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NOTES

A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics

I. INTRODUCTION*

In his book, *Unaccountable Accounting*, Abraham Briloff voiced a plea to the professionals in his field:

In essence I am seeking to impose a "Nuremberg Code" on each of us engaged in our professional pursuit, a code whereby we commit ourselves to implement a standard of fairness, even though a contrary result could be subsumed under GAAP. And we should adhere to the code in spite of "superior orders" or client's directives. This is an awesome burden which I am imposing on the individual—but it is only through the acceptance of just such a burden that accountants will have a fair claim to professional recognition.¹

Why would a distinguished scholar voice a plea for conduct that plainly is required both by statute and professional codes of conduct? Perhaps the answer to this type of question is found in the spectacle of Watergate,² the increasing number of criminal convictions against attorneys and accountants, and a general public distrust of the honesty and integrity of many professions. For example, in 1973 approximately 500 suits by corporations against accounting firms were pending. Further, the plethora of attorneys involved in Watergate evidences a need for ethical backbone in the conduct of professional affairs. Taken together, these events demonstrate that the public is demanding strengthened controls over the conduct of professional activity.

Because of their immense effects on the daily lives of the pub-

* The author wishes to express his appreciation to Professor L. Harold Levinson for his aid in the preparation of this Note.

1. A. BRILOFF, *UNACCOUNTABLE ACCOUNTING* 335 (1972).

2. A former president of the ABA, Chesterfield Smith, has stated:

Watergate has sent a pall over the country and a shadow over our profession. While it is patently unfair to blame our profession for Watergate just because many participants happen to be lawyers, I do think that the blame that has been cast on us ultimately will have a healthy effect on the profession and a positive influence on the country.

60 A.B.A.J. 1041 (1974); similarly, Paul Carrington has stated that "The Watergate planning and execution is deemed by the public to have been managed by lawyers . . . [and] they, in the public opinion, are very largely responsible for the crisis we all face." Carrington, *The Ethical Crisis of American Lawyers*, 36 U. PRR. L. REV. 35, 49 (1974). See also the recent comments of the current ABA president James D. Fellers: "Since Watergate, lawyers have stood up with the public and loudly demanded that the profession be rid of those who are not worthy either by character or ability, to practice within it." ABA Release, (Tuesday, March 11, 1975); Stein, *The Silent Complicity of Watergate*, 43 AMER. SCHOL. 21 (1973).

lic,³ professionals are subjected to a high standard of ethical conduct. A professional is impressed with a public trust and responsibility, a position in which he is guided not only by his own conscience, but also by criminal statutes, state licensing statutes, the regulations of many federal agencies and his professional code of ethics.⁴ The current ethical crisis, however, demonstrates that these controls do not always induce proper professional conduct. The sanctions may be applied selectively and may depend in large part upon peer reaction. Thus, professional discipline may be made difficult because of the fraternal stigma attached to the reporting of or testifying about professional misconduct.

Proper conduct of professional affairs may be encouraged by the creation of an environment in which ethical conduct is made as *easy as possible*. To the extent that the pressure to engage in unethical action is removed the individual will be free to act in accordance with both the pertinent statutes and his professional code. These pressures may take the form of missed filing deadlines, a burdensome workload, or client demands for a particular result. Particularly affected, however, is the employee professional, who in many situations may be involved in an activity that is or borders on the illegal or unethical. A good example would be an associate in a law firm,⁵ or an accountant employed as a junior auditor in a CPA firm.⁶

3. The enormity of the effect of professionals' effect upon the public can be seen in the Equity Funding swindle. [1973 Decisions] CCH FED. SEC. L. REP. ¶ 93,917 (Complaint, C.D. Cal., April 3, 1973). Further, it is estimated that 10% of all doctors had malpractice suits pending in 1974 and in that year California alone saw 30 awards over \$300,000. 78 U.S. NEWS & W. REP., Jan. 20, 1975, at 53. Attorneys and accountants were chosen for consideration because they are most often in the public eye and are regulated extensively by their professional organizations. The medical profession also serves as a useful model for the instant situation, but the complex nature of the medical chain of command and hospital administration precludes ease of comparison. It can be seen that the situation of an "abusive discharge" could arise perhaps more frequently in the medical context. A nurse or intern could be ordered to take certain steps that they believe are unethical. Recent cases have held that the nurse is under a duty to resist such an order. See *Darling v. Charleston*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965); AMERICAN NURSES ASSOCIATION, CODE FOR NURSES (1968) as cited in I. MURCHISON & T. NICHOLS, LEGAL FOUNDATIONS OF NURSING PRACTICE 468, 470-71 (1970) [hereinafter cited as A.N.A. NURSES CODE]. ". . . the maintenance of competence in practice is the personal responsibility of each individual practitioner. . . . Neither physician's orders nor the employing agency's policies relieve the nurse of responsibility for her own nursing actions or judgments. . . . Whenever a practice threatens the patient's health, welfare, or safety, the nurse has no choice but to take appropriate action on his behalf. *Id.* at 470-71.

4. ABA CODE OF PROFESSIONAL RESPONSIBILITY (December 1974); AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, *Code of Professional Ethics* (1974).

5. The modern law firm is composed of a group of partners who control the operation of the firm and a group of associates employed by the firm on a salaried basis. The normal process of advancement finds an employee becoming a partner anywhere from three to eight years, depending on the locale and the size of the firm.

6. For large accounting firms, the hierarchy of auditing personnel, in descending order,

If these types of employees are asked to engage in conduct of questionable propriety, they must recognize the potential problem and bring it to the attention of their superiors. Hopefully this action would stimulate a vigorous discussion of the problem within the firm resulting in an ethically acceptable course of conduct—the employee either would be shown the propriety of the action or an alternative course would be taken.⁷ The current moral climate prevailing in the professions, however, may be such that in many cases unethical conduct is the expected or that the client's desires justify any means for their satisfaction. If this is the case, or if discussion of ethical issues is not encouraged, a chilling effect will occur and the associate or junior accountant may never raise potential conflicts with other firm members. He may fear that the discussion and questioning of the proposed action will result in "bad marks" for performance or in informal sanctions for insubordination. Further, he may even fear that raising ethical issues or refusing to take action that he believes unethical will result in his discharge.⁸

When these pressures exist, the employee's dilemma is placed in the sharpest perspective. The associate or junior accountant has worked toward advancement within the firm and termination of his employment will mean severe repercussions for his family and finances. Likewise, informal sanctions such as the failure to be made partner or the assignment to an undesirable department are serious and unpleasant. Thus, the employee may be dissuaded from the proper exercise of his professional responsibility. Conversely, if these threats are eliminated, the discussion of ethical issues and ultimately the resistance to unethical activity will be fostered.

Under current law, however, the mere threat of discharge re-

comprises "partners," "managers" (or "supervisors" or "principals"), "seniors," "semi-seniors" and "juniors." The partner is usually in charge of several simultaneous audits and may or may not participate in the field work at the client's premises. The manager will participate in the field work although he too has multiple engagements at most times. As part of the engagement, each individual supervises, guides, and then reviews the work of his subordinates. Fifiis, *Current Problems of Accountants' Responsibilities to Third Parties*, 28 VAND. L. REV. 31, 36-37 (1975) [hereinafter cited as Fifiis]. See also MONTGOMERY'S AUDITING (8th ed. N. Lenhart & P. DeFiese 1957). Professor Fifiis indicates that for the junior accountant involved in the auditing procedure, "bewilderment far outweighs understanding." Given this fact and the anxiousness of subordinates to perform properly, it would be no surprise to find younger members of the firm somewhat reticent in bringing ethical questions to the attention of their superiors. Fifiis, *supra* note 6, at 37 n.18.

7. This resistance need not be one of hostility. Most often, the employee will sincerely be in doubt about the wisdom of his position. The normal course of action will be to discuss the problem with other members of the firm to reach some informal solution. See notes 126-28 *infra*.

8. This exact problem is discussed briefly in INVITATION TO DIALOGUE 70-71 (J. Hendrix ed. 1970).

mains a major impediment to the effectuation of professional ethics, because the normal contract of the professional is oral and is construed to be "at will"—terminable at any time by either party.⁹ Thus, under the prevailing theory of professional employment the discharged attorney or accountant has no remedy at law against the employer even when the discharge is motivated by the employee's discussion of ethical issues or his resistance to the orders of his superiors. Although this problem has not been publicized frequently, the doctrine of employment "at will" has been judicially considered as it relates to the entire field of employment.¹⁰ Indeed, the problem may be common to a broad range of employees. Examples include discharges for the refusal to date the employee's foreman,¹¹ for political activity,¹² or for the filing of a workmen's compensation claim.¹³ Recently, a minority of courts have allowed recovery for these types of abusive discharges on the theory that public policy should foster the employee's moral, political and ethical activity and that therefore discharge for the stated reasons should not be upheld.¹⁴ Given this trend, the same theory dictates a remedy for the professional employee because the scope of professional misconduct, whether illegal or unethical, greatly affects the public interest and thus justifies judicial sanction.

The purpose of this note is to create a right of recovery for professional employees who are discharged as a result of discussing unethical activity that has occurred or has been solicited or resisting

9. A 1971 survey found that 51% of the law firms surveyed confirmed the terms of employment by letter or other written instrument. "Many of the firms, however, volunteered that they intentionally did not confirm employment of associates in writing because they wanted to remain flexible if 'other matters came up.'" K. STRONG, *A SCHOLASTIC APPROACH TO LAW FIRM MANAGEMENT* 56 (1971). This is not to say, however, that these writings were the contracts themselves. More than likely, they merely confirmed an already concluded oral understanding. No information was available as to the inclusion of "for cause" provisions.

10. The problem was first examined by Dean Lawrence Blades who focused on an "abusive discharge" under an "at will" contract. Here the employee was discharged for reasons totally unrelated to job performance and found himself without employment and without remedy against the employer.

What is important is that such abuses, however common or uncommon, should not go unremedied. Whether for the sake of providing specific justice for the affected individual, deterring a practice which poses an increasingly serious threat to personal freedom generally, or instilling into employers a general consciousness of and respect for the individuality of the employee, the law should confront the problem.

Blades, *Employment at Will v. Individual Freedom: On Limiting The Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1410 (1967) [hereinafter cited as Blades].

11. *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

12. See Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015 (1970).

13. *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973).

14. See cases cited notes 11-13 *supra*.

superior orders that solicit unethical activity. The creation of this remedy and the resultant job security for the associate or junior accountant hopefully will foster an atmosphere of free discussion of ethical issues within professional firms and will induce subordinates to act consistently with the ethical precepts of the profession.

This note will limit consideration to attorneys and accountants. They will serve as useful models for all professions¹⁵ because both are licensed by the state, are subject to a code of ethics, and are immensely powerful in the conduct of everyday problems and business affairs. Further, only part of the broad range of professional employment will be considered. Concern will be limited to private, non-government employee professionals,¹⁶ excluding from consideration those persons in a single-person practice.¹⁷ Undoubtedly, these persons face problems similar to professionals in firm practice, but their current remedies are different and perhaps more readily available.¹⁸

This note will discuss first the duties demanded of a professional in the proper exercise of his ethical responsibilities, including conduct demanded both by criminal statutes and by professional codes of conduct. Secondly, an examination will be made of three alternatives for the enforcement of professional ethics without the necessity of a right to recovery in the discharged employee. Thirdly, the limitations of traditional master-servant theory will be discussed as they relate to a possible cause of action for an "abusive discharge." Finally, this cause of action will be proposed and a consideration will be made of the elements of the remedy. Among the elements considered will be: the standard of proof; the allocation of the burden of proof; the nature and extent of damages;

15. It should be noted that this right of recovery will have important implications for the conduct of paraprofessionals such as paralegal assistants and paramedical assistants. Because many of these persons are neither licensed by the state nor bound by the professional codes of ethics, public policy may not be as strong in favor of granting a recovery for an "abusive discharge." The dilemma here, however, is that a large potential for public damage still exists if a paraprofessional fails to resist an illegal or unethical order of his superior.

