-client privilege and bring an offensive suit for wrongful termination. Part II of this note discusses the ethical concerns and current case law regarding offensive claims by in-house counsel. Part III provides a summary of the *Willy* decision. Part IV.A suggests that the Fifth Circuit correctly decided the case by interpreting the applicable precedents and finding a federal breach of duty exception under Supreme Court Standard 503[9] and the Model Rules of Professional Conduct. Furthermore, Part IV.B emphasizes how the court's seeming assault on the attorney-client privilege may in fact strengthen the privilege's goal of compliance with the law while encouraging procedural rights of attorneys. Part IV.C provides a proposed means of allowing privilege waiver and offensive suits by in-house counsel while protecting the identity of the defendant-corporation and minimizing the adverse effects to the attorney-client relationship. This note concludes in Part V.

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5. DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 10 (2d ed. 2004).

6. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2004).

7. John Jacob Kobus, Jr., Note, *Establishing Corporate Counsel's Right to Sue for Retaliatory Discharge*, 29 VAL. U. L. REV. 1343, 1387 (1995); *see also* Balla v. Gambro, 584 N.E.2d 104, 113 (Ill. 1991).

8. 423 F.3d 483 (5th Cir. 2005).

9. SUP. CT. STANDARD 503(d)(3), 56 F.R.D. 183, 235-40 (1972). In order to understand the utility of the Supreme Court Standards, their history is worth noting:

> Supreme Court Standards are not part of the Federal Rules of Evidence. The Supreme Court originally proposed the Standards as Rules, but Congress struck them before enacting the other proposed Rules into law. However, Supreme Court Standard 503 restates, rather than modifies, the common law lawyer-client privilege. Thus, it has considerable utility as a guide to the federal common law referred to in Rule 501 . . . .

3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.02, at 503-10 (Joseph M. McLaughlin ed., 2d ed. 2006).

II. Current Law of Privilege Waiver and Offensive Suits by In-House Counsel

A. Ethical Obligations vs. Evidentiary Rules

Concerns regarding an attorney waiving privilege to bring an offensive action involve both the rules of evidence as well as the rules of ethics. Concededly, the two are closely related, but not identical.[10] The evidentiary rule of attorney-client privilege "protects only against *compelled* disclosure, and only against disclosure of information *communicated* between client and lawyer."[11] On the other hand, the Model Rules of Professional Conduct (MRPC) cover a much broader scope by dealing with confidentiality and ethics while applying to all information related to representation and to all representational contexts.[12] Accordingly, anything covered by the attorney-client privilege is also protected by the MRPC, while many things covered by the MRPC are not covered by the attorney-client privilege.[13] This Part discusses this distinction between the ethical and evidentiary rules. Next, Part II.B.1 briefly discusses the tort of retaliatory discharge. Finally, Part II.B.2 provides an explanation of the three judicial approaches to offensive suits by in-house counsel, including the traditional approach that strictly prohibits offensive claims and the current trend of allowing offensive claims with privilege waiver by in-house counsel.

MRPC 1.6 is the rule on point for attorney-client confidentiality. MRPC 1.6(a) provides that "[a] lawyer shall not reveal information relating to the representation of a client unless" there is informed consent from the client, implied authorization from the client, or one of six exceptions stated in part (b) of the rule.[14] Originally, MRPC 1.6 only included exceptions "to prevent reasonably certain death or substantial bodily harm" or "to establish a claim or defense on behalf of the lawyer."[15] Recent developments, however, have brought amendments that include the crime-fraud exception and exceptions for compliance with rules or court orders.[16]

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10. Arthur Garwin, *Confidentiality and Its Relationship to the Attorney-Client Privilege*, *in* ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY 31, 31 (Vincent S. Walkowiak ed., 3d ed. 2004).

11. *Id.* (quoting 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.2, at 9-6 (3d ed. Supp. 2003)).

12. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmts. (2004).

13. Garwin, *supra* note 10, at 32.

14. MODEL RULES OF PROF'L CONDUCT R. 1.6.

15. Garwin, *supra* note 10, at 32-33.

16. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b).

This note is primarily concerned with MRPC 1.6(b)(5), which allows disclosure by an attorney "to establish a *claim* or defense."[17] The claim exception is generally invoked when an attorney is attempting to collect a fee.[18] The clear language of the exception, however, may be interpreted to allow other claims to be brought by an attorney. In fact, the American Bar Association Standing Committee on Ethics and Professional Responsibility (ABA) recently noted "that a retaliatory discharge or similar claim by a former in-house lawyer against her employer is a claim under Rule 1.6(b)."[19] The ABA's comments provide that an offensive claim against a former employer should not be considered unethical nor should the claim subject an attorney to discipline.[20] Perhaps more importantly, for purposes of this note, the ABA's ethical stance on this topic has persuaded some courts to allow more evidentiary privilege waivers when an attorney wishes to bring a retaliatory claim against a former employer.[21]

Although ethical concerns are generally governed by principles based on the MRPC, the Federal Rules of Evidence (FRE) govern what material is subject to the attorney-client privilege, and therefore, what is admissible or excludable in trial. Specifically, FRE 501 determines that unless required by the Constitution or rules handed down from Congress or the Supreme Court, "privilege . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States," with the exception that state law shall control in state proceedings and in federal diversity cases.[22] Stated differently, FRE 501 codifies a federal common law of privilege which is determinative in cases involving federal question jurisdiction, while allowing state law to control in all other actions.[23] Notably, the evidentiary rule of attorney-client privilege creates a possibility of inconsistent outcomes depending upon whether federal or state law applies.[24]

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17. *Id.* (emphasis added).

