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Intra Law Firm Privileged Communications Regarding Questionable Attorney Conduct

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ARTICLE

Evan King | Jeffrey A. Parness

Intra Law Firm Communications Regarding Questionable Attorney Conduct

Abstract. When questions are raised regarding a law firm attorney's representation of a firm client, the questioned attorney often wishes to seek legal counsel. A conferral will often benefit the attorney, the firm, and the client. Conferences regarding questioned conduct should be encouraged, not discouraged. To encourage these beneficial conferrals, a broad attorney–client communication privilege and a broad work-product protection (or privilege) should be available.

Availability should not be dependent upon whether in-house, outside, or other legal counsel is employed. While earlier federal precedents were split regarding the availability of the attorney–client communication privilege in the in-house counsel setting, increasingly therein the privilege is recognized by state high courts. In addition, work-product protections should often be available to legal counsel advising questioned attorneys. Because of current federal–state and interstate differences in the two immunities from compelled involuntary disclosure, conferring legal counsel and questioned attorneys must proceed cautiously.

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I. INTRODUCTION

Attorney–client privilege laws generally “recognize[] that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”¹ To achieve this purpose the laws “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”² Anything but full disclosure on the part of the client limits a lawyer’s ability to advise the client or advocate on the client’s behalf.³ Privilege laws promote truthful and candid communication with lawyers “by removing the fear of compelled disclosure of information”⁴ outside of the attorney–client relationship. But what happens when the attorney representing a client effectively becomes a client herself by seeking legal advice regarding the quality of her work for her client? Can the attorney, for example, expect her communications with her attorney to be privileged from disclosure if the client sues for malpractice and seeks disclosure? Generally, the answer is yes.⁵ But what if she seeks counsel from an attorney within her own firm? Do the conflicting interests of the firm and the client it represented at the time of communication render the privilege unavailable later to the firm and its lawyers? While the extent of protection of such intra-firm communications sought by the firm and its lawyers varies,⁶ there is a growing trend in support. However, the parameters of such protection remain somewhat uncertain. Uncertainties abound, in part, because until recently there were only federal case precedents; the primary focus was on the communications within very large law firms, and there was scant attention to other possible protections, like work-product.

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

2. *Id.*

3. *See id.* (emphasizing the client’s need to disclose relevant information to their advocate in order to be well represented).

4. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 256 (Ill. 1982).

5. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(4) & cmt. 9 (2013) (“A lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply with these [r]ules.”).

6. *Compare* *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255, 255 (S.D.N.Y. 1994) (“No principled reason appears for denying a comparable attorney[–]client privilege to a law partnership which elects to use a partner or associate as counsel . . .”), *with In re SonicBlue Inc.*, No. 03-51775, 2008 WL 170562, at *9 (Bankr. N.D. Cal. 2008) (“[A] law firm cannot assert the attorney[–]client privilege against a current outside client when the communications that it seeks to protect arise out of self-representation that creates an impermissible conflicting relationship with that outside client.”).

This Article will first explore the federal precedents on the attorney–client communication privilege relevant to communications between a law firm’s attorneys for the purpose of obtaining legal advice regarding a firm member’s questionable representation of an existing client. It will then explore four very recent state court rulings. In light of these recent precedents, as well as a 2012 American Bar Association resolution,⁷ it will conclude that an intra-firm attorney–client communication privilege should generally be recognized, though other protections may also be available. A Model Rule is then proposed which recognizes the need for interstate modifications based on state law differences on basic attorney–client privilege and other protections against compelled disclosures. These interstate variations are exemplified by a review of current Illinois and Texas laws, providing a roadmap for how all state courts should approach privilege assertions regarding attorney-to-attorney communications involving questionable attorney conduct.

When assessing privilege issues involving conferrals about questionable attorney conduct, the Article will go beyond current precedents, which chiefly involve communications between questioned lawyers and in-house law firm counsel. It will explore protected (and sometimes privileged) work-product and privileged attorney–client communications, suggesting that differing foundational bases will likely prompt differing state law approaches.