16. See Dotson, *The Emerging Doctrine of Privilege in Public Employment*, 15 PUB. AD. REV. 77 (1955); Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 COLUM. L. REV. 719 (1966).

17. The ethical dilemma of the sole practitioner arises most often when pressure is exerted by the client to perform an unethical or illegal act. If the attorney or accountant refuses to accede to the demand, the client usually will take his business elsewhere. The creation of a right to recovery in this instance would be unwise because it would form the basis for recovery in nearly any situation. The critical difference is that the relationship between the professional and the client is one of an independent contractor. Recovery should be limited to situations in which the professional is an employee.

18. The independent professional loses only the client and can remedy this by obtaining alternate business. On the other hand, unionism may be an attractive alternative to the professional employed by a large corporation. See part III *infra*.

prerequisites to recovery; and protection of the employer from vexatious employee suits.

II. THE SCOPE OF THE DUTY OWED BY THE PROFESSIONAL

Before examining the elements of any proposed remedy for an "abusively discharged" professional employee, it is necessary to examine the legal and ethical duties required of an attorney or an accountant by criminal statutes and the codes of ethics. Potential legal liability must be discussed because it is one method by which professional conduct is regulated, albeit ineffectively in many cases. Nevertheless, the professional must weigh his alternatives and constantly be aware that his actions may constitute a crime.¹⁹ Similarly, the associate or junior accountant is governed by his professional code of ethics which demands both a minimum of ethical responsibility and perhaps a duty to "blow the whistle" on unethical demands. As will be seen, the latter duty may vary between attorneys and accountants.

A. Criminal Liability

1. *Accountants.*—Criminal liability of an accountant may arise in many circumstances unrelated to the accounting function. For example, a junior accountant can participate in the destruction of records used as evidence or in the giving of perjured testimony.²⁰ Liability will exist for these types of offenses under both state and federal criminal statutes, as well as state licensing statutes.

Criminal liability also may be imposed when the accountant is directly engaged in the accounting or auditing function. The main sources of liability are found in five federal statutes:

- a. The Securities Exchange Act of 1934.²¹
- b. The Securities Act of 1933.²²
- c. The Federal Conspiracy Statute.²³

19. This process will necessarily involve the presentation of a conscious choice to the subordinate and without knowledge of conscious wrongdoing—scienter, perhaps—liability will exist only for negligence. There may be criminal liability, however, if the breach of duty is the result of wanton negligence or reckless disregard for the reasonable standard of care. *U.S. v. Simon*, 425 F.2d 796 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970). Also of possible application is *Hochfelder v. Ernst & Ernst*, 503 F.2d 1100 (7th Cir. 1974) holding that a negligent breach of the accountant's duty of inquiry was sufficient to impose criminal liability for aiding and abetting a violation of section 10(b) of the 1934 Act and Rule 10b-5.

20. See TENN. CODE ANN. § 39-3301 (1955).

21. 15 U.S.C. § 78ff (1970).

22. 15 U.S.C. § 77x (1970).

23. 18 U.S.C. § 371 (1970).

- d. The Federal False Statements Statute.²⁴
- e. The Federal Mail Fraud Statute.²⁵

Under the Securities Exchange Act of 1934, criminal penalties often are assessed against accountants for making materially false statements in required reports filed with the SEC.²⁶ Additionally,

section 10(b) and Rule 10b-5 established by the SEC have been broadly interpreted to include a variety of potentially fraudulent acts and, as long as a connection can be shown between the accountant and the purchase or sale of a covered security, he may come within the criminal provisions of the statute for willful violations.²⁷

Liability of accountants under the Securities Act of 1933 arises primarily in the preparation of registration statements and prospectuses. Under the Act an accountant making any untrue statement of a material fact or omitting to state any material fact in a registration statement may be subject to both fine and prison sentence.²⁸

Another source of criminal liability for the accountant is the Federal Conspiracy Statute.²⁹ Under this statute there must be an agreement to violate another statute (normally one of the other four listed) and an overt act towards completion of that agreement. It is noteworthy that this statute was used to obtain convictions in many of the most significant cases of accountant's liability.³⁰

To deter false or fraudulent statements willfully made to any department or agency of the United States, the Federal False Statements Statute provides for a 10,000 dollar fine and/or a five year prison term. Liability for accountants arises most often in the filing of financial and proxy statements. "Since it is generally conceded that the financial statements are representations of management, accountant's liability under this statute is restricted to factual assertions made in their audit report."³¹

24. 18 U.S.C. § 1001 (1970).

25. 18 U.S.C. § 1341 (1970).

26. Section 32 of the 1934 Act provides criminal penalties for the willful and knowing making of a statement in any required report that is false or misleading with respect to any material fact. 15 U.S.C. § 77ff (1970); see *United States v. Simon*, 425 F.2d 796, 798 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970).

27. Dunfee & Glein, *Criminal Liability of Accountants: Sources and Policies*, 9 *AMER. BUS. L.J.* 1, 6 (1971) [hereinafter cited as Dunfee & Glein].

28. Securities Act of 1933, § 24, 15 U.S.C. § 77x (1970).

29. 18 U.S.C. § 371 (1970).

30. *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970); *United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964); *United States v. White*, 124 F.2d 181 (2d Cir. 1941); Complaint at count 2, *SEC v. National Student Marketing Corp.*, [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,360 (Feb. 3, 1972) [hereinafter cited as N.S.M. complaint].

31. Dunfee & Glein, *supra* note 27, at 4.

Frequently, criminal liability also is assessed against accountants under the Federal Mail Fraud Statute. It is a crime under this statute to place in the mails "any scheme or artifice to defraud."³² Because a separate violation occurs each time an item of this nature is placed in the mails,³³ the statute allows multiple counts and in many cases is a primary tool in implementing the securities acts.³⁴ Thus, the accountant faces liability when certified financial statements are knowingly false and subsequently posed in violation of this statute.³⁵

2. *Attorneys.*—Within the scope of his professional employment, the attorney may incur criminal liability for a multitude of offenses. This occurs because the lawyer often represents a multitude of clients in extreme varieties of situations. Unethical lawyers will always have opportunities to embezzle trust funds, bribe juries, destroy evidence, make witnesses unavailable and suborn perjury. Given this range of offenses, any consideration of attorneys' criminal liability resists compartmentalization.³⁶

Criminal liability for the attorney often arises under the statutes governing the accountant's liability³⁷ discussed above. Liability may also arise under state licensing statutes that provide restrictions on the activities of attorneys. For example, if a senior partner ordered an associate to perform activities constituting the unauthorized practice of law, some states would find criminal liability.³⁸ It is sufficient to say that the potential for conscious criminality is great, and can force the associate-employee into an ethical dilemma.

B. *Ethical Responsibilities*

1. *Accountants.*—The accountant, more than any other professional,³⁹ is in a difficult ethical position because he must provide

32. 18 U.S.C. § 1341 (1970).

33. The statute has been interpreted to include the proposition that each mailing constitutes a separate offense. *Milan v. United States*, 322 F.2d 104 (5th Cir. 1963); *United States v. Interstate Engineering Corp.*, 288 F. Supp. 402 (D.N.H. 1967).

34. Isbell, *An Overview of Accountant's Duties and Liabilities Under the Federal Securities Laws and a Closer Look at Whistle-Blowing*, 35 OHIO ST. L.J. 261, 265 (1974) [hereinafter cited as Isbell].

35. N.S.M. complaint, *supra* note 30, at count 7.

36. For the purposes of this paper, however, liability will be discussed within the framework of the business-oriented law firm. Although ethical questions that do not involve a business setting may arise in a law firm, in order to retain a parallel with the considerations of accountant's liability, consideration will be limited to these situations.

37. See notes 20-25 *supra*.

38. See *People v. Sipper*, 61 Cal. App. 2d 844, 142 P.2d 960 (App. Dep't., Super. Ct. of L.A. 1943); TENN CODE ANN. § 29-303 (Cumm. Supp. 1974).

39. Although the term "professional" is used by many groups as a self-serving term to

the client with auditing and accounting services and at the same time maintain an independence from the client since third parties rely on the audit report.⁴⁰ This independence is required by the accountant's code of ethics and, when lacking, liability may ensue.⁴¹

In analyzing the ethical responsibility of an accountant, his countervailing duties must be recognized.⁴² Rule 301 of the American Institute of Certified Public Accountants' (AICPA) Code of Professional Ethics provides that "a member shall not disclose any confidential information obtained in the course of a professional engagement, except with the consent of the client."⁴³ The obvious purpose of this rule is to facilitate the flow of information between accountant and client while at the same time, protecting the private interests of the latter.⁴⁴ As stated by one commentator:

It would be fatal to the CPA's own professional cover and damaging to the whole profession, if the information entrusted to him is improperly revealed. It is the accountant's duty to respect the confidential relationship with a client. The man with the loose tongue, the man who cannot keep a secret, should never attempt to practice public accountancy.⁴⁵

Rule 301 mentions only the accountant-client relationship. This

elevate group status (*viz.* barbers, mechanics) certain fields traditionally have been denominated as the "professions." Common to the traditional definition of professions has been (1) an intellectual discipline capable of formulation on a theoretical line, (2) private practice, meeting the needs of a clientele on a person-to-person basis, (3) advisory function, (4) a tradition of service, objective and disinterested, (5) a representative institute, and (6) a code of conduct. F.A.R. BANNION, *PROFESSIONAL ETHICS, THE CONSULTANT PROFESSIONS AND THEIR CODE* 15 (1969). See also Wilensky, *The Professionalization of Everyone?* 52 *AMER. J. OF SOC.* 37 (1964).

40. Liability may be assessed in civil damage suits, criminal proceedings, civil injunctions instituted by the SEC and administrative proceedings by the Commission. See Securities Act of 1933, § 20, 15 U.S.C. § 77i (1970); Securities Exchange Act of 1934, § 21, 15 U.S.C. § 78u (1970); SEC Rule of Practice 2(e), 17 C.F.R. § 201.2(e) (1974).

41. This note will focus on the AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS' (AICPA) CODE OF PROFESSIONAL ETHICS (1974) to identify the required standards of conduct for the instant problem. Additional support is found also in Treasury Department Circular 230, 31 C.F.R. § 10.21 (1974) (knowledge of client's omission), which gives the rules of professional conduct for accountants in practice before the Internal Revenue Service.

42. There is no national code of ethics for accountants. The AICPA's Code of Professional Ethics is the most pervasive restriction, but this does not apply to non-members of the organization, or to other classes of practitioners. State Boards of Accountancy have promulgated codes of ethics to include larger numbers of accountants, but these are not uniform in nature. See TENN. CODE ANN. § 62-127 (Cumm. Supp. 1974).