18. Garwin, *supra* note 10, at 38.

19. *Id.* (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-424 (2001)).

20. *Id.*

21. *See* Willy v. Admin. Review Bd., 423 F.3d 483, 500 (5th Cir. 2005); O'Brien v. Stolt-Nielsen Transp. Group Ltd., 838 A.2d 1076, 1086 (Conn. Super. Ct. 2003).

22. FED. R. EVID. 501.

23. *See id.*; *Willy*, 423 F.3d at 495.

24. EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 20 (4th ed. 2001) (noting that while the choice of law is not normally a factor, there are some notable differences from state to state).

B. Case Law Concerning Offensive Claims and Privilege Waivers by Attorneys

1. The Tort of Retaliatory Discharge

Before examining how courts handle tortious retaliatory discharge claims by attorneys and in-house counsel, a basic understanding of the policy reasons and justification for the tort will be helpful. Historically, employment has been "at will" and could be terminated by either an employer or employee for any reason.[25] Nonetheless, courts have recognized that while an employer can terminate an employee for any reason or without just cause, an employer should not be able to terminate an employee for the *wrong reason* — such as in retaliation for an employee reporting corporate misconduct that is in violation of federal or state law.[26] In the late 1960s, amid corporate scandals, social activists pioneered a push for internal corporate governance through whistleblowers and whistleblower protection.[27] In response, legislatures enacted whistleblower statutes and courts enacted public policy exceptions to protect employees that were terminated in retaliation for reporting illegal corporate conduct.[28] The result of the whistleblower movement has been recognition of a tort of retaliatory discharge that is grounded in the desire to protect society from corporate misconduct while providing a remedy for employees that are terminated for reporting the illegal activity.[29]

2. The Judicial Approach to Offensive Claims by Attorneys

As noted above, the possibility of differing outcomes based on whether the federal common law of privilege or the state law of privilege applies is apparent when viewing how courts have handled attempts by in-house counsel to bring offensive claims against former employers.[30] Generally, courts have dealt with an attorney's cause of action against a former employer in one of three ways.[31] First, some courts have found that attorneys may never bring a claim against a former employer because of the special fiduciary relationship between an attorney and client and because of societal protections afforded by ethical rules.[32] Second, other courts have allowed attorneys to bring an offensive claim as long

25. Kobus, *supra* note 7, at 1344.
26. *Id.* at 1345.
27. WESTMAN & MODESITT, *supra* note 5, at 8-10.
28. *Id.* at 10-12.
29. Kobus, *supra* note 7, at 1345-47.
30. *See* EPSTEIN, *supra* note 24, at 20; *see also* Lane, *supra* note 1, at 237.
31. *See* Lane, *supra* note 1, at 237-46.
32. *Id.*

as the attorney does not have to use privileged material to state a cause of action.[33] Under this approach, if an attorney cannot prove his or her case without using privileged material, then the claim must fail. Finally, a growing trend allows attorneys to bring the action and waive privilege if necessary to state a claim.[34] This note advocates the promotion of this current trend for all cases, including actions in state court and actions under the federal common law of privilege. Even so, this note acknowledges the importance of protecting privileged communication and advocates a standardized procedure designed to protect client confidences.[35]

a) The Traditional Approach: No Offensive Claims by Any Means

The first — and traditional — approach to offensive claims would disallow an attorney from ever bringing an offensive action against a former employer.[36] The seminal case stating this view is *Balla v. Gambro*,[37] an Illinois case based on state law.[38] The *Balla* majority recognized that Balla had a valid retaliatory discharge claim mandated by public policy,[39] but found that he should not be able to bring the claim because of the detriment that extending the tort would have on the attorney-client relationship and because the court determined that the ethical rules of attorneys, by themselves, would protect society from corporate misdealing.[40] The court noted that "[i]n-house counsel do not have a choice of whether to follow their ethical obligations as attorneys . . . or follow the illegal and unethical demands of their clients."[41] Therefore, the court held extension of the tort of retaliatory discharge to an attorney unnecessary because an attorney is already obligated to report corporate crime or fraud that might harm society.[42] The court further reasoned that because society is protected by an attorney's ethical obligations, the only possible outcome from extending the tort to attorneys would be "an undesirable effect on the attorney-client relationship."[43] The court noted that "[e]mployers might be hesitant to turn to their in-house counsel for advice regarding potentially questionable corporate conduct knowing

33. *Id.*
34. *Id.*
35. *See infra* Part IV.C.
36. *See* Meredith v. C.E. Walther, Inc., 422 So. 2d 761 (Ala. 1982); Ausman v. Arthur Andersen, L.L.P., 810 N.E.2d 566 (Ill. App. Ct. 2004); McGonagle v. Union Fid. Corp., 556 A.2d 878 (Pa. 1989).
37. 584 N.E.2d 104 (Ill. 1991).
38. *Id.*
39. *Id.* at 107.
40. *Id.* at 108.
41. *Id.* at 109.
42. *Id.*
43. *Id.*

that their in-house counsel could use this information in a retaliatory discharge suit."[44]