II. THE FEDERAL CASES

It is increasingly common for a law firm to have in-house counsel for the purpose of advising firm members regarding potential civil liability to clients and firm compliance with Rules of Professional Conduct.⁸ The

7. See ABA House of Delegates, Formal Op. 103 (2013) (calling for the recognition of a privilege protecting communications between attorneys and in-house counsel). See generally *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, PC*, 746 S.E.2d 98 (Ga. 2013) (ruling that attorney–client privilege could be applied to the firm’s in-house counsel); *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012) (allowing a law firm to retain documents and communications between in-house counsel during a legal malpractice suit); *RFF Family P’ship v. Burns & Levinson, LLP*, 991 N.E.2d 1066 (Mass. 2013) (holding that communications between law firm attorneys and in-house counsel concerning a malpractice claim asserted by a current client were protected by the attorney–client privilege); *Crimson Trace Corp. v. Davis Wright Tremaine*, 326 P.3d 1181 (Or. 2014) (en banc) (deciding that communications between lawyers in a firm and in-house counsel fall under the attorney–client privilege).

8. See Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1765–66 (2005) (emphasizing the increasing change of the role of in-house counsel); Susan Fortney, *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer’s Lawyer*, 53 U. KAN. L. REV. 835, 836 (2005) (revealing that firms of all sizes benefit from in-house counsel devoted to the

notion that the attorney–client privilege should protect against compelled disclosure of such advice is not new. Bar associations, commentators, and others have supported the privilege.⁹ The notion arose initially from the analogy comparing a law firm to a corporation.¹⁰ Law firms wanted to take advantage of the same benefits of employing in-house advisors that corporations enjoyed. Benefits include decreased costs, quicker access to advice, and informed decision making.¹¹ However, until recently, there were no clear precedents on whether intra-firm communications would be privileged. The federal cases, most of which were at the district level, offered only persuasive authority to the state courts. Overall, the federal cases were not favorable.¹² These cases may not be very influential,¹³ but their review is warranted to provide background for, and contrast to, recent precedents.

firm’s own legal affairs); Douglas R. Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 SYRACUSE L. REV. 69, 69–70 (2004) (suggesting that appointing in-house counsel can increase a law firm’s protection); Jeremy Gogel, *Intra-Firm Communications About Potential Legal Malpractice Claims: An Exception to Attorney–Client Privilege*, FOR THE DEFENSE, Apr. 2012, at 66, 66 (asserting that the public is better served when problems are examined early by general counsel).

9. See generally Brief of the Illinois State Bar Ass’n & the Chicago Bar Ass’n as Amici Curiae Supporting Defendants, *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012) (No. 11-0115) (supporting the privilege of in-house counsel communications); ABA House of Delegates, Formal Op. 103 (2013) (recognizing a privilege of communications between attorneys and in-house counsel); Edward J. Imwinkelried, *Preliminary Thoughts on an Attorney–Client Privilege for Law Firms: When a Current Client Threatens to Sue the Firm for Malpractice, Does the Privilege Apply to the Firm’s Consultation with In-House Counsel About the Potential Claim?*, 48 VAL. U. L. REV. 715 (2014) (discussing circumstances when intra-firm privileges should be upheld against a former client).

10. See *Hertzog, Calamari & Gleason*, 850 F. Supp. at 255 (“[A] partner or associate is the functional equivalent of a corporate staff attorney representing a corporate employer.”).

11. See *Upjohn Co. v. United States*, 449 U.S. 383, 390–92, 403 (1981) (addressing the issue of privileged communications between employees and in-house counsel in the corporate setting). In *Upjohn*, the Court addressed the issue of privilege in the corporate setting, holding that privilege does attach to conversations between corporate employees and the corporation’s in-house counsel when the communication is made for the purpose of obtaining legal advice. *Id.* at 403.