43. 2 CCH AICPA, PROF. STANDS. RULE 301 (1974). Arguably, however, the client waives confidentiality when the CPA is retained to prepare an audit report for publication.

44. CPA-client communications were not privileged under the common law. In many states, however, the privilege has been established by statute. Among these states are: Ala., Ariz., Colo., Fla., Ga., Ill., Ia., La., Md., Mich., Nev., N.M., Penn., Tenn., & Puerto Rico. See J. CAREY & W. DOHERTY, *ETHICAL STANDARDS OF THE ACCOUNTING PROFESSION* 132 (1966) [hereinafter cited as CAREY].

45. CAREY, *supra* note 44, at 131.

limitation, however, should not be interpreted to mean that subordinates or employees are not bound to confidentiality. Certainly, the Rule should extend to the CPA's employees.⁴⁶

When the junior accountant learns of illegal or unethical action by a client, he is faced with a choice of resistance or acquiescence. The firm could simply withdraw from the engagement upon discovering such wrongdoing, but the junior accountant alone is not in a position to do so. Moreover, his discussion of the proprieties of the situation or his resistance to the action may result in informal sanction or discharge.

The alternative to withdrawal would be to bring the action to the attention of the proper authorities, whether the SEC, the ethics committee of the AICPA or the public prosecutor. The question also arises whether mere resistance to individual wrongdoing is enough. Must the auditor "blow the whistle" on the client or on the firm after its acquiescence to client demands? David Isbell, counsel to the AICPA, suggests that the role of the auditing firm is not to "vouch for the rectitude of the client in any field other than the financial one, or in that field with respect to anything other than the financial statements which bear his report."⁴⁷ Rather, he asserts that the auditor's responsibility relates to his opinion on the financial statements.⁴⁸ If the firm owes no duty to "blow the whistle" on the client, then under the code there would seem to be no *ethical* requirement that the junior accountant report any misdeeds of the client or partner.⁴⁹ This is not to say, however, that conflict over this point does not exist. The Securities and Exchange Commission, in its complaint against National Student Marketing stated that the accountants involved in that case were under a duty to demand compliance with the securities laws from their clients, and failing this, they were to ". . . withdraw from the engagement and to come forward and notify plaintiff commission," of the violation.⁵⁰ Of course, some question may exist whether this duty extends to the

46. *Id.* at 132.

47. Isbell, *supra* note 34, at 277.

48. An accountant does have a duty to disclose material information acquired after the issuance of an opinion on a financial statement if the subsequent knowledge convinces him the statement is misleading. *Fischer v. Kletz*, 266 F. Supp. 180 (S.D.N.Y. 1967); AICPA, STATEMENT ON AUDITING PROC. No. 41(a) (1967).

49. One can reach such a requirement only by tortuous analogy. Rule 102 of the code requires that a member shall not subordinate his judgment to that of others, and rule 501 states that a member shall not commit an act discreditable to the profession. It could be argued that, when taken together, these two provisions require "whistle-blowing." More than likely, however, these provisions were not designed to reach this result and are a mere command to virtue.

50. N.S.M. complaint, *supra* note 30, at count 2, par. 48(h) the accountant is viewed as a central figure in the protection of the investing public.

subordinate accountant, as asserted by the SEC, or is limited merely to the firm as an entity. Nevertheless, the position of the SEC is not held by the Internal Revenue Service. Treasury Department Circular 230 requires only that the accountant advise the client of an error with no affirmative duty to report it to the service.⁵¹ Likewise, several commentators have advocated the position that the accountant need not "blow the whistle," and that he need do no more than withdraw from the engagement.⁵²

Relating this controversy to the situation under scrutiny, one can easily see that the junior accountant is faced with an overwhelmingly difficult choice if his firm refuses to support his ethical stance. He is bound by his professional code to maintain the confidentiality of client communications while, at the same time, he must refrain from the commission of acts violative of the law or other code of ethics' provisions.⁵³ Furthermore, he may be bound to bring the action to the attention of the SEC or the person harmed by the act. If, in good conscience, he discusses the propriety of the conduct or refuses to accede to the demands and subsequently is discharged, the duty of confidentiality may still apply, and thus preclude any search for individual relief or professional sanctions.⁵⁴

2. *Attorneys.*—The attorney-client privilege, unlike that of the accountant, is a common-law concept of early antecedent.⁵⁵ It was designed to allow individuals to "freely and fully confide in one having knowledge of the law,"⁵⁶ without fear of disclosure by the lawyer. This policy is expressed in the American Bar Association's Code of Professional Responsibility, Canon 4: "A lawyer should preserve the confidences and secrets of a client." Because ethical consideration EC 4-2 allows the transmission of confidential client communications within the law firm, the client's confidences are not violated when an associate learns of and discusses possible client misdeeds.

If a lawyer obtains knowledge of client fraud, his duty to make this information known to an aggrieved person or to a court is governed by different policies. Under the Code of Professional Responsibility the duty of the lawyer is to represent the client zealously,

51. 31 C.F.R. § 10.21 (1974).

52. CAREY, *supra* note 44, at 136-37; Isbell, *supra* note 34, at 276.

53. Rules 202 and 203 of the AICPA Code of Ethics require compliance with GAAS and GAAP. Acts knowingly inconsistent with these standards would be unethical.

54. It may even be argued that the subordinate owes a duty of confidentiality to his firm in matters relating to its clients.

55. See *Sano Petroleum Corp. v. Shell Oil Co.*, 3 F.R.D. 467 (D.C.N.Y. 1940). As to the accountant's privilege see text accompanying notes 43, 44-46 *supra*.

56. *Baird v. Koerner*, 279 F.2d 623, 629-30 (9th Cir. 1960).

within the bounds of the law.⁵⁷ The code also provides, however, that the attorney may not "counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent."⁵⁸ Furthermore as stated by Disciplinary Rule 7-102(B)(1):

A lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.⁵⁹

From this it can be seen that, unlike accountants,⁶⁰ attorneys have a specific duty to report improper conduct on the part of the client.⁶¹ If the associate is aware of client fraud or is asked to work on a particular matter involving fraud, in a sense, the firm's client could be considered his client and therefore the associate has a duty to "blow the whistle."⁶² By analogy this duty can be expanded to cre-

57. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 7, EC 7-1 (1974).

58. *Id.*, DR 7-102 (A)(7).

59. *Id.*, DR 7-102(B)(1); In January, 1974, the Rule was amended adding "except when the information is protected as a privileged communication." See also *id.*, DR 4-101(C)(3), as to future crimes; Lowenfels, *Expanding Public Responsibility of Securities Lawyers: an Analysis of the New Trend in Standard of Care and Priorities of Duties*, 74 COLUM. L. REV. 412, 416 (1974).

60. See text accompanying notes 47-49 *supra*.

61. The concept of an affirmative duty to report impending crime has been extended recently to include a psychologist found liable for damages for the failure to warn the victim of a death threat made by an imbalanced person under his care. *Tarasoff v. Regents of the University of California*, 118 Cal. Rptr. 129 (1974).

62. It should be noted that DR 7-102(B)(1) speaks only of fraud and not merely of crimes or unethical activity. It could be argued possibly, that this limitation implies a certain level of severity before the duty to reveal the fraud comes into existence. For example, a client guilty of a minor campaign contribution violation may be treated differently from the corporate client who knowingly conceals material information from its shareholders. See Isbell, *supra* note 34, at 277.

This argument produced several interesting comments in a recent ABA National Institute on the Responsibilities and Liabilities of Lawyers and Accountants.

Mr. Kenneth J. Bialkin: I don't think there is much of a difference. Where the client is about to commit any illegal act which would operate upon someone else, whether it is larceny or any other crime, I wouldn't draw a distinction. It depends on whether the lawyer is in a position to prevent it, and whether it is a prospective act, as opposed to a past act. Mr. J. Gordon Cooney: . . . I think that the Commission is now getting down to the point of saying that the Disciplinary Rule 7-102(B) means that if you were representing a client at one time and/or are now representing a client, and during the course of the representation of that client, the client committed a fraud, and the fraud has been successfully completed, then the lawyer still has an obligation to act. I think also you have to watch out for the fact that the staff would probably take a strong position that perhaps the present failure to disclose the past fraud is itself a fraud on the theory that failure to correct an error may be a fraud in itself.

30 Bus. Law. 28 (Special Iss., March 1975).

The distinction in the severity of the offense may also be relevant to the distinction between reporting client fraud and reporting intrafirm concealment of the fraud. If the firm's

ate a duty in the associate to report fraud on the part of a firm member.

Thus, an associate who is commanded to commit an illegal or unethical act or to ignore an illegal act of a client is faced with conflicting ethical provisions. The Code of Professional Responsibility may order him both to report the client's fraud, and to retain the client's confidences. The conflict is resolved, however, by the limitations placed upon the attorney-client privilege, which extends only to past crimes and not to situations involving current or continuing frauds and crimes.⁶³ This is certainly the position of the SEC on the matter, as evidenced by its National Student Marketing complaint.⁶⁴ The SEC imposes this duty because it considers critical the attorney's role in the protection of the investing public. Likewise, in the protection of the public from unethical activities, the attorney is the central enforcement figure and the same duty to "blow the whistle" on unethical activity should apply.

A possible conflict with this duty arises if a duty of confidentiality to the firm on the part of the associate exists when the activity in question, whether that of a firm member or client, is legal but at the same time is unethical. In these situations, neither the *law* nor the Code of Ethics demands that the associate reveal information obtained in the representation. DR4-104 states that the confidences of the client may be revealed when necessary to prevent a crime. Similarly DR7-102(b) states that the attorney must "blow the whistle" only when a fraud is perpetrated upon a person or tribunal. These provisions seem to imply that an attorney has no duty to report such violations and that logically, he should have the further duty of loyalty to his firm in matters not involving violations of law.

One additional point deserves mention. Both the AICPA Code of Ethics and the ABA Code of Professional Responsibility provide

countenance of client fraud is viewed as less serious than the fraud itself, the associate may escape the commands of DR 7-102(B)(1).

63. *Garner v. Wolfbarger*, 430 F.2d 1093, 1102-03 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Hinds v. State Bar*, 19 Cal. 2d 87, 92-93, 119 P.2d 134, 137 (1941) (attorney learned that client would make false statements to secure a divorce).

64. N.S.M. complaint, *supra* note 30, at count 2, par. 48(h). From the turmoil of Watergate has emerged a concern for the activities here discussed when they are outside the scope of the lawyer's professional duties. The question asked was whether the attorney must comply at all times with the precepts of the Code of Professional Responsibility. This was answered in the affirmative in *Professional Ethics Formal Opinion* 336 (June 3, 1974), 60 A.B.A.J. 250 (1974). This opinion raises interesting questions on the propriety of an employee's recovery for discharge related to activities demanded by the employer outside the professional duties of the employee.

that the professional should not handle a matter that he knows he is not competent to discharge. DR6-101(A)(2) states that an attorney shall not "handle a legal matter without preparation adequate in the circumstances."⁶⁵ Likewise, AICPA Rule 201 provides that a member "shall not undertake any engagement which he or his firm cannot reasonably expect to complete with professional competence."⁶⁶ From these sections, one can postulate an ethical violation that may occur frequently: that of the junior accountant or associate attorney who is given an unreasonably burdensome work load. Arguably, the superior should have reason to know (especially when informed of the problem by the associate or junior) that a burdensome workload could result in inadequate and incompetent representation. If so, countenance of the situation could be regarded as a breach of ethics by the superior. Nevertheless, a discussion of the ethics of the situation or a protest against an unreasonably large workload could result in a discharge.⁶⁷ It must be emphasized that in the present situation an "unreasonably burdensome workload" does not mean the normally strenuous work undertaken by most professionals.⁶⁸ Rather, the amount of work must cause or tend to cause harm to the client's interests. In this situation public policy should dictate a remedy for an associate against whom reprisal is taken for questioning the weight of his workload; otherwise he may be impotent to protest.