Courts following the *Balla* approach rely on the faulty assumption that the ethical duties of attorneys protect society from corporate impropriety without extending a remedy of tortious retaliatory discharge to in-house counsel. In fact, the *Balla* dissent disagreed with this assumption: "[T]o say that the categorical nature of ethical obligations is sufficient to ensure that the ethical obligations will be satisfied simply ignores reality."[45] The dissent further reasoned that just because an attorney is ethically obligated to report impropriety, the decision is no less difficult for an attorney than any other employee.[46] The corporation still maintains the power to unfairly terminate the employment relationship, to leave the attorney unemployed, and to possibly cause irreparable harm to the attorney's reputation.[47] Disallowing an offensive claim by an attorney simply because the attorney has an ethical obligation to report misconduct places the attorney in an unnecessary predicament when the attorney realizes he or she will have no remedy for retaliatory discharge. Thus, recognizing that every other employee is allowed a remedy if discharged in retaliation for reporting misconduct, and that an in-house counsel is forbidden the opportunity simply because of her profession and ethical obligations, the traditional approach is not only unjust to the attorney, but is also unsound policy for the protection of society.

b) A Limited Cause of Action

The second approach taken by some courts is to allow a claim by in-house counsel, but to strictly limit the claim and often disallow privileged materials to substantiate a cause of action.[48] This approach recognizes that an attorney should not be estopped from bringing a claim of retaliatory discharge against his or her employer simply because of the nature of the attorney's employment, but requires the claim to be established without using privileged information and attempts to give particular credence to preserving the fundamental values underlying the attorney-client relationship.[49] Courts accepting this view

44. *Id.*

45. *Id.* at 113 (Freeman, J., dissenting).

46. *Id.*

47. *Id.* at 115.

48. *See* Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364 (5th Cir. 1998); Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994); GTE Prod. Corp. v. Stewart, 653 N.E.2d 161 (Mass. 1995); Nordling v. N. States Power Co., 478 N.W.2d 498 (Minn. 1991).

49. Lane, *supra* note 1, at 241-42.

recognize that allowing a retaliatory claim furthers public interest.[50] Nevertheless, these courts conclude that protecting the attorney-client privilege is more important than the interest in allowing offensive claims by in-house counsel.[51] Arguably, this approach "ha[s] failed to accord a meaningful cause of action to in-house attorneys and, therefore, ha[s] failed to adequately support the public policy that the tort of retaliatory discharge exists to protect."[52] In other words, the reality of allowing an offensive claim but not a privilege waiver does little to advance the *Balla* line of cases.

c) The New Trend: Allowing Offensive Claims with Privilege Waiver

The third approach allows in-house counsel to bring an offensive suit and to waive privilege if necessary to state a claim.[53] This is the approach applied in *Willy v. Administrative Review Board* and advocated by this note. This new trend recognizes that "[t]here is no interest in allowing a corporation to conceal wrongdoing, if in fact any has occurred."[54] The goal of privilege is to encourage compliance with the law, not to provide a shield for criminal activity or corporate impropriety. The courts following this approach recognize that disallowing a retaliatory discharge claim to an attorney would prevent the attorney from having a forum to adjudicate his or her rights — a restriction that may implicate due process violations.[55] More importantly, these courts emphasize that the remedy and incentives for a retaliatory discharge claim to attorneys are more important than upholding privileged communication to a guilty corporation.[56]

III. Statement of the Case: Willy v. Administrative Review Board

A. Events Leading to a Twenty-Year "Odyssey"

The facts in *Willy* involve two separate events that occurred while Donald Willy was acting as in-house counsel for Coastal Corporation and Coastal States Management (Coastal).[57] These two incidents led to twenty years of

50. *See Gen. Dynamics*, 876 P.2d at 497; *GTE Prod.*, 653 N.E.2d at 164-65.

51. *See Gen. Dynamics*, 876 P.2d at 503-04; *GTE Prod.*, 653 N.E.2d at 166-67.

52. Lane, *supra* note 1, at 244 (quoting Sally R. Weaver, *Client Confidences in Disputes Between In-House Attorneys and Their Employer-Clients: Much Ado About Nothing — Or Something?*, 30 U.C. DAVIS L. REV. 483, 511-12 (1997)).

53. *See* Burkhart v. Semitool, Inc., 5 P.3d 1031 (Mont. 2000); Parker v. M & T Chems., Inc., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989); Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852 (Tenn. 2002).

54. Willy v. Admin. Review Bd., 423 F.3d 483, 499 (5th Cir. 2005).

55. Lane, *supra* note 1, at 245.

56. *Id.* at 245-46.

57. *Willy*, 423 F.3d at 486-87.

administrative reviews and multiple appeals to federal court before eventually being settled in the current action.[58] The first incident occurred when Willy performed an environmental audit and wrote two reports for Belcher Oil Company (Belcher), a wholly owned subsidiary of Coastal.[59] Willy reported that Belcher was in violation of several environmental statutes that would make them susceptible to liability.[60] There was some disagreement, however, amongst Coastal employees about the accuracy of Willy's conclusions.[61] Specifically, a co-worker of Willy, Troy Webb, sent a memo to Belcher's president informing him that Willy's report may have overstated concerns for liability.[62] Soon after Webb's memo, Willy's supervisor asked him to revise his report and "to delete reference to some of Belcher's violations."[63] Willy, however, refused to change the report and chose to discuss the issue with Coastal's general counsel instead.[64] At this meeting, the general counsel also disagreed with Willy and ultimately changed the report himself.[65]