12. But see *Hertzog, Calamari & Gleason*, 850 F. Supp. at 255 (recognizing privilege between firm attorneys and the firm’s in-house counsel); *TattleTale Alarm Sys., Inc v. Calfee, Halter & Griswold*, No. 2:10-CV-226, 2011 WL 382627, at *9–10 (S.D. Ohio Feb. 3, 2011) (enforcing the attorney–client privilege to find documents not discoverable). See generally *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071, 2007 WL 578989 (N.D. Cal. Feb. 21, 2007) (compelling production of intra-firm documents); *Bank Brussels Lambert v. Credit Lyonnais*, 220 F. Supp. 2d 283 (S.D.N.Y. 2002); *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, PC*, 212 F.R.D. 283 (E.D. Pa. 2002) (denying intra-firm privilege); *In re SonicBlue Inc.*, No. 03-51775, 2008 WL 170562 (Bankr. N.D. Cal. 2008) (refuting that a law firm can assert the attorney–client privilege against a current client).

13. See Joan C. Rogers, *Massachusetts High Court Backs Privilege for Consults with Firm’s In-House Counsel*, 29 LWS. MAN. ON PROF. CONDUCT (ABA/BNA) 422 (July 17, 2013) (stating that courts are now backing the attorney–client privilege for in-house counsel).

A. *Denying Protections for Intra-Firm Communications*

Most federal cases denying the attorney–client privilege for intra-firm communications have done so based on some variant of either the fiduciary duty or current-client exception.¹⁴ The fiduciary duty exception arose from trust law, operating on the theory that the beneficiary of the trust is the ultimate beneficiary of any legal advice the trustee receives related to the administration of the trust; therefore, such consultations cannot be privileged against the beneficiary.¹⁵ The current-client exception holds that a privilege does attach to the communications between an attorney and one to whom a fiduciary duty is owed who speaks to the attorney on trust matters. But it further holds that if the fiduciary is also an attorney, that attorney’s fiduciary duty to her current client trumps the privilege.¹⁶ The common-client exception also holds that information will not be privileged against one client being jointly represented with another client by the same attorney.¹⁷ Later cases and scholarly work have criticized these federal cases.¹⁸

One federal case is *Koen Book Distributors v. Powell, Trachtman, Logan,*

14. See *Thelen Reid & Priest*, 2007 WL 578989, at *7 (implying that a conflict may exist when a law firm represents both itself and its client); *Bank Brussels Lambert*, 220 F. Supp. 2d at 287 (emphasizing that conflicts of interest arise when a firm seeks to represent both itself and another client); *Koen Book Distrib.*, 212 F.R.D. at 286 (contrasting the idea that a firm can both represent itself and fulfill its fiduciary duty to its client); *In re SonicBlue*, 2008 WL 170562, at *9 (suggesting the use of the attorney–client privilege to protect attorney papers is a conflict of interest).

15. See *Mueller Indus., Inc. v. Berkman*, 927 N.E.2d 794, 807 (Ill. App. Ct. 2010) (“The fiduciary-duty exception is limited by the requirement that the subject of the communications with the attorney was the ordinary affairs of the trust or corporation: if the communications concern the personal liability of the fiduciary or were made in contemplation of adversarial litigation, the exception does not apply.”). See generally *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970) (extending the fiduciary duty exception outside the bounds of trust law to the attorney–client relationship).

16. See, e.g., *Bank Brussels Lambert*, 220 F. Supp. 2d at 287 (“While the privilege will be applicable as against all the world, it cannot be maintained against [the current defendant].”).

17. See, e.g., *Valente v. PepsiCo, Inc.*, 68 F.R.D. 361, 368 (D. Del. 1975) (“[W]here an attorney serves two different clients in relation to the same matter . . . the court will not allow the attorney to protect the interest of one client by refusing to disclose information received from that client, to the detriment of another client . . .”).

18. See *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, PC*, 746 S.E.2d 98, 103–08 (Ga. 2013) (recognizing that the courts don’t see eye to eye on in-house privilege); *RFF Family P’ship v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1078–79 (Mass. 2013) (reasoning that the attorney–client privilege between in-house counsel ensures that information regarding ethical, regulatory, or risk management issues is confidential and easily accessible); see also Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1739–44 (2005) (questioning the rationale behind exempting in-house counsel from the protections of the attorney–client privilege when regarding current clients).