III. OTHER METHODS OF ENFORCING ETHICAL CONDUCT

The preceding discussion of statutory and professional code provisions demonstrates the nature and limits of the duty required

65. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-101 (A)(2) (1974).

66. AICPA, CODE OF PROFESSIONAL ETHICS, 2 CCH AICPA PROF. STANDS., RULE 201 (1974).

67. A parallel to this situation can be found in the strike by legal aid attorneys in New York (*See* 4 *Juris Doctor* No. 10, 34-44 (November, 1974)) and in the many law suits filed against public defenders for inadequate representation. *See e.g.*, *Williams v. State*, 283 So. 2d 585 (Fla. App. 1973) (failure to take an appeal); *McLaughlin v. City of New York*, 41 U.S.L.W. 2576 (E.D.N.Y. April 6, 1973); *Gardner v. Luckey*, 500 F.2d 712 (5th Cir. 1974) (suits to enjoin representation or to reorganize badly overworked public defender offices). In those cases the relief sought was different, but the problem was the same. In New York legal aid attorneys protested that case load levels resulted in inadequate representations for indigent clients. In the public defender cases prisoners sought either release or injunctive relief on the grounds that public defender representation was inadequate under the sixth amendment right to counsel.

68. This is not to say, however, that the professional's task is not difficult work and long hours. Proficiency in the law "must come through the hard work of the lawyer himself, to the extent that work, whether it be in attending institutes or lecture courses, in studying after hours or in the actual day in and day out practice of his profession. . . ." *Report of the Special Committee on Specialization and Specialized Legal Education*, 79 ABA REP. 582, 588 (1954).

of the subordinate professional. It is now necessary to determine whether additional or alternative methods exist that will encourage an atmosphere of openness and propriety in ethical matters, and thereby facilitate ethical behavior without the need for a remedy for an abusive discharge. Criminal penalties such as those under the Securities Acts and the requirements of the codes of ethics are tending toward greater enforcement of ethical conduct, but other means of enforcement may be necessary. One possibility is the unionization of professionals to protect employment rights through collective bargaining. In this fashion, the professional employee can enjoy job security sufficient to raise ethical issues with confidence and to resist the solicitation to unethical activity. A second method may be the strengthening of criminal and professional disciplinary sanctions against employers who solicit criminal or unethical conduct on the part of employees. Both sanctions may serve to discourage the employer's unethical conduct, but are also subject to great limitations in the creation of job security.

A. *Unionization of Professionals*

One possible method for achieving greater enforcement of professional ethics and providing job security for the subordinate professional is unionization, a movement similar to that of blue-collar workers of the early 1900's. A common theme of the early movement was that the employer must have "good cause" before a worker could be discharged. Today, modern collective-bargaining agreements universally include provisions of this type and appear to protect the union worker adequately.⁶⁹ Identical provisions in employment contracts for attorneys or accountants would achieve the same result, but the problem remains that few professionals work under written contracts. The informal and often oral nature of current professional contracts probably is not conducive to a formal "discharge for cause" agreement.

Although professional associations such as the AMA, the ABA and the AICPA have long existed, these organizations have not addressed adequately the problems of the salaried professional. Movements toward unionization for salaried professionals, however, have seen significant development in recent times. The Association

69. "For cause" or "just cause" restrictions are found in 82% of the modern collective bargaining agreements. Many of the remaining agreements list one or more specific grounds for discharge. The most frequently listed reasons for discharge are: violation of company rules, incompetence or failure to meet work standards, intoxication, dishonesty or theft, and insubordination. 2 BNA COLL. BARG. NEG. & CONT. 40:1 (1971). See also CCH LAB. L. REP. ¶ 59,520 (1971).

of Legal Aid Attorneys of the City of New York was formed almost six years ago, and similar organizations of educators and physicians are also in existence.⁷⁰ Although these organizations may afford some promise for group representation, whether professionals in private practice are subject to unionization is open to question.

Professional unionization has occurred largely in the context of government and institutional employees,⁷¹ where large numbers of these professionals have banded together, wielding sufficient strength to obtain recognition as a group force. The concern of this note, however, is primarily with private employment, a situation that may be inherently different from employment in government or in a large institution. Thus, in the context of a private firm, the number of employees will be limited and they undoubtedly will have less "clout." Moreover, even disregarding this size differential, the factor most prohibitive against unionization is the investment each private professional has in his position. Although they may have specialized grievances, lawyers and accountants have invested years in preparation for their practice and perhaps several years in pursuit of partnership. They are often too close in time to their goal of independence and professional success to protest current impediments to it. As a result, employee professionals may not raise ethical questions or may acquiesce to employer demands,⁷² on the theory that only a few years hence, they will be in the position of independence and control. Thus, as one commentator has stated: "it is no answer to suggest that [professional employees] should seek salvation in unions—that in order to maintain their personal autonomy in the face of [an employer], they should surrender it to the massive labor union."⁷³

B. *Criminal Sanctions Against the Employer*

A second method that may be useful in encouraging the discus-

70. See 4 *Juris Doctor* No. 10, 34-44 (November, 1974). The New York association went on strike September 10, 1974 protesting the lack of cost-of-living allowances, and the inability to represent clients from the start to the finish of each case. The strike proved disastrous to the young union and may have given the impression that better representation for clients was secondary to more money for union members. *Id.* at 36-37.

71. Unionization of professions is strongest, perhaps, in the field of education. Teachers have long been represented by the National Education Association and the American Federation of Teachers. Both organizations are currently courting the attention of university professors as is the American Association of University Professors. *Id.* at 38.

72. In this regard it should be noted that one primary aim of all unions is to improve working conditions. As examined, *supra*, part II the overload of work on a professional employee might be regarded as a breach of ethics triggering the right to relief.

73. Blades, *supra* note 10, at 1414. See also, Goldstein, *Some Aspects of the Nature of Unionism Among Salaried Professionals in Industry*, 20 *AM. SOCIAL. REV.* 199 (1955).

sion of ethical issues and the resistance to unethical activity is the stricter enforcement of criminal sanctions against the professional employee's supervisor. This remedy, of course, would require the reporting of the crime by the subordinate, and in most cases, the mere threat of exposure will be sufficient to dissuade the criminal activity or violation. This alternative, however, is only superficially attractive. If an illegal act is indeed committed, either by solicitation to criminal activity or the activity itself, the superior may be convicted, but if he is dissuaded from his action, the employee still may be discharged without a remedy. Further, this alternative would not be effective when the employee is discharged for merely raising ethical issues since the employer's action would not constitute a crime.

If, however, a right of recovery is created in the discharged professional this remedy likely will increase the effectiveness of criminal sanctions because the employee can report criminal violations knowing he is protected against future economic hardship.

C. Professional Organizations

Another alternative to employee recovery may be in a strengthened role for existing professional organizations in monitoring conduct of their members. The availability of professional disciplinary procedures is an important factor in maintaining high standards of professional conduct, but when applied to the matter under consideration, they are subject to the same limitations as criminal sanctions.⁷⁴ Because grievances must be signed and in writing, this form of action falls short of effective relief. Employers learning of such action may be likely to institute informal sanctions against the complaining employee. One possible answer to this problem, however, may be in the establishment of advisory opinions concerning "hypothetical" situations. Under this system the employee could ascertain the correctness of his proposed conduct and act accordingly. Although this would allow for certainty in one's choice, it would not reduce the impact of noncompliance with the superior's orders, nor would the necessary time delay facilitate the need for prompt action.

74. As opposed to the lack of criminal sanctions, the discharge for the mere discussion of ethical issues could be considered to be a breach of ethics. This theory can be justified by EC 1-5 requiring that a lawyer maintain high standards of ethical conduct and that he encourage fellow lawyers to do likewise. Further, the very fact that a code of ethics exists would imply that free discussion of ethical matters is demanded.

IV. LIMITATIONS OF TRADITIONAL EMPLOYMENT THEORY UPON THE ENFORCEMENT OF ETHICS

It has been demonstrated that the traditional means of enforcing professional ethics do not make ethical conduct "as easy as possible" for the professional employee. On one hand, criminal and professional sanctions govern the actions he may take in the course of his practice; they may even demand that he report violations of other persons within his firm. On the other hand, the reporting of criminal and ethical violations on the part of the employer ultimately could result in either informal sanctions or possibly a discharge. Additionally, the foregoing examination of existing alternatives for encouraging ethical practice indicates that they are insufficient because they fail to protect the professional employee's job security from the risks that may ensue from raising ethical issues or resisting unethical or illegal conduct. What is lacking is an assurance that the ethical course of action will not result in hardship for the associate or junior accountant. The obvious course of resignation is unsatisfactory because, as in the discharge situation, the employee is economically dislocated and may not be immediately re-employed.

Rather, the professional employee needs a "club" to give him the "clout" that he cannot find in the current means of enforcement. A right of recovery for an "abusive discharge" would satisfactorily supplement the existing statutory and professional inducements to ethical conduct. Unfortunately, however, the prevailing traditional legal theory does not grant job security for the subordinate professional. Because attorneys and accountants normally have been employed under oral contracts that run for an indefinite period of time,⁷⁵ the employment continues only so long as both parties are satisfied with the performance and the conditions. In this country,⁷⁶ this situation has long been held to be a hiring terminable "at the will" of either party.⁷⁷ Under this characterization, payment for a particular term⁷⁸ or denominating the employment as "permanent"⁷⁹ have no effect upon the legal result.⁸⁰ Given this approach,

75. See note 9 *supra*.

76. The English rule was that a hiring was presumed to be for one year's service when no particular term was stated. 1 C. LABATT, *MASTER SERVANT* § 156, at 504-05 (1913).

77. *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895); *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967).

78. 1 A. CORBIN, *CONTRACTS* § 70, at 292-93 (1963); *RESTATEMENT (SECOND) OF AGENCY* § 442, comment *b* at 339 (1958). *But see* *Odum v. Bush*, 125 Ga. 184, 53 S.E. 1013 (1906); *GA. CODE ANN.* § 66-101 (1966).

79. *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 392-93, 153 N.W.2d 587, 589 (1967).

80. Several commentators have characterized the American rule as a mistaken interpre-

no action will lie for the termination of the employment.

A. *Economic Foundations of the "At Will" Doctrine*

The reasoning underlying this doctrine can be found in the origins of laissez-faire capitalism as it developed in the latter half of the nineteenth century.⁸¹ The rule was well-suited to "the rustic simplicity of the days when the farmer or small entrepreneur . . . was the epitome of American individualism."⁸² It was also suitable to a developing industrial society in which labor was scarce. Under such circumstances, it was to the worker's advantage to be able to change jobs "at will" and so achieve advancement of position. Similarly, the employer could be reasonably certain that a discharged employee would find some alternate employment.⁸³ The combination of these economic factors, when coupled with the view that one should not be forced to employ one whom he despises,⁸⁴ led, logically, to the formulation of the employment "at will" doctrine.