The second incident occurred when Willy contacted the Texas Department of Water Resources (TDWR) about a closure bond for the Corpus Christi Refinery.[66] This phone call caused more tension between Willy and Webb because Willy failed to inform Webb that, due to financial problems, the TDWR had warned Willy that the refinery may have been subject to a lawsuit.[67] After this incident, the Coastal supervisor decided he needed to call a meeting to relieve tensions between Willy and Webb.[68] After this meeting, Willy's supervisor confirmed that Willy had made the call to the TDWR and decided that action was needed.[69] A final meeting resulted in Willy being fired for a serious "breach of trust."[70] The contrast between these two events is important because Coastal contends that Willy was fired for denying that he called the

58. *Id.* at 485.
59. *Id.* at 486.
60. *Id.*
61. *Id.*
62. *Id.* Willy's conclusions were considered factually accurate, but it was argued that the tone of the report was "inflammatory." *Id.*
63. *Id.*
64. *Id.*
65. *Id.* Willy claims that he received the "cold shoulder" after this incident. *Id.*
66. *Id.* The Corpus Christi Refinery is another subsidiary of Coastal. *Id.*
67. *Id.* Tensions were exceptionally high because Willy did not report this finding to Webb and Webb considered the Corpus Christi Refinery "his turf." *Id.*
68. *Id.* The supervisor decided not to reprimand Willy at the meeting because he was not satisfied with Webb's side of the story. *Id.* at 486-87.
69. *Id.* at 487.
70. *Id.*

TDWR at the Christi Refinery and for not reporting the call, while Willy contends that he was fired in part for the Belcher report.[71]

B. The Fifth Circuit Hands Willy the Sword

After his termination, Willy filed a complaint with the Department of Labor, alleging he was terminated in response to the Belcher report and that Coastal was in violation of environmental whistleblower statutes.[72] In order to state a claim, Willy needed admission of the Belcher reports, which both Willy and Coastal stipulated were subject to the attorney-client privilege.[73] The Administrative Review Board (ARB) determined that an attorney could not waive privilege in order to bring an offensive claim.[74] On appeal, however, the *Willy* court agreed with Willy that the reports were admissible under the breach of duty exception to the attorney-client privilege.[75]

When analyzing the case, the *Willy* court concluded that the federal law of privilege applied because the case was brought before the court on federal question jurisdiction concerning federal whistleblower statutes.[76] Next, the court found that rules in the Supreme Court Standard and MRPC create a federal breach of duty exception that allows an attorney to waive privilege to bring an offensive claim.[77] After finding a federal breach of duty exception, the court rejected the ARB's insistence on following the First Circuit's holding in *Siedle v. Putnam Investments, Inc.*,[78] which stated that an attorney could only use the breach of duty exception as a defensive measure.[79] Instead of following this reasoning, the *Willy* court found that an attorney merely cannot use privilege waiver simultaneously as both a shield and a sword.[80]

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71. *Id.*

72. *Id.* ("Specifically, Willy sued under the Clean Air Act, the Water Pollution Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, the Toxic Substances Control Act, and the Comprehensive Environmental Response, . . . Compensation and Liability Act . . . ." (footnotes omitted)).

73. *Id.* at 494 n.48.

74. *See id.* at 489.

75. *Id.* at 496. The court rejected Willy's claim challenging the constitutionality of the Administrative Review Board under the Appointments Clause. *Id.* at 494. Also, after finding the reports admissible under the breach of duty exception, the court declined to review Willy's other arguments that Coastal waived attorney-client privilege when it placed the report at issue in litigation and that the report was admissible under the crime fraud exception. *Id.* at 496 n.58.

76. *Id.* at 495.

77. *See id.* at 496.

78. *Id.* at 497. *See generally* Siedle v. Putnam Invs., Inc., 147 F.3d 7 (1st Cir. 1998).

79. *Siedle*, 147 F.3d at 11.

80. *Willy*, 423 F.3d at 497.

Finally, the *Willy* court focused its attention on *Doe v. A Corp.*,[81] another Fifth Circuit case based on federal law.[82] The ARB had dismissed reliance on *Doe* because the facts in *Doe* did not require privilege waiver.[83] The *Willy* court, however, took this opportunity to clarify that *Doe* was not intended to distinguish actions requiring privilege waiver from actions that did not.[84] Instead, *Doe* was meant to stand for the proposition that an attorney is not barred from bringing an action against a former employer under any circumstance, including cases where an attorney can waive privilege under a defined exception.[85]

After discarding reliance on *Siedle* and clarifying the Fifth Circuit's previous holding in *Doe*, the *Willy* court found that the federal breach of duty exception created by Supreme Court Standard 503(d) would allow Willy to waive privilege and bring an offensive claim against Coastal.[86] Unfortunately, the court took one final step to limit its holding to the facts of *Willy*. Specifically, the court limited its decision to actions "under the federal whistleblower statutes when the action is before an [Administrative Law Judge],"[87] and implied that the case might have been decided differently if the suit involved public proceedings.[88]

IV. Implications of the Fifth Circuit Decision

A. The Court's Decision

The *Willy* court correctly followed the trend of allowing offensive suits and privilege waiver by in-house counsel. The court recognized that allowing privilege waiver to in-house counsel for retaliatory discharge actions will protect societal interests under federal whistleblower statutes. The position taken by the *Willy* court is not only correct for policy reasons, but also soundly reasoned under a recognized exception to privilege and applicable precedent. In fact, the only unfortunate result of *Willy* is that the court did not do more to allow offensive suits and privilege waiver for claims of retaliatory discharge. Specifically, the court's limited holding and explicit warning that the case might have been decided differently if the suit involved public proceedings is disappointing for two reasons.[89]