Carrle, Bowman & Lombardo, PC.¹⁹ There, the defendant law firm had been informed by its clients that they were considering a malpractice action against the firm. Nevertheless, the firm continued to represent the clients.²⁰ Roughly a month before the clients brought a malpractice action, the firm hired outside counsel to evaluate its representation of the client.²¹ The lawyers employed by the firm who had done the work for the clients, sought advice regarding ethical issues from another attorney within the firm.²² The intra-firm communications generated documents that were sought by the plaintiffs in the malpractice case.²³ The court rejected the firm's assertion of privilege regarding its internal documents, holding "that the law firm was in a conflict of interest relationship with its clients"²⁴ because "the firm still owed a fiduciary duty to plaintiffs while they remained clients"²⁵ and that "this duty is paramount to [the firm's] own interests."²⁶ The court suggested that when a law firm found itself in such an "unenviable situation," it should either immediately request to withdraw as counsel or seek the client's consent to continue representation after a full disclosure.²⁷

Would the firm in *Koen* have been ordered to disclose communications made with outside counsel before the firm's representation of the clients ended? It appears that the answer in *Koen* would be yes, even though the only communications sought in the case were the firm's internal documents; the court stated that "because plaintiffs may have retained other counsel does not remove the conflict so long as defendants also continued to represent them."²⁸

19. *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, PC*, 212 F.R.D. 283 (E.D. Pa. 2002).

20. *Id.* at 283.

21. *Id.* at 284 (acknowledging that communications with outside counsel were not the subject of this case, and the court did not specifically address whether such communications would be discoverable).

22. *Id.*

23. *Id.*

24. *Id.* at 286.

25. *Id.*

26. *Id.*

27. *See id.* (recognizing the threat of a bankruptcy hearing on short notice as an "unenviable situation").

28. *Id.* In a number of cases, either the client or the client's new counsel determines it would be in the client's best interest for the firm with which the conflict lies to continue representation of the adversely interested client. This makes sense because the firm that has been handling the case is most intimately familiar with the client's case and interests. *See RFF Family P'ship v. Burns & Levinson, LLP*, 991 N.E.2d 1066 (Mass. 2013) (discussing a firm's continued representation of a client despite a conflict); *see also Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012)

The *Koen* court was guided primarily by the decisions *In re Sunrise Securities Litigation*²⁹ and *Valente v. PepsiCo, Inc.*³⁰ In *In re Sunrise*, a firm defended itself against a former client seeking discovery of documents generated within the firm during the representation; the court initially found that the lines between attorney and client had been blurred and that attorneys and clients must be entirely separate entities for privilege to apply.³¹ Upon reconsideration, the court conceded that there might be situations in which a law firm could assert attorney–client privilege for intra-firm communications, though such a context could be fraught with “conflicting fiduciary duties which seldom arise in corporations or other professional associations.”³² The court found the determinative question to be “whether the interest in protecting clients who may be harmed by such a conflict affects the applicability of the attorney client privilege to a law firm’s communications with in[-]house counsel seeking legal advice for the firm.”³³

To answer this question, the *In re Sunrise* court looked to *Valente*, a class action by minority shareholders of Wilson Sporting Goods against PepsiCo, the majority shareholder of Wilson, regarding a merger of the two companies.³⁴ The plaintiffs in *Valente* sought internal documents from PepsiCo that included communications involving PepsiCo’s in-house general counsel, who also held a seat on Wilson’s board of directors, and a document from PepsiCo’s outside law firm, a partner which was also a member of Wilson’s board of directors.³⁵ The *Valente* court found that PepsiCo’s general counsel had conflicting fiduciary duties and therefore could not assert privilege against Wilson based on the common-client exception.³⁶ Pursuant to this reasoning, the *In re Sunrise* court held “that

(illustrating a client choosing to be represented by a firm despite asserting legal malpractice claims against the firm).

29. *In re Sunrise Sec. Litig.*, 130 F.R.D. 560 (E.D. Pa. 1989).

30. *Valente v. PepsiCo, Inc.*, 68 F.R.D. 361 (D. Del. 1975).