A characteristic that distinguishes the professional from the broad range of employees, however, may be found in the tradition of apprenticeship for professional training. In the Nineteenth century the apprentice paid his employer for training and experience in a particular trade. This contract could not be terminated "at will" by the employer but ran for a specified time, provided the apprentice performed his work diligently. Although professional apprenticeships no longer exist in the twentieth century, the early years of "professional experience" are still regarded as part of the

tation of common-law tradition. The modern rule apparently was the result of a single scholar, H.G. Wood, who coined the Rule in his 1877 Treatise, *Master and Servants*. "Wood offered no analysis to justify the assertion of this rule or his rejection of the English tradition. He cited only four American cases as authority for his approach to general hirings, none of which supported him." Note, *Implied Contract Rights to Job Security*, 26 *STAN. L. REV.* 335, 341 (1974).

81. As was stated in an early Tennessee case:

May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? . . . All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.

Payne v. Western & A.R.R., 81 *Tenn.* 507, 518-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 *Tenn.* 527, 179 *S.W.* 134 (1915).

82. *Blades*, *supra* note 10, at 1416.

83. The doctrine of mutuality of obligation dictates that if the employee has the right to terminate the engagement "at will," so also must the employer have the same right. 9 *S. WILLISTON, CONTRACTS* § 1017, at 129 n.11 (1967); *J. CALAMARI & J. PERILLO, CONTRACTS* § 67 (1970) [hereinafter cited as *CALAMARI & PERILLO*].

84. *Johnson v. Shrewsbury & Birmingham Ry.*, 43 *Eng. Rep.* 358 (Ch. 1853). See 9 *S. WILLISTON, CONTRACTS* § 1017, at 134 (1967).

training of the employee professional—perhaps a reason why increased starting salaries are a recent phenomenon. The employee professional may be regarded as participating in a quasi-apprenticeship. In retrospect, then, the professional employee may have retained some incidents of apprentice status, but he has lost the job security with which it was once associated. To a certain extent this explains the lack of precedent regarding professional employee contracts as they are distinguished from the law of master-servant as applied to other employment relationships.

B. *The Legal Foundations of the "At Will" Doctrine*

The "at will" Doctrine in legal theory was justified on the ground that the employment contract was really an offer to a unilateral contract by the employer, to be accepted by the employee through the performance of the specified services.⁸⁵ Under this theory, the employee could cease work at any time and thus not accept further offers; the employer being bound to pay only for services rendered and not for future services.⁸⁶

The right of an employer to terminate "at will" reached constitutional proportions with respect to state statutes that attempted to protect union activity. In two cases, *Adair v. United States*⁸⁷ and *Coppage v. Kansas*⁸⁸ the United States Supreme Court held that laws interfering with the "right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it, . . ." were violative of due process.⁸⁹ In striking down these anti-yellow-dog statutes the Court held that both the fifth and the fourteenth amendments required that it is "the right of the employee to quit the service of the employer, for whatever reason [and that it] is the same . . . right of the employer, for whatever reason, to dispense with the services of such employee."⁹⁰

Eventually, the forces of organized labor were successful in combating the laissez-faire expressions of the *Adair* and *Coppage* courts.⁹¹ Workers were protected in their efforts to unionize and,

85. "In a good many such cases, it has been held that the employee has made no promise of any kind; he accepts the offer by merely continuing to render the specified service, and becomes entitled to the promised salary in proportion to the work actually done." 1 A. CORBIN, CONTRACTS § 70, at 292-93 (1963).

86. *Id.* at 293.

87. 208 U.S. 161 (1928).

88. 236 U.S. 1 (1915).

89. 208 U.S. 161, 174 (1908).

90. *Id.* at 174-75.

91. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act and its authorization of free unionism).

once recognized, found a powerful tool in the right of collective bargaining.⁹² Currently, nearly all negotiated contracts provide that discharge must be for cause and thus minimize the potential for abusive discharges. Nonetheless, despite union advancement, workers not protected by union contracts are still subject to discharge "at will." This anomaly has resulted in spite of the Supreme Court's criticism of employers' use of "discharge as a means of intimidation and coercion."⁹³ As suggested by Dean Lawrence Blades:

the demise of *Adair* and *Coppage* demonstrates that from the standpoint of sound policy and thus as a matter of constitutional principle, the traditional rule can no longer be justified. The industrial revolution made an anachronism of the absolute right of discharge by destroying the classical ideal of complete freedom of contract upon which it is based.⁹⁴

If, as suggested, the traditional rule of employment "at will" cannot be justified in circumstances amounting to a discharge without cause or in the situation of an "abusive discharge," what movements have occurred to mitigate its operation? The traditional rule has found few defenders among modern commentators⁹⁵ and many alternate theories have been advanced. It has been suggested that the employee's promise to perform services for an unspecified period is sufficient consideration to support an implied promise of discharge only for cause or creating an option to remain as long as the services are needed and satisfactory.⁹⁶ The courts, however, have been conservative in their evaluation of the consideration theory and have held that the employer's consideration is the wages alone and that no further consideration is generated by the employee to support a promise of permanent employment.⁹⁷

92. As to the unionization of professionals see part III *supra*.

93. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937).

94. Blades, *supra* note 10, at 1418. See also Dawson, *Economic Duress and Fair Exchange in French and German Law*, 11 *TUL. L. REV.* 345 (1937).

95. See Blumrosen, *Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power*, *United States Report*, 18 *RUTGERS L. REV.* 428, 432 (1964); Blades, *supra* note 10, at 1428-30; Note, *Implied Rights to Job Security*, 26 *STAN. L. REV.* 335 (1974); Comment, 43 *FORDHAM L. REV.* 300 (1974). A number of recent cases, however, have applied the traditional rule, often without questioning its foundation in policy. *Bishop v. Wood*, 377 F. Supp. 501 (W.D.N.C. 1973); *Lorson v. Falcon Coach, Inc.*, 522 P.2d 449, 214 Kan. 670 (1974); *Senac v. L.M. Berry Co.*, 299 So.2d 433 (La. App. 1974); *Cactus Feeders, Inc. v. Wiltler*, 509 S.W.2d 934 (Tex. Civ. App. 1974).

96. Cf. Blades, *supra* note 10, at 1420-21; Comment, 43 *FORDHAM L. REV.* 300, 305 (1974). See 1 A. CORBIN, *CONTRACTS* § 49, at 187 (1963). See also *Harrison v. Jack Eckerd Corp.*, 342 F. Supp. 348 (M.D. Fla.), *aff'd*, 468 F.2d 951 (5th Cir. 1972) (plaintiff unsuccessfully urged that stock option was partially accepted by accepting employment, thus making the option irrevocable).

97. See Note, *Employment Contracts of Unspecified Duration*, 42 *COLUM. L. REV.* 107, 121 (1942); Blades *supra* note 10, at 1420.

This position appears unsound when applied to the employee professional. The added responsibilities of the professional may indeed justify an implied promise of employment as long as the services are satisfactory. The professional is subject to many requirements over and above those of the ordinary employee, including regulation by state licensing boards and the imposition of a code of professional ethics. Further, the employee is bound to a duty of confidentiality to the employer as well as the client and perhaps a duty to develop his professional skills. Finally, the attorney or accountant, though an employee, may have a responsibility to complete the adequate representation of a client.⁹⁸ He cannot simply cease his work on a project at the risk of jeopardizing the client's interests. Perhaps these additional factors would justify an implied term in the professional employment contract requiring that discharge must be for cause. If so, the discharged employee would have a remedy under contract theory without resort to principles of tort. This result is attractive because it recognizes the elevated public duty inherent in the status of the professional, and provides the quid pro quo of this responsibility in the form of an implied promise of permanent employment so long as the services are needed and are professionally competent.

Other than the traditional analysis of consideration, recourse to protection through the concepts of adhesion contracts⁹⁹ and the doctrine of unconscionability has occurred.¹⁰⁰ Contracts of adhesion involve an overreaching of one of the parties, in this case the employee. Social policy justifies this alternative because in the modern industrial society—especially with the current job market for attorneys¹⁰¹—the employee seldom can demand or even negotiate terms of employment.¹⁰² Given this inequality of bargaining power brought

98. Under EC 2-31 & -32 lawyers who undertake representation must complete the work involved. Further, under DR 2-110(A)(1)-(2) permission is required from the tribunal before he may withdraw and the attorney must take proper steps to avoid prejudice to the client.

99. See, e.g., *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3rd Cir. 1948); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

100. The Uniform Commercial Code § 2-302 provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

See generally, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

101. It is estimated that currently there are 400,000 lawyers in the United States with only 19,000 new jobs opening up every year, while law school enrollment is 106,000 persons. *A Surfeit of Lawyers*, 84 Newsweek, Dec. 9, 1974, at 74 (quoting Dep't of Labor statistics).

102. This, of course, does not mean that the professional does not know the terms of his employment contract. Rather, it refers to his ability to vary those terms. The traditional

about by market conditions,¹⁰³ resort to the concept of adhesion may ameliorate the harsh results of the freedom of contract. As Dean Blades illustrates, however, the doctrine normally is used to invalidate existing contractual terms and not to create new implied obligations.¹⁰⁴ Similarly, the doctrine of unconscionability has applied in the main to sales and not to employment contracts.¹⁰⁵ In most cases it has been further limited to consumers,¹⁰⁶ and courts have not been responsive to claims of unconscionability when brought by businessmen and middle-class cash purchasers.¹⁰⁷ Therefore, these contractual remedies do not afford immediate potential for relief, because in the absence of "for cause" provisions, the courts have steadfastly refused recovery based on principles of adhesion and unconscionability.

Three important cases, however, have allowed recovery for "abusive discharges." In *Petermann v. Teamsters Local 396*,¹⁰⁸ the employee was fired for failing to commit perjury when solicited to do so by his employer.¹⁰⁹ The court held that the employee had a cause of action for damages against the employer, and stated that "[t]he public policy of this state requires that every impediment, however remote to the . . . objective [of truthful testimony] must be struck down when encountered" and that the employee's discharge was thus a breach of the employment contract.¹¹⁰ A second case, *Frampton v. Central Indiana Gas Co.*,¹¹¹ concerned a discharge for the filing of a workman's compensation claim. The court found that it was a crime to prevent the filing of these claims and that because of this strong public policy, the employee had a private right of action for damages. Finally, the court in *Monge v. Beebe*

theory, however, has been that "[t]he servant cannot complain, as he takes the employment on the terms which are offered him." *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892) (Holmes, J.).

103. It should be noted that it is these same market conditions that exacerbate the critical concern of this note—the fact that the subordinate professional compromises his ethical principles out of fear of economic dislocation and the dread of seeking alternative employment in a glutted field.

104. Blades, *supra* note 10, at 1421. The author also indicates that the implied promises, if any, would still lack consideration to support them.

105. See UNIFORM COMMERCIAL CODE § 2-102: "this article applies to transactions in goods." *But see* *Fairfield Lease Corp. v. Umberto*, 7 UCC REP. SERV. 1181 (N.Y. Civ. Ct. 1970).

106. See, e.g., H. BLACK, *BUY NOW PAY LATER* (1967); D. CAPLOVITZ, *THE POOR PAY MORE* (1969).

107. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE, 114-15 (1972).