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81. 709 F.2d 1043 (5th Cir. 1983).
82. *Willy*, 423 F.3d at 498-500.
83. *Id.* at 499.
84. *See id.*
85. *See id.*
86. *See id.* at 501.
87. *Id.*
88. *Id.* at 500-01.
89. *Id.*

First, the *Willy* court recognized that disallowing privilege waiver and retaliatory discharge claims by in-house counsel would impede attorneys' procedural rights and provide protection for guilty corporations.[90] Because the court clearly recognized that public policy favored allowing a claim for retaliatory discharge, the court should have broadly allowed offensive claims and focused on providing other measures to protect corporate identity and limit possible adverse effects on the attorney-client privilege stemming from privilege waiver. Allowing broad use of privilege waiver and providing precautionary measures to protect corporate identity appeared to be the next logical step for the *Willy* court, especially considering the favorable discussion of these precautionary measures provided by both *Siedle v. Putnam Investments, Inc.* and *Doe v. A Corp.*, which were both scrutinized by the *Willy* court. Furthermore, *Doe* is another Fifth Circuit case that provided a model of protection for corporate clients while allowing offensive claims by in-house counsel. The *Willy* court's narrow holding and failure to extend the protectionist measures in *Doe* may in fact discourage other courts from following the *Doe* model. The *Willy* court's reliance on *Doe*, coupled with the recognition of a federal breach of duty exception to privilege, makes the court's narrow holding to the facts of *Willy* an inexplicable disappointment.

Second, the *Willy* court failed to capitalize on its unique opportunity to consider the first case of privilege waiver by in-house counsel to bring an offensive action under the federal common law of evidence. Other courts allowing privilege waiver have based their decisions on state law and state evidentiary rules.[91] Instead of trying to provide a narrow holding, this unique opportunity could have bound the Fifth Circuit when dealing with offensive claims under federal common law cases and provided a solid foundation for other federal law cases in other circuits. Moreover, a more expansive holding would have bolstered the current trend allowing privilege waiver for offensive suits and acted as a guidepost for states that are still looking to decide or reconsider the issue. While the *Willy* court did correctly decide the case on precedent and policy grounds, the Fifth Circuit missed a landmark opportunity to provide guidance to other jurisdictions.

1. Interpretation of Precedent

Because jurisdiction was founded on the federal question of whistleblower statutes, the *Willy* court determined that the federal common law of privilege was

90. *See id.* at 499-501.

91. *See* Burkhart v. Semitool, Inc., 5 P.3d 1031 (Mont. 2000); Parker v. M & T Chems., Inc., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989); Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852 (Tenn. 2002).

controlling.[92] This made FRE 501 determinative as to whether an exception to privilege existed and whether an attorney could bring an offensive suit. As noted above, FRE 501 creates a federal common law of privilege different from state law and determined by the courts of the United States and rules prescribed by the Supreme Court.[93] This allowed the *Willy* court to follow Supreme Court Standard 503(d), which creates an exception when a client breaches a duty to his attorney.[94] Specifically, the express breach of duty exception in Supreme Court Standard 503(d)(3) finds no privilege "[a]s to a communication relevant to an issue of breach of duty by the lawyer to his client *or by the client to his lawyer*."[95] Following the explicit language of the rule, the *Willy* court correctly found a federal breach of duty exception to the attorney-client privilege. Further, the *Willy* court was also persuaded by the ABA's stance that an attorney bringing an offensive claim against his former employer is not unethical.[96]

Next, the *Willy* court analyzed the ARB's reliance on *Siedle v. Putnam Investments, Inc.*[97] The *Siedle* court, following the current trend of allowing privilege waiver and offensive claims by in-house counsel, would have allowed Siedle the use of privileged material if the material had come under a recognized exception.[98] The *Siedle* court, however, explicitly rejected the possibility that an attorney could bring an offensive claim under a breach of duty exception.[99] In its opinion, the *Willy* court dismissed any reliance on *Siedle* because *Siedle* was a diversity action decided on Massachusetts state law and not the federal common law of privilege.[100] Furthermore, the *Willy* court refused to find the *Siedle* reasoning as even a persuasive precedent and criticized the *Siedle* court for misinterpreting the case law upon which it relied.[101] Perhaps just as importantly, the *Willy* court emphasized that the *Siedle* case centered on whether a seal order should be lifted on privileged material that had been entered into evidence, not whether an attorney could bring an offensive suit.[102] Recognizing that *Siedle* was based on Massachusetts state law and primarily dealing with whether to lift a seal order, the *Willy* court was correct to disregard the ARB's reliance on the *Siedle* holding and to focus on *Doe v. A Corp.*

92. *Willy*, 423 F.3d at 495.
93. *See supra* text accompanying notes 22-23.
94. SUP. CT. STANDARD 503(d)(3), 56 F.R.D. 183, 236 (1972).
95. *Id.* (emphasis added).
96. *Willy*, 423 F.3d at 496.
97. *Id.* at 497.
98. Siedle v. Putnam Invs., Inc., 147 F.3d 7, 12 (1st Cir. 1998).
99. *Id.* at 11.
100. *Willy*, 423 F.3d at 497.
101. *Id.*
102. *Id.* at 497-98.