31. *In re Sunrise*, 130 F.R.D. at 565. The requirement that clients and attorneys be separate entities seems to conflict directly with *Upjohn*, where the Supreme Court held that communications between corporations and their in-house counsel are privileged. See *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981) (holding that communications between corporations and their in-house counsel are privileged). While the court reconsidered its decision and heard the law firm’s argument based on *Upjohn*, it did not extend the holding of *Upjohn* to apply to law firms. See *In re Sunrise*, 130 F.R.D. at 572 (differentiating between an attorney–client relationship and a relationship between members of the same entity).

32. *In re Sunrise*, 130 F.R.D. at 595.

33. *Id.* at 596.

34. *Id.* (employing the *Valente* decision).

35. *Valente*, 68 F.R.D. at 364.

36. *Id.* at 368 (“[W]here an attorney serves two clients having common interests and each party

a law firm's communication with in[-]house counsel is not protected by the attorney[-]client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication."³⁷ In short, law firms may not assert privilege against clients in contexts where a conflict of interest exists between the client and the firm.³⁸ This reasoning begs this question: What constitutes a conflict? Is an inherent conflict always created by a law firm seeking legal advice from in-house counsel regarding its representation of a current client? If so, it would appear that retaining outside counsel would implicate the same conflict.

Some federal courts have suggested that while privilege may apply to some intra-firm communications, the privilege should be very narrowly construed.³⁹ *Thelen Reid & Priest LLP v. Marland*⁴⁰ involved a contract dispute between a plaintiff law firm, Thelen, and the defendant, Marland, where Thelen sued for material breach and also sought to enjoin Marland from pursuing arbitration related to the contract in another jurisdiction.⁴¹ During discovery, Marland sought documents generated internally by Thelen for which Thelen asserted privilege.⁴² The *Thelen* court noted that *In re Sunrise* acknowledged at least "the theoretical existence of an attorney[-]client privilege between the law firm as attorney and itself as client."⁴³ The court stated:

[L]aw firms should and do seek advice about their legal and ethical obligations in connection with representing a client and . . . firms normally

communicates to the attorney, the communications are not privileged in a subsequent controversy between the two."). There is a serious problem with Valente's reasoning here. It is true PepsiCo's general counsel had conflicting fiduciary duties, but he was not jointly representing both PepsiCo and Wilson and although he could not have separated the knowledge he gained as a board member for Wilson, this is not a proper application of the common-client exception. See *id.* at 368 (recognizing the "universally recognized exception to the attorney[-]client privilege" concerning conflicting fiduciary duties).

37. *In re Sunrise*, 130 F.R.D. at 597.

38. *Id.*

39. See *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071, 2007 WL 578989, at *7 (N.D. Cal. Feb. 21, 2007) (urging against a bright-line rule that would discourage attorneys from conversing with other attorneys about ethical issues); *In re SonicBlue Inc.*, No. 03-51775, 2008 WL 170562, at *8 (Bankr. N.D. Cal. 2008) ("Because the attorney[-]client privilege operates to withhold relevant evidence from the fact-finder, it should be construed narrowly and only applied where necessary to achieve its purpose.").

40. *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071, 2007 WL 578989 (N.D. Cal. Feb. 21, 2007).

41. *Id.* at *1, 3.

42. *Id.* at *3-4.

43. *Id.* at *6.

seek this advice from their own lawyers. . . . A rule requiring disclosure of all communications relating to a client would dissuade attorneys from referring ethical problems to other lawyers, thereby undermining conformity with ethical obligations.⁴⁴

However, consistent with *In re Sunrise*, the court ordered Thelen to disclose all documents related to “consultations between Thelen lawyers on the firm’s ethical and legal obligations to Marland” based on the court’s perceived conflict of interest.⁴⁵ This order included documents “discussing claims that Marland might have against the firm or discussing known errors . . . [and] conflicts in its representation of Marland.”⁴⁶ The court declined to adopt a bright line rule, however, because it would “make conformity costly by forcing the firm to either retain outside counsel or terminate an existing attorney–client relationship to ensure confidentiality of all communications relating to that client.”⁴⁷

The federal cases denying the attorney–client privilege to intra-firm communications are based on the misapplication of a privilege exception or a failure to take account of the unique characteristics of a law firm that employs in-house counsel.⁴⁸ The fiduciary exception should not apply to most consultations regarding questionable attorney conduct.⁴⁹ The attorney liability that may stem from a fiduciary relationship with a client does not prevent the fiduciary from seeking counsel—thereby enjoying privilege.⁵⁰ For the common-client exception to apply, two or more beneficiaries must actually be common clients in an attorney–client

44. *Id.* at *7.