108. 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959).

109. *Id.* at 189, 344 P.2d at 28.

110. *Id.* at 189, 344 P.2d at 27. For a detailed examination of this case see Comment, 43 FORDHAM L. REV. 300, 306-07 (1974).

111. 297 N.E.2d 425 (Ind. 1973). *But see* *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956) (no private cause of action created in discharged employee).

Rubber Co.,¹¹² invalidated a discharge based on an employee's refusal to "go out" with the defendant's foreman.¹¹³ This 1974 case held that a discharge under an employment contract terminable "at will" could not be motivated by retaliation, malice, or bad faith.¹¹⁴ *Monge*, however, did not involve a strong legislatively expressed public policy that would conflict with the motivation of the discharge.¹¹⁵ Rather, the court appeared to hold that contemporary conditions demanded a change from the traditional rule.¹¹⁶ In this the court may have expressed a new public policy—the public interest demands that the employee fired in bad faith be permitted to recoup his loss through the judicial system.

In each of the three cases granting recovery to the discharged employee, the court appeared to struggle with the characterization of the right of action. *Petermann* and *Monge* were held to sound in contract, while *Frampton* was totally unclear.¹¹⁷ Logically, it would appear that theories of the tort liability could govern the recovery for an "abusive discharge."¹¹⁸ Several parallels to such an action exist, including actions for abuse of process,¹¹⁹ actions for third-party interference with an employment relationship¹²⁰ and numerous statutory causes of action.¹²¹ Tort recovery is preferable because it avoids the unyielding requirement of consideration essential to a contract action.¹²² At issue is the harm done to the employee and the breach of duty owed by the employer. The problem, of course, is in

112. 316 A.2d 549 (N.H. 1974).

113. *Id.* at 552.

114. *Id.* at 551.

115. An apt analogy to the retaliatory discharge is the retaliatory action involved in some landlord-tenant cases. In many cases tenants have recovered for eviction motivated by the tenants' actions in contacting housing authorities. *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972) (D.C. Code prohibited retaliatory evictions).

116. Two excellent analyses of the *Monge* decision are found in Comment, 43 *FORDHAM L. REV.* 300 (1974), and Comment, 8 *GA. L. REV.* 996 (1974).

117. In all probability, the characterization was the result of the parties in their choice of pleadings. The courts were perhaps strained in compartmentalizing the theory of the cases, but at the same time felt bound to grant relief.

118. *Blades*, *supra* note 10, at 1422-27.

119. W. PROSSER, *THE LAW OF TORTS* § 121, at 856 (4th ed. 1971) [hereinafter cited as PROSSER].

120. PROSSER, *supra* note 119, § 129, at 932-33. *See, e.g.*, *United States Fidelity & Guar. Co. v. Millonas*, 206 Ala. 147, 89 So. 732 (1921) (employee discharged because employer's insurer threatened cancellation of policy if employee filed compensation claim).

121. CAL. LAB. CODE §§ 1102, 1105 (West 1971). *See also* Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 *STAN. L. REV.* 1015 (1970). Several federal statutory provisions exist prohibiting various forms of employer abuse or discrimination. National Labor Relations Act, 29 U.S.C. § 158 (a)(3) (1970); Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (Supp. II, 1972); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1970).

122. The cases sounding in contract did not discuss the need for consideration.

establishing the duty because, in dealing with the traditional rule, one is confronted with a century of action where the employer has had the absolute right of discharge regardless of the motive.

The problem of creating job security for the professional employee may be solved under the holding of these recent cases by further reliance on the concept of public policy. Certainly the state has a strongly expressed public policy in favor of encouraging ethical conduct. The states license professionals, their statutes prohibit criminal activities, and the states' highest court often regulate the bar. Together, these interests form an overwhelming public policy supporting the actions of the resisting professional employee. If courts have allowed recovery based on the public policy considerations present in perjury solicitation and intimidation against compensation claims, recovery also should be given for a discharge resulting from refusing solicitation to unethical and criminal activity or the mere questioning of the propriety of contemplated actions.

V. CREATION OF THE REMEDY

This note has demonstrated that under the traditional "employment at will" doctrine an employee has no remedy for an "abusive discharge." This section is an attempt to create such a remedy for the professional employee, either as a continuance of the recent common-law trend of cases such as *Frampton*, *Petermann*, and *Monge* or as a proposal for legislative adoption.

PROPOSAL: *No professional employee shall be discharged primarily for raising and discussing ethical issues regarding his employment.*

PROPOSAL: *No professional employee shall be discharged primarily for the refusal to obey the order of a superior or employer when this refusal was the only feasible means to prevent either a violation of a criminal statute or a breach of his professional ethics.*

The above statements embody the proposed cause of action for the discharged professional employee. Several points, however, must be discussed regarding the limits of this right. First, it must be determined whether a total discharge should be necessary to bring the right into existence or whether informal pressure brought to bear by the employer should be sufficient. Secondly, some procedure must be provided for exhausting all informal remedies prior to discharge. Thirdly, difficult questions exist concerning matters of proof and the employee's ability to marshal the facts. Fourthly, an examination of the potential recovery must be made and whether

compensatory or punitive damages will be allowed. Finally, the source of the right to recovery will be examined. This will involve consideration of possible common-law and statutory rights and the possibility of administrative agency supervision.

A. *Degree of Employer Sanction*

Because this note is concerned with both the prevention of unethical conduct and the necessity of job security for the professional employee, it is necessary to examine the degree to which one may be disciplined before any right of action should arise against the employer. Certainly, a complete discharge will suffice because it represents the ultimate in the employee's economic dislocation. A discharge necessarily requires the employee to search for new employment and at the same time forces him to justify his reasons for leaving his prior position when negotiating with prospective employers.¹²³

The firm, however, may resort to informal moves against a recalcitrant associate or junior accountant. Such moves could be the result of the merely raising of possible improprieties or resisting a superior's orders. These sanctions could involve a denial of promotion, a salary freeze, a less desirable work assignment, or an unfavorable reference to a future employer. Although these tactics are burdensome to the employee, they should not result in the triggering of a right of recovery against the employer. Informal sanctions do not involve the economic hardships present in the discharge situation. The associate or junior accountant is still employed and may discreetly seek employment elsewhere.¹²⁴ This presents the most workable solution to the problem because, ideally, it is undesirable to be employed by a firm that disallows discussion of ethical issues or demands unethical conduct from its employees. On the other hand, wages are still being earned, allowing a continuance of family support.

It can easily be seen, however, that once created, a right of recovery in the employee could be circumvented by the employing firm. The firm need only make the employment so difficult and unpleasant that the employee would quit in frustration. Upon an action for damages, the firm would simply counter with the defense that the employee resigned voluntarily.¹²⁵ Therefore, in order to counteract this tactic, recovery should be allowed when the em-

123. See note 101 *supra*.

124. See *Blades*, *supra* note 10, at 1406.

125. This was argued in *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), but the court found a discharge.

ployer engages in actions or imposes job requirements that are so unreasonable that they justify the employee's resignation. Although this standard is necessarily subjective, theoretically, it is no more so than the standard for ordinary negligence and it may be made more specific by subsequent judicial interpretation. Hopefully, this requirement would minimize employer harassment, yet would not afford recovery in a situation in which the employee's resignation is due only to minor conflicts.

B. Informal Remedies

By far the greatest number of intra-firm ethical conflicts are resolved informally. The obvious desideratum is that upon the senior partner's approach, the associate or junior accountant will voice his objections to the course of action, and through informal discussion, the ethical course will be taken.¹²⁶ If no understanding is reached,¹²⁷ the desirable practice would be to discuss the action with other members of the firm. Often the subject actually is brought before a meeting of the partnership or of the entire firm.¹²⁸

If the problem is elevated to one of confrontation, two things should be noted. First, the employee would be wise to seek guidance and support for his position from members of the local professional association and perhaps from the local grievance committee. Some local associations maintain telephone advisory services that allow a quick resolution of doubts as to the propriety of certain actions.¹²⁹ Secondly, the associate should be prepared to suffer the conse-

126. In a law office "[m]uch can be accomplished if an older lawyer in the office is willing to serve as a preceptor for a young lawyer and to take the time to talk over with him the problems that he will face during his professional life." T. VOORHEES, *THE PRACTICAL LAWYER'S MANUAL FOR LAW OFFICE TRAINING FOR ASSOCIATES* 40 (1969); see also Burke, *Conflicts of Interest*, in *MANAGING LAW OFFICE* 229 (PLI ed. 1965).

127. In many cases the probable result is an education of one of the parties to the nature of the transaction. Either the associate will point out the ethical problem to the partner, or, in reverse, the partner will demonstrate the correctness of the course of action.

128. Mr. Robert B. von Mehren, a partner in the firm of Debevoise, Plimpton, Lyons & Gates, has stated:

Law firms must recognize the ethical problem when it arises. That is a question of sensitivity and discussion among the lawyers. In our office, if someone runs into a problem of professional ethics he will discuss the question with one or more partners. If the matter is something which raises considerable doubt in the view of the partners who consider it, it will be discussed at the firm's weekly luncheon. There the issue will be resolved in accord with the judgment of all of the partners.
von Mehren, *Ethics*, in *MANAGING LAW OFFICES* 234 (PLI ed. 1965). In the author's discussions with members of firms in Nashville, Atlanta and San Francisco, the above procedure was most often used.

129. New York City has such a service whereby grievances are telephoned to a committee on ethics. *Id.* at 233.

quences if his position subsequently is found to be erroneous. Again, this is not to suggest that a firm should be allowed to discharge an employee merely because he questioned the propriety of a certain action although stopping short of actual insubordination. In fact, the near universal practice is to encourage open discussion of ethical problems. But when this practice is not the norm, discharge for merely raising ethical concerns should give rise to a cause of action in the discharged employee.

Thus, although a remedy should be given for a discharge that is the result of resistance or even mere questioning of improprieties, it should not be allowed when discharge results from the *refusal* to follow superior orders when the employee's position was incorrect. To hold otherwise would be to elevate individual ideas to a position of primacy,¹³⁰ if not to reward erroneous judgment.

C. *Problems of Proof*

Closely aligned with the pursuit of informal remedies is the problem of proof of the employer's actions. By its very nature, solicitation to unethical activity will be covert at best. The typical situation will not involve readily provable facts and could evolve into a swearing contest between the parties. Moreover, once a right of recovery is established, the danger of fictitious claims arises, a possibility that should be eliminated by a sufficiently stringent standard of proof.

A prerequisite to any recovery by the discharged employee should be that all internal avenues of conflict resolution¹³¹ be exhausted and that the conflict be brought to the attention of the local grievance committee. This requirement serves a dual purpose since it not only encourages a settlement of the controversy before any damaging acts are done but also forms a record of actions taken that

130. Under many theories of civil disobedience (Thoreau-Ghandi-King) there is no expected relief from punishment. Likewise, in the instant situation, the employee's resistance is grounded in conscious resistance. The difference, however, is that the professional employee asserts this position as the systematic norm and only later is he proved incorrect. See generally Levinson, *Civil Disobedience and the Need for a Proportioned Response*, 20 U. FLA. L. REV. 278, 279 (1968). The author believes that departure from the firm is the only practical alternative when there is a denial of the employee's request not to work on matters distasteful to him which are short of being unethical.