As mentioned above, *Doe* was decided on the federal common law of privilege just twelve years earlier.[103] While the original *Doe* holding allowed offensive suits by attorneys under a breach of duty exception, the ARB refused to rely on *Doe* because the Fifth Circuit had not specified that privilege waiver was acceptable when bringing an offensive claim.[104] Fortunately, the *Willy* court clarified the ambiguity in *Doe* by confirming that privilege waiver coupled with an offensive claim is permitted when an exception to privilege exists. After determining which precedent was relevant and clarifying its previous holding in *Doe*, the *Willy* court was able to craft an opinion in line with the needs of public policy, which demand offensive claims by attorneys. Nevertheless, the court failed to capitalize on its well reasoned opinion by limiting its holding to the rare facts in *Willy*.

2. An Exception by Another Name

Although the *Willy* court was able to decide the case by correctly interpreting the relevant precedent and supporting the decision with rules such as the MRPC and Supreme Court Standard 503, the court may have been able to allow Willy's claim under the widely accepted crime-fraud exception or under a special exception for public policy. The crime-fraud exception to the attorney-client privilege generally provides that "privilege do[es] not extend to communications with a lawyer which are intended to be in furtherance of a presently occurring or planned illegality."[105] Communications about a crime or fraud that occurred in the past are not exempted from privilege.[106] Since changing the Belcher report would have been in *furtherance* of a crime, the crime-fraud exception would have been applicable to the reports if changing the reports was found to be a violation of the federal whistleblower statute or otherwise fraudulent. The *Willy* court, however, found the breach of duty exception to be applicable, and therefore, there are insufficient facts in the opinion to determine whether or not the crime-fraud exception would also apply.

Even though the breach of duty exception was found to exist and a factual determination may have also included a crime-fraud exception to the privileged reports, the *Willy* court could have also found a public policy exception that would have allowed Willy to waive privilege and bring an offensive suit against Coastal. A public policy exception would be applicable because Willy claimed he was fired for an internal report that indicated a Coastal subsidiary was in

103. *See* Doe v. A Corp., 709 F.2d 1043 (5th Cir. 1983).

104. *See Willy*, 423 F.3d at 499.

105. H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 KY. L.J. 1191, 1215 (1998).

106. *Id.* at 1219-20.

violation of environmental statutes.[107] These environmental statutes were enacted for the protection of society. In turn, whistleblower statutes were enacted to protect employees that reported impropriety by corporations failing to comply with the environmental statutes. Public policy should infer that all whistleblowers should be able to state a cause of action if discharged for retaliatory purposes. An attorney should not be barred from bringing a suit because of a fiduciary relationship or because she would have to waive privilege to state a claim. Likewise, disallowing a claim by in-house counsel or disallowing privilege waivers is tantamount to allowing guilty corporations to violate the policy justifications for environmental statutes. The *Willy* court could have concluded that disallowing Willy's claim for retaliatory discharge, when he was trying to protect a public interest, would violate public policy. This conclusion would have been sound considering that forty-five jurisdictions have found a public policy exception for retaliatory discharge.[108] Therefore, the *Willy* court could have concluded that public policy requires extension of the tort of retaliatory discharge to attorneys and that privilege waiver is necessary under the public policy exception.

B. Implications on the Attorney-Client Privilege and In-House Communication

Reluctance of some courts to allow privilege waiver and offensive suits by attorneys stems from the respected tradition and goals of the attorney-client privilege. The privilege is intended to promote candid communications between attorney and client and to facilitate the client's faith in the attorney's ability to safeguard the client's secrets.[109] Theoretically, decisions that limit the privilege will result in less candid communication and limit a client's faith in his attorney. Some courts have disallowed an attorney's cause of action against his or her former employer predominantly on the basis that allowing the suit will result in clients being "less willing to be forthright and candid with their in-house counsel."[110] The fear is that a corporation may not involve legal counsel on some decisions because counsel will later be able to use the same information

107. *Willy*, 423 F.3d at 487.

108. WESTMAN & MODESITT, *supra* note 5, at 335. Notably, in-house counsel that wished to bring an offensive claim under an age- or sex-discrimination statute would not be able to claim the public policy exception because the harm would only be to the attorney that was discriminated against, rather than a greater harm to society that the public policy exception would protect. *See id*. at 95. Theoretically, finding a breach of duty exception, as the *Willy* court did, would allow in-house counsel to bring an offensive claim with privilege waiver for discriminatory discharge instead of only retaliatory discharge under a public policy exception. *See Willy*, 423 F.3d at 496.

109. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

110. Balla v. Gambro, Inc., 584 N.E.2d 104, 109 (Ill. 1991).

in a suit against the corporation.[111] Consequently, the possibility of these negative effects should require a court to use a heightened level of scrutiny any time they consider a case that will limit the scope of the attorney-client privilege. This section explores how the *Willy* court largely ignored any analysis of the potential negative effects which may arise from privilege waiver and avoided balancing the positive and negative consequences of a broader holding. Further, this section provides that the potential negative consequences of allowing privilege waiver may be exaggerated or even illusory in the context of the corporate attorney-client privilege.