45. *Id.* at *8. The court stated the “documents relate to the Marland representation and were created during the Marland representation . . . and Thelen’s fiduciary relationship with Marland as a client lift[ed] the lid on these communications.” *Id.* at *7.

46. *Id.* at *8.

47. *Id.* at *7.

48. See *In re Sunrise* Sec. Litig., 130 F.R.D. 560, 597 (E.D. Pa. 1989) (declaring that attorney–client privilege within in-house counsel is not protected “if the communication implicates or creates a conflict between the law firm’s duties to itself and its duties to the client.”); see also *Thelen Reid & Priest LLP*, 2007 WL 578989, at *7 (suggesting that a firm’s fiduciary relationship with a client denies privileged communications concerning the client); *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, PC*, 212 F.R.D. 283, 286 (E.D. Pa. 2002) (emphasizing a firm’s duty to a client as “paramount to its own interests”); *Valente v. PepsiCo, Inc.*, 68 F.R.D. 361, 368 (D. Del. 1975) (summarizing the fiduciary exception to attorney–client privilege).

49. See *RFF Family P’ship v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1075 (Mass. 2013) (contending that when a trustee seeks legal advice for their own use and protection, “the fiduciary exception does not apply and the communications between the trustee and her attorney remain privileged.”); see also *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 536 (Ill. App. Ct. 2012) (failing to apply the fiduciary exception to attorney–client privilege).

50. See *RFF Family P’ship*, 991 N.E.2d at 1075 (stating potential attorney liability does not bar an attorney from soliciting counsel).

relationship with the same attorney, not simply two distinct beneficiaries of a fiduciary relationship with the attorney. In general, the federal cases fail to recognize that a law firm is able to employ in-house counsel to assist regarding questionable attorney conduct while still complying with ethical and legal obligations to its clients.

B. *Affording Protections for Intra-Firm Communications*

There are only a handful of federal cases that have protected the attorney–client privilege for intra-firm communications. In a memorandum opinion in *Hertzog, Calamari & Gleason v. Prudential Insurance Co. of America*,⁵¹ the court stated “[i]t is well settled that the attorney[–]client privilege applies to communications between the corporation and its attorneys . . . [and that t]he privilege attaches to communications with in-house counsel if the individual in question is acting as an attorney, rather than as a participant in the underlying events.”⁵² The judge then found that “[n]o principled reason appear[ed] for denying a comparable attorney[–]client privilege to a law partnership which elects to use a partner or associate as counsel of record in a litigated matter.”⁵³

Applying Ohio law in a diversity case, the court in *TattleTale Alarm Systems, Inc. v. Calfee, Halter & Griswold*⁵⁴ found that the privilege should be protected based on Ohio state law that recognized few exceptions to attorney–client privilege in general.⁵⁵ Here, TattleTale Alarm Systems held a patent and claimed it had charged the law firm of Calfee, Halter & Griswold with ensuring that the maintenance fees associated with the patent were paid.⁵⁶ The fees were not paid on time, and the patent lapsed.⁵⁷ When TattleTale filed a malpractice suit against Calfee and sought intra-firm communications related to the suit, the court denied TattleTale’s motion to compel based on Ohio law holding that an attorney may not testify to “a communication made to the attorney by a client in

51. *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255 (S.D.N.Y. 1994).

52. *Id.* at 255.

53. *Id.*

54. *TattleTale Alarm Sys., Inc. v. Calfee, Halter & Griswold*, No. 2:10-CV-226, 2011 WL 382627 (S.D. Ohio Feb. 3, 2011).

55. *See id.* at *3 (describing Ohio common law privileges that are separate from those privileges in the statute).