131. A similar requirement exists for judicial review of administrative agency action. "[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); Cf. K. DAVIS, *ADMINISTRATIVE LAW TEXT* §§ 20.01-.10 (3d ed. 1972); the A.N.A. NURSES CODE, *supra* note 3, states that there should be ". . . an established mechanism for the reporting and handling of incompetent, unethical or illegal practice within the employment setting, so that such reporting can go through official channels and be done without fear of reprisal." *Id.* at 471.

can be used by the employee as proof. Because this type of solicitation to unethical activity normally will be covert, letters of protest, witnesses to discussions, minutes of partnership meetings, and grievance committee petitions all will be available to document the employee's resistance to unethical activity. He still must prove that his resistance was the "primary" motive for the discharge, but an exhaustion requirement would aid the employee's marshalling of the evidence.¹³²

It should be noted that many accounting and law firms do not have formal procedures for resolving ethical questions that may arise in the course of practice. If a right to recovery is granted, however, it may serve as an inducement to less formality and make the plaintiff's case more difficult to prove. This problem might be solved in two ways. First, any remedy granted by statute could require the adoption of formal or semi-formal grievance procedures within law and accounting firms. Secondly, similar procedures could be required by state professional associations or by the respective codes of ethics. If these provisions were adopted, the absence of satisfactory procedures could result in a shifting of the burden of proof to the employer to prove that the discharge was not motivated primarily by the employee's response to the ethical problem.¹³³

When informal grievance procedures are available and have been exhausted, the employee logically should have the burden of proof on the issue of the reason for the discharge.¹³⁴ Some question exists, however, concerning the proper quantum of evidence needed to sustain a recovery. Under the traditional civil standard the plaintiff must prove his case by a preponderance of the evidence.¹³⁵ This

132. As noted *infra*, where an administrative agency to handle cases of professional discharges exists, of necessity there must be resort to administrative action before the grant of judicial relief.

133. An interesting example of this type of affirmative requirement can be found in an SEC consent order involving law firm regulation. The Commission enjoined the firm's illegal activity and required a process for assuring compliance with the order. Among the requirements were: that the firm meet every two weeks to discuss the firm's active cases and obtain approval of all partners before any opinions are issued; that the firm investigate bond offerings to assure use of independent auditors and to check the background of participants; and that partners and associates, at least annually, attend continuing education workshops and seminars. *In re Ferguson*, Securities Act Release No. 5523 (Aug. 21, 1974); 5 SEC DOCKET No. 2, at 37-38 (Sept. 3, 1974), BNA SEC. REG. & L. REP. No. 268, at A-25 (Sept. 11, 1974). This type of action is a new approach in using leverage against professionals to cure ills not solely in the securities markets. See Fiflis, *supra* note 6, at 64, n.125.

134. *But cf.* the Military Selective Service Act of 1967, 50 U.S.C. § 459 (App. 1970) (burden of proof on employer).

135. See C. McCORMICK, THE LAW OF EVIDENCE § 339 (2d ed., E. Clearly 1972) [hereinafter cited as McCORMICK]; 9 J. WIGMORE, TREATISE ON EVIDENCE § 2498 and cases cited at 325 n.1 (1940).

standard has been defined as "proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence."¹³⁶ This standard appears appropriate in the instant situation because it forces the plaintiff to demonstrate, as a factual matter, that his resistance was the "primary" motive in bringing about the discharge. Thus, when both sides present equally persuasive cases, the plaintiff will have failed to satisfy his burden under this standard.

An alternative to the "preponderance test" is the "clear and convincing evidence" test.¹³⁷ Under this test the plaintiff has the greater burden of showing a "high probability" of the existence of his factual assertions.¹³⁸ This standard is used most often in actions in which the facts are known only to the parties, such as cases involving fraud or undue influence in the making of a will.¹³⁹ The use of this standard is tempting in the instant case because of the covert nature of the solicitation. Further, a higher standard of proof would tend also to minimize recovery in vexatious suits in which the jury's sympathies may lie with the employee. A countervailing factor, however, is the requirement that the informal remedies be exhausted prior to any judicial action. Of necessity, the pursuit of an informal remedy will acquaint third parties with the controversy and thus bring the facts outside the exclusive knowledge of the parties.

Once the standard of proof is determined, an examination must be made of the inferences appropriate for use in establishing the requirement that the discharge be "primarily" the result of the employee's resistance. Parallel examples may be found in actions before the National Labor Relations Board under the National Labor Relations Act provisions forbidding discharge on grounds of union activity or membership.¹⁴⁰ Assuming that an employer attempts to justify discharge on grounds other than employee resistance to unethical action, the employee may prove his case in several ways: the contemporaneous nature of the resistance and the firing,¹⁴¹ recent promotion or commendation of the employee,¹⁴² lesser sanc-

136. McCORMICK, *supra* note 135, at § 339, at 794; *see also* MODEL CODE OF EVIDENCE rule 1(3) (1942).

137. McCORMICK, *supra* note 135, at § 340.

138. *See id.* at 796.

139. *Id.* at 797.

140. 29 U.S.C. § 158(a)(3) (1970). *See Note, California's Controls of Employer Abuses of Employee Political Rights*, 22 STAN. L. REV. 1015, 1044 (1970).

141. *Cf. NLRB v. Council Mfg. Corp.*, 334 F.2d 161 (8th Cir. 1964); *NLRB v. Tru-line Metal Prods. Co.*, 324 F.2d 614 (6th Cir. 1963), *cert. denied*, 377 U.S. 906 (1964).

142. *Cf. NLRB v. Council Mfg. Corp.*, 334 F.2d 161 (8th Cir. 1964).

tions given to other employees for the same stated reasons,¹⁴³ or a long and uneventful term of employment already served.¹⁴⁴ When combined with third-party testimony concerning the conflict, these factors will aid the employee in establishing the reasons for the discharge. Thus the associate's burden does not seem insurmountable; the key factor will be the documentation of employer action.

D. Damages

If the plaintiff prevails, he should be compensated for the damages to his professional reputation,¹⁴⁵ economic losses suffered as a result of the lost employment,¹⁴⁶ and perhaps attorney's fees and costs.¹⁴⁷ Essentially, these are compensatory damages and could be awarded either under a common-law action or by statutory enactment. Compensatory damages have been defined as substitutionary, that is, giving the plaintiff relief to make up for a loss not originally a money loss, but one that ordinarily may be measured in money.¹⁴⁸ Additionally, some possibility of nonpecuniary compensatory damages may be desirable. This could involve a public declaration of moral standing or perhaps the entry of a corrective notice in the official professional organ.

Problems do exist, however, in determining the method of measuring compensatory damages. If recovery is measured by the period from discharge to the trial,¹⁴⁹ the plaintiff might be encouraged merely to await recovery. This situation is not likely to occur, however, because few, if any, plaintiffs could afford not to seek alternate employment. Additionally, a duty to mitigate damages should be imposed by requiring the employee to seek satisfactory employment

143. *Cf. Colecraft Mfg. Co. v. NLRB*, 385 F.2d 998, 1004 (2d Cir. 1967).

144. *Cf. Sterling Aluminum Co. v. NLRB*, 391 F.2d 713 (8th Cir. 1968); *Mims v. Metropolitan Life Ins. Co.*, 200 F.2d 800 (5th Cir. 1952), *cert. denied*, 345 U.S. 940 (1953) (libel action for stated reason of discharge when employee had served 32 years).

145. Rarely are special damages awarded for damage to the employee's reputation. They are ordinarily said to be too remote and not in the contemplation of the parties. *Mastoras v. Chicago M. & St. P. Ry.*, 217 F. 153 (D.C. Cir. 1914); *Gary v. Central of Ga. Ry.*, 37 Ga. 744, 141 S.E. 819 (1928). In the instant case, however, the primary asset of the professional is his reputation. Discharge by the employer certainly contemplates the resultant damage to one's reputation.

146. Recovery for back pay has been allowed for wrongful discrimination in hiring and discharge under Title VII of the Civil Rights Act of 1964, § 706(9), 42 U.S.C. §§ 2000e-2000e-11 (1970), *as amended*, Equal Employment Opportunity Act of 1972, 86 Stat. 103 (codified at 42 U.S.C.A. §§ 2000e-2000e-1 (1970)); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973).

147. *Accord*, Comment, 8 GA. L. REV. 996, 1006 (1974).

148. D. DOBBS, REMEDIES § 3.1 (1973) [hereinafter cited as DOBBS].

149. See Comment, *Monetary Recovery Under Federal Statutes*, 45 TEX. L. REV. 853 (1967).

elsewhere, although the plaintiff would not be bound to accept a different or inferior job.¹⁵⁰

An additional possibility for recovery would be the granting of punitive damages.¹⁵¹ This alternative is attractive because a major purpose of a punitive damage award is to deter the tortfeasor's actions.¹⁵² Since the major function of the present cause of action is to create an atmosphere that deters unethical conduct, punitive damages are particularly appropriate.¹⁵³ Traditionally, these damages have been awarded when the defendant's conduct is intentional, deliberate, and of a character "frequently associated with crime."¹⁵⁴ Conduct proscribed by the proposed remedy certainly will be intentional and it can be argued persuasively that the intentional solicitation to criminal or unethical activity satisfies any requirement of outrageous activity.¹⁵⁵ Nevertheless, if punitive damages are allowed, grave potential for abuse exists. Disgruntled employees, faced with a legitimate discharge, may resort to a type of coercion using the threat of punitive damages to insure continued employment. This problem should be solved by requiring the plaintiff to prove that discharge resulted "primarily" from the employee's raising of ethical issues which would thus allow the employer to terminate the employment relationship when good cause exists.

A further aspect of punitive damages is that they are often a veiled award for attorney's fees and expenses encountered in bringing suit.¹⁵⁶ This appears to be a laudable purpose, although if a right

150. The employee need not seek or accept a position of lesser rank, *State ex rel. Freeman v. Sierra Co. Bd. of Ed.*, 49 N.M. 54, 157 P.2d 234 (1945); *Mitchell v. Lewensohn*, 251 Wis. 424, 29 N.W.2d 748 (1947), at a reduced salary, *Crahtree v. Elizabeth Arden Sales Corp.*, 105 N.Y.S.2d 40 (Sup. Ct. 1951), *aff'd*, 305 N.Y. 48, 110 N.E.2d 551 (1953), or at a distant place, *San Antonio & A.P. Ry. v. Collins*, 61 S.W.2d 84 (Tex. Civ. App. 1933). See generally *J. CALAMARI & J. PERILLO*, *supra* note 83, at § 219 (1970).

151. Punitive damages have been allowed in suits under Title VII, *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973). *But see Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973), and in civil rights contexts under 42 U.S.C. § 1982, 1983 (1970). See *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965); *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360 (S.D. Cal. 1961).

152. *Scott v. Donald*, 165 U.S. 58 (1896); *PROSSER*, *supra* note 119, at § 2, at 9.

153. Punitive damages also may serve a useful purpose in those jurisdictions in which compensatory damages are not allowed for damage to reputation. See note 145 *supra*.

154. *PROSSER*, *supra* note 119, § 2, at 9.