In *Willy*, the court simply concluded that there was no per se ban on offensive suits by in-house counsel when the case is in front of an Administrative Law Judge.[112] This conclusion was made without acknowledging the adverse effects that may come from allowing privilege waiver. Despite the *Willy* court's cursory analysis of the negative effects that allowing privilege waiver might have on in-house communication, the court still reached the correct conclusion. Undeniably, privilege waiver should not be allowed without a high degree of scrutiny. Nonetheless, privilege should also not act as a complete bar to the admission of evidence.[113] In all practicality, the implementation of a balancing test may be needed to discern when privilege waiver should be allowed and when it should not.[114] The test should balance the need for privilege waiver against the legitimate adverse effects of allowing privilege waiver.[115] In the case of retaliatory discharge, the balance shifts in favor of allowing privilege waiver to state a claim.

The *Willy* court should have acknowledged the *possible* negative effects of allowing privilege waiver, including: decreased communication between management and counsel, a diminution of faith in the attorney to protect some secrets, and perhaps, even a decreased level of internal audits and investigations.[116] Undoubtedly, these *possible* adverse effects could lead to

111. *Id.* at 110.

112. *Willy*, 423 F.3d at 501.

113. *See* Sara A. Corello, Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389, 411 (1992).

114. *See* Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 478 (1977). Implementation of a balancing test may be more justified in the context of a corporate attorney-client privilege because the "certainty" of privilege is already limited by vague rules defined by the control group and subject matter tests. *Id.* at 473-74. Furthermore, a corporation is normally more financially driven and more attuned to dealing with uncertainty. *Id.*

115. *Id.* at 479 (calling for "a weighing of benefits and harms [of allowing privilege waiver], followed by an application of the resulting balance, through the rules of privilege").

116. *See* Corello, *supra* note 113, at 417-18 (noting that a major concern when allowing retaliatory suits by in-house counsel is that the corporation will be less willing to communicate

several troubling scenarios. For instance, a decrease in candor and communication between the client and attorney or a decrease in internal auditing might result in an increase in illegal conduct.[117] The fear is that the increase in illegality may not even be willful, but instead, may arise from the legal ignorance that results from the absence of counsel.[118]

While decisions made without legal counsel and contrary to the law are troubling, a great fear of the increase of illegality may be unfounded for two principal reasons. First, these negative effects are only possible or theoretical.[119] Debate exists as to whether or not a client's actions would noticeably change even if privilege waiver was allowed.[120] A second factor casting doubt on increased illegality is that the economic costs of not implementing internal auditing are so great that corporations will almost certainly continue to perform them.[121] Because auditing and frank communication are not likely to be limited in the corporate setting, the ability of a corporation to skew the results of all audits would be greatly limited by extending the protection of a tort claim for retaliatory discharge to auditors such as in-house counsel.[122]

On the other end of the balancing test are the rights of attorneys and the continued safety of the public. Allowing privilege waiver and offensive claims by in-house counsel will afford attorneys an opportunity to adjudicate their claim. In many cases, disallowing privilege waiver would make it impossible for counsel to state a claim or prove their case.[123] Therefore, without privilege waiver, a corporation could wrongfully discharge in-house counsel without any repercussions. Disallowing attorneys a forum to adjudicate their rights stands in direct contradiction to the policies in place to protect society from corporate impropriety.[124] In-house counsel are undoubtedly less inclined to report corporate misconduct when the corporation can easily discharge them and leave them without a legal remedy.[125] Allowing privilege waiver and offensive claims for retaliatory discharge, on the other hand, will encourage whistleblowing by attorneys and will advance the goals of protecting society from corporate misconduct.[126] In fact, because of attorneys' unique ability to access sensitive

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with counsel, which will increase illegal conduct).

117. *Id.* at 418.

118. *See id.*

119. GERGACZ, *supra* note 2, § 1.06, at 1-7; Note, *supra* note 114, at 470.

120. *See* GERGACZ, *supra* note 2, § 1.06, at 1-7; Note, *supra* note 114, at 470.

121. Corello, *supra* note 113, at 418-20.

122. *Id.* at 410 (noting that the cost of a retaliatory discharge suit from in-house counsel will deter violations of the law and subsequent firing of counsel).

123. Lane, *supra* note 1, at 244.

124. Corello, *supra* note 113, at 406.

125. *See id.* at 405-06.

126. *Id.* at 406.

materials and information, they may be in a better position to thwart criminality that will lead to social harm.[127] After weighing the possible consequences on the attorney client relationship against the extra protection afforded to attorneys and society as a whole, the scales tip in favor of allowing privilege waiver to bring offensive claims for retaliatory discharge.

While the *Willy* court largely ignored this balancing analysis, the court's decision to allow privilege waiver was still correct. Additionally, had the court not limited its holding, the result may have strengthened the utilitarian objective of the attorney-client privilege, which is compliance with the law. The court, perhaps in a desire to avoid this balancing analysis, opted instead to limit the holding to non-public proceedings and utterly failed to provide meaningful guidance to other courts.

C. Proposed Means of Allowing Offensive Suits for Retaliatory Discharge

As shown above, allowing in-house counsel to waive privilege and bring a claim against a former employer may actually strengthen the underlying principles of the privilege and also provide attorneys a forum to adjudicate their rights and an incentive to report corporate impropriety. Furthermore, after balancing the incentives created by allowing offensive claims against the possible negative effects on corporate communication and the attorney-client privilege, a determination must be made that offensive claims for retaliatory discharge should be allowed. In fact, this note advocates extending the position of the *Willy* court by allowing all offensive claims for retaliatory discharge by in-house counsel, rather than only allowing those claims in cases brought before an administrative court. This note further advocates the enactment of a three-prong procedural test designed to manage all offensive claims for retaliatory discharge that are brought by former in-house counsel. The procedural test operates on the premise that all retaliatory discharge claims by in-house counsel are to be allowed. The test, however, incorporates procedural safeguards including an in camera hearing, a trial under anonymity, and a closed record to protect the defendant-corporation. These steps are aimed not only at promoting the benefits of allowing offensive claims, but also at minimizing any harsh effects that may result to the client-attorney relationship.