155. "It is usually the defendant's mental state that is said to justify a punitive award against him, rather than his outward conduct." *DOBBS*, *supra* note 148, at § 3.9, at 205; see *Taylor v. Atchison, T & S.F. Ry.*, 92 F. Supp. 968 (D. Mo. 1950) (punitive damages allowed where employee fired in violation of contract). Although punitive damages normally are not allowed in an action on a contract, the instant remedy should be characterized as one in tort for wrongful discharge. *CALAMARI & PERILLO*, *supra* note 83, at § 205.

156. *PROSSER*, *supra* note 119, at § 2, at 11.

to recovery were granted statutorily, such expenses could be awarded without punitive damages.

E. Reinstatement

Although reinstatement may be offered as a possible remedy for the discharged professional, it is not the optimum solution because of its potentially self-defeating nature. Litigation between the parties to the action is likely to cause anger and hostility, an atmosphere not conducive to good working relationships. Further, forcing the employer to reinstate a discharged associate or junior accountant often will mean simply that the employer will search for other causes for discharge.¹⁵⁷ These reasons might include fabricated charges of insubordination or unsatisfactory performance of an unreasonably burdensome workload.

Most importantly, perhaps, the private employer should have the absolute power to discharge an employee, particularly in the professional fields. In the operation of the modern law or accounting firm, firm members interact constantly, and this interaction would be impaired seriously by a requirement that the employee be reinstated. Thus, even though the employer should not have the *right* to discharge, because contract or tort theory will provide a recovery for the employee, the employer should still have the *power* to do so. As under any contract, it should be a matter of the employer's choice. The price of the power to breach the contract is the damage incurred by the other party. Indeed, it is hoped that compensatory and punitive damages may be sufficiently burdensome to dissuade unethical conduct from the beginning.

F. The Source of the Remedy

A final, but critical topic of concern is the source and method of enforcement of any right of recovery for an "abusive discharge." At issue is whether the right is to be found under federal or state constitutional provisions, federal or state statutory provisions, common-law actions, or through the establishment of an administrative agency.

It has been suggested that the acts of private individuals might be regulated legitimately under the federal constitution as if these same acts were done by an arm of the government.¹⁵⁸ This theory is

157. See Note, *Improving the Effectiveness of NLRB Remedies in Discriminatory Discharge Cases*, 36 GEO. WASH. L. REV. 1169 (1968); Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015, 1048 (1970).

158. Cf. Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974). See also Blades, *supra* note 10, at 1431 & 1431

advanced on the basis that certain large private entities serve a quasi-governmental function and thus satisfy the state action requirement of the fourteenth amendment.¹⁵⁹ While some large corporations may, arguably, approach this status because of their pervasive effects upon an individual's life, even a large accounting or law firm would not fit within this categorization.¹⁶⁰ Thus, it appears improbable and perhaps visionary that the Federal Constitution will provide the direct source of any private cause of action on the part of an abusively discharged professional employee.¹⁶¹

A better hope for a constitutionally based cause of action lies in the emerging importance of state constitutions. Although most state constitutions contain state action requirements,¹⁶² in many cases the language is ambiguous and unlitigated.¹⁶³ Additionally, some state constitutions require state action for some provisions but not for others.¹⁶⁴ In those states where state action is not required for certain provisions, some cases have held that a private right of action is created directly by the state constitution.¹⁶⁵ It is conceivable that the proposed cause of action could be created under certain "right to work" provisions¹⁶⁶ or, in the alternative, under state "due process" provisions, but the creation of a recovery for the discharged professional admittedly would necessitate a strained construction of even the most liberal state constitutions. State constitutional inter-

n.127; A.S. MILLER, *PRIVATE GOVERNMENTS AND THE CONSTITUTIONS* 13 (Occasional Paper for Center for the Study of Democratic Institutions, 1959) cited in *Blades* at 1431 n.127.

159. The state action requirement was first enunciated in the Civil Rights Cases, 109 U.S. 3 (1883). The quasi-governmental authority concept was extended in *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) and subsequently limited in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). As to the creation of a private right of action under a federal constitutional amendment, see *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (cause of action created under the fourth amendment).

160. Constitutional regulation of private action has been criticized strongly by some commentators. See, e.g., Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 *YALE L.J.* 345 (1961).

161. Procedural due process upon discharge is also limited even in instances involving state action. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). See generally E. REUTHER & R. HAMILTON, *THE LAW OF PUBLIC EDUCATION* 455-57 (1970).

162. *Project Report: Toward an Activist Role for State Bills of Rights*, 8 *HARV. CIV. RIGHTS-CIV. LIB. L. REV.* 271, 277-301 (1973).

163. *Id.*

164. FLA. CONST. art. I § 6 (right to work and collectively bargain); FLA. CONST. art. I § 9 (due process); ILL. CONST. art. I § 17 (prohibiting discrimination in hiring and promotion practices without regard to state action); N.J. CONST. art. I § 19 (constitutional right to work and collectively bargain).

165. *Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189, 175 A.2d 639 (1961) (action created under N.J. CONST. art. I § 19 to enforce right to collectively bargain); *Local 519 Plumbers & Pipefitters v. Robertson*, 44 So. 2d 899 (Fla. 1950) (action to enforce rights guaranteed under FLA. CONST., Decl. of Rts. § 6 (1885) (now FLA. CONST., Decl. of Rts. § 12—right to work)).

166. *Id.*

pretation, however, would be further support for the existence of such a right whether subsequently created by statute or developed from the common law.

Perhaps the easiest method for creating a right of recovery would be through a federal or state statute. The statute could take the form of the proposals described above and could provide both the standard of proof and the nature of damages. Of necessity, the statute must satisfy federal¹⁶⁷ or state¹⁶⁸ jurisdictional grounds, but, given the extent of regulation in other areas,¹⁶⁹ this does not appear problematic.

Although the modern law or accounting firm is involved with and affects interstate commerce to a degree sufficient, in all probability, to justify federal involvement, it is likely that the problem under consideration is more suited to state regulation. Federal legislation might be difficult to obtain, and because professionals are organized, licensed, and regulated on a state by state basis, state-created remedies seem preferable.

As an exercise of the police power, a state could create a right of recovery for the wrongfully discharged professional employee.¹⁷⁰ This alternative appears to afford the best opportunity for acceptance and as under a federal statute, proof could be prescribed and damages specifically stated. Given the increased public awareness of ethical problems and the greater push towards ethical training for young professionals, state statutory solutions may be within the realm of possibility. Certain obstacles, however, may exist. Paradoxically, some resistance to a state statute may come from state professional organizations. While the statute could boost their public image, members of the organizations might not view the remedy as in their best interests because such legislation offers the potential for recovery against themselves and their firms.

A recovery under common-law principles of master-servant law or tort law could be accomplished without too great a break with

167. Federal legislation not keyed to state action and the fourteenth amendment is normally upheld under the Commerce Clause. U.S. CONST. art. I § 8.

168. Although many state constitutions require state action under specific provisions, they do not operate as limitations on the legislative power. This is justified under the state's inherent "police powers." See *State Bills of Rights*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 271, 298 (1973).

169. Cf. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964) (racial discrimination); Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)-(e)(2) (1970) (employment discrimination); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1970).

170. An analogous remedy has been enacted in California prohibiting discharge for an employee's political activities. CAL. LABOR CODE § 1102 (West 1974 Supp.).

traditional theory.¹⁷¹ The traditional theory was and still is that "at will" contracts may be terminated for any reason. As noted previously, however, recovery has been granted recently in situations involving nonwork-related discharges.¹⁷² In these cases, recovery was based on the fact that a strong public policy existed in favor of the employee's actions. It is difficult to imagine a stronger public policy than that of regulating professional occupations and preserving ethical conduct. To illustrate: each state licenses attorneys, accountants and other professionals contingent on the provision of ethical conduct, and its statutes prohibit criminal activities. Together, these interests form an overwhelming public policy supporting the actions of a resisting employee. Thus, whether the cause of action is created in tort or in contract, courts should protect their own interests in preserving ethical conduct.

A final alternative for compensating the wrongfully discharged employee lies in resort to an administrative agency for resolution of the claim.¹⁷³ To this end, a new agency could be created to deal specifically with this problem, or an existing agency's jurisdiction could be expanded. Again, it would be preferable to vest this power in a state agency, because existing state agencies such as a state fair employment commission may already have the necessary expertise in handling similar matters. The use of a currently existing agency would also provide the best answer to the limited number of cases of this type that might be brought. It is anticipated that the volume of litigation would be small¹⁷⁴ and thus a specialized agency could better supply evenhanded treatment. Also, professional organizations could establish arbitration boards to handle such cases with further referral to the courts.

171. With respect to the role of the judiciary in creating new judicial remedies see Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).

172. *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973); *Peterman v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25, 29 Cal. Rptr. 399 (1959).

173. See, e.g., the establishment of the Equal Employment Opportunity Commission to prevent employment discrimination. 42 U.S.C. §§ 2000(e) *et seq.* (1970), *as amended*, 42 U.S.C. §§ 2000(e) *et seq.* (1970). It should be noted that the proposed cause of action could be established through the regulatory powers of some federal agencies. These regulations could provide that unless discharged professional employees were compensated, the firm would be barred from practicing before that agency. See note 133 *supra*. On the state level, jurisdiction could be granted to hear claims dealing with licensed professional employees. There would, of course, be obvious but not undue difficulties in defining the term "professional."

174. A letter from Mr. John Bonomi, Chief Counsel to Committee on Grievances, the Association of the Bar of the City of New York (February 25, 1975), stated that Mr. Bonomi had not encountered any situation involving the discharge of a professional employee for resistance to superior orders but he gave no opinion on the possible frequency of unreported incidents.

V. CONCLUSION

It has been demonstrated that under current law, the "abusively discharged" professional employee has no real recourse against his employer. This note has attempted to fashion such a right and to offer different alternatives for affording relief. This remedy is not designed to result in a flood of suits against professional employers, for it is hoped that the burden of proof and prerequisites to recovery will deter spurious actions. In a sense, the employee will not be relieved of any burden regarding unethical conduct, but in reality will be put in a position of greater responsibility. Once the associate or junior accountant is protected from discharge by the creation of a right to recovery, far less excuse exists for his acquiescence to unethical superior orders or for the failure to raise ethical questions. Previously, the fact that action was taken as a result of superior commands would be held in mitigation in any proceeding against the employee.¹⁷⁵ If the employee is otherwise protected, however, no reason exists to mitigate possible sanctions. Thus, the employee may be put into a position of greater responsibility, a responsibility to refrain zealously from unethical conduct.

From another point of view, the employer must be protected from vexatious or abusive complaints by disgruntled employees. It is hoped that actions for abuse of process could deter vexatious suits, but if not, perhaps the employee could be subject to professional sanctions for the filing of such complaints. This could involve public censure, or perhaps a suspension.

An unsolved problem will be the source of any remedy for the discharged professional. Given the recent decision in *Monge* it may be likely that judicial expansion of common-law principles will provide the greatest potential for change. Further, with the intimate role of the judiciary in the achievement of high professional standards for attorneys, the courts could easily find that the instant remedy is a necessary expansion of its supervisory powers. While judicial control is not as strong with respect to other professionals, common-law relief for them also would be appropriate.

Finally, a strong possibility of legislative action exists. Similar types of statutes regulate other sectors of the population and it should be recognized that if any class requires such protection it should be the professionals. They are statutorily regulated in both their qualifications and conduct. Consistent with this regulation a type of job security should be granted to those professions whose actions greatly affect the affairs of the public.

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175. *Id.*