After recognizing that a bright-line rule allowing privilege waiver for all cases involving retaliatory discharge must be implemented,[128] the first part of the test

127. *See id.* at 405.

128. The procedural test advocated in this note is primarily designed for offensive claims of *retaliatory discharge*. If another claim requiring privilege waiver is brought, then a balancing test, like the one described in Part IV.B, may be necessary to prove that the benefits of allowing privilege waiver outweigh any negative consequential effects.

would be initiated by a pretrial, in camera hearing.[129] The in camera hearing is an integral component of the first part of this test, because it will ensure the least intrusive means of establishing how the case should advance.[130] Further, the initial hearing will allow the judge to determine whether a valid claim has been stated and whether the plaintiff-attorney must waive the attorney-client privilege to state a claim. If the plaintiff-attorney can state a claim without waiving privilege, then the case will go to trial as normal and privileged material will remain barred from the proceedings. Furthermore, because confidences and privileged information will not be at stake, the defendant-corporation will not be afforded the benefits of the next two prongs of this proposed test. On the contrary, if the plaintiff-attorney needs to waive privilege in order to state a claim, then the case will advance under anonymous party names and with a closed record as provided in prongs two and three.

After finding that a claim has been made and privilege waiver invoked, the next step is to begin a trial under anonymity. A trial under anonymity is the key to providing protection to the client-attorney confidences that may be lost by allowing offensive claims. Undeniably, the largest concern in allowing offensive claims by in-house counsel is the harm it may have on communications with counsel in critical situations.[131] The concern is that the client-corporation will not speak candidly with counsel and entrust secrets that the attorney may later use in an action against the corporation.[132] Client-corporations also fear that allowing an attorney to bring a suit may generate negative publicity and attention toward the corporation.[133] The best way to prevent damage from negative publicity while still allowing the claim to proceed is to perform the trial under anonymity. For example, in *Doe v. A Corp.*, the court found that an offensive action should be allowed, but that the parties could be protected by a level of anonymity.[134] The anonymity advocated in *Doe* provides an integral part of the three-prong test aimed at balancing the need to allow offensive claims, while protecting confidences currently afforded by the attorney-client privilege.

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129. In camera review of privileged material is a widely accepted means of handling cases dealing with privilege. In fact, "[t]he Supreme Court has long made clear its approval of in camera review as the preferred means of determining questions of privilege." Brown, *supra* note 105, at 1253 n.147 (citing Kerr v. U. S. Dist. Court for the N. Dist. of Cal., 426 U.S. 394, 405-06 (1976); United States v. Nixon, 418 U.S. 683, 706 (1974)).

130. *Id.* at 1253 (citing United States v. Zolin, 491 U.S. 554, 572 (1989)).

131. *See* Balla v. Gambro, Inc., 584 N.E.2d 104, 109 (Ill. 1991).

132. *Id.*

133. *See* Corello, *supra* note 113, at 411.

134. Doe v. A Corp., 709 F.2d 1043, 1045 n.1 (5th Cir. 1983).

The final part of the test is to provide a closed record. The primary purpose of the closed record is to provide a second layer of protection to the corporation. The corporation's identity should be completely protected by the anonymity factor and a closed record. Protecting the identity of the corporation and sealing the record should afford all the protections of secrecy that the attorney-client privilege is in place to protect. Granted, the corporation is still subject to liability, but the privilege is not in place to protect criminal or tortious activity. If the corporation has terminated in-house counsel in retaliation for reporting misconduct, then the corporation should be liable for the tort. The corporation should not be allowed to hide behind the attorney-client privilege. Instead, the attorney should have an opportunity to prove the case, and the corporation should have the opportunity to defend the action.

The application of this three-prong test should provide the most equitable results when in-house counsel wishes to waive privilege in order to bring an offensive claim for retaliatory discharge. Simply allowing privilege waiver, or just as quickly dismissing the action by in-house counsel, are inappropriate means of handling these types of suits. In fact, recognition of the importance of allowing these suits versus the consequential effects on the attorney-client relationship requires further consideration of how to handle these cases. Applying a bright-line rule that always allows offensive suits for retaliatory discharge, but also takes steps to provide layers of protection for the identity of the corporation, will provide the most beneficial results to society.

V. Conclusion

In *Willy v. Administrative Review Board*, the Fifth Circuit held that there was not a per se ban on an attorney's ability to waive privilege and bring an offensive suit against his or her employer. The court correctly determined that a breach of duty exception exists under the federal common law of privilege and that societal interests require allowing retaliatory discharge actions by in-house counsel. Unfortunately, the court failed to maximize the opportunity to expand whistleblower rights to in-house counsel in all situations and hinted that the result may have been different if the case had been in a public proceeding and not in front of an Administrative Law Judge. In addition to recognizing the importance of extending the tort of retaliatory discharge to in-house counsel and allowing privilege waiver to prove the claim, the *Willy* court should have also provided guidelines for allowing these actions, which would have included an in camera hearing, a trial under anonymity, and a closed record.

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