56. *See id.* at *1 (explaining that the basis of the suit relates to maintenance fees for a patent, that were not paid).

57. *See id.* (“Calfee firm had assumed responsibility for insuring that the fee was paid but that it failed to do so, resulting in the premature lapse of the patent.”).

that relation or the attorney's advice to a client."⁵⁸ The court reasoned that "[t]he fact that the attorneys seeking advice also represent a client with potentially conflicting interests is logically irrelevant to whether those attorneys can retain counsel and become clients."⁵⁹ The only novel aspect here was that both sides of the attorney–client relationship were from the same firm.⁶⁰ The absence of an argument by TattleTale regarding the imputation of conflicts⁶¹ to attorneys within the same firm, however, leaves one wondering whether such an argument would have changed the outcome.⁶²

In *United States v. Rowe*,⁶³ the court addressed the question of whether the attorney–client privilege can apply between a law firm's attorneys and its in-house counsel. However, there the party seeking the information was not the client.⁶⁴ Two associate attorneys at a law firm were assigned by a partner, Rowe, to investigate irregularities in the handling of client funds by another attorney within the firm.⁶⁵ The associates were later subpoenaed to testify about their conversations with Rowe, but claimed attorney–client privilege.⁶⁶ Rowe had essentially created in-house counsel out of the associates and sought from them legal advice regarding the firm's liability for another attorney's practices.⁶⁷ The government argued first that the attorneys were not practicing law but merely gathering

58. *See id.* at *3 (stating that intra-firm communications are protected under Ohio law (quoting OHIO REV. CODE ANN. § 2317.02 (West 2012))).

59. *Id.* at *4.

60. *See id.* (commenting on the unusual fact that this attorney–client relationship occurred from the same firm).

61. *See* MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (2013) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9"); *id.* R. 1.7(a) (explaining the existence of concurrent conflicts of interest).

[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. *Id.*

62. *See TattleTale Alarm Sys.*, 2011 WL 382627, at *10 (noting based on precedent, that Ohio would likely enforce privilege).

63. *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996).

64. *See id.* at 1296 (emphasizing the person seeking the information was not the client).

65. *See id.* at 1295 (proclaiming two associates were assigned to examine another attorney of the firm's mishandling of client funds).

66. *See id.* at 1295–96 (declaring that once the associates were subpoenaed to testify they claimed protection under the attorney–client privilege).

67. *See id.* at 1296 (advancing that by Rowe using the two associates to investigate an attorney within the firm an in-house counsel was created).

information for Rowe, so that the privilege should not apply.⁶⁸ However, based on Supreme Court precedent,⁶⁹ the court found that even if the attorneys were merely engaged in fact-finding, that is a requisite step before rendering legal advice and therefore the associate attorneys were performing professional legal services with Rowe as their client.⁷⁰

The *Rowe* court also rejected the government's argument that a law firm should not benefit from a privilege for communications between its partners and associates because a normal corporation would not enjoy a privilege regarding comparable manager–employee relationships.⁷¹ The court pointed out that a corporation would likely turn to in-house or outside counsel, rather than an employee, to investigate any matters potentially implicating legal issues, and such a relationship would certainly enjoy attorney–client privilege protection.⁷² The fact that a law firm has attorneys at its disposal, to a much greater extent than a normal corporation, should not preclude a law firm from using its own attorneys as counsel in matters regarding the firm's liability.⁷³

III. THE STATE CASES

Currently, three state high court cases recognize intra-firm attorney–client privilege.⁷⁴ The high courts in Massachusetts, Georgia, and Oregon have protected intra-firm communications. Earlier, an Illinois Appellate Court did the same.⁷⁵ These cases reflect the growing trend. The federal

68. *See id.* (claiming they were not engaging in the practice of law but only collecting information).

69. *See id.* at 1297 (“The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.” (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 390–91 (1981))).

70. *See id.* at 1297 (asserting that fact-finding is done before giving legal advice and therefore performing legal services).

71. *See id.* (maintaining that because other corporations would not have this privilege, the privilege should not be applied).

72. *See id.* (concluding that a normal corporation that hired an attorney to investigate a manner would be protected by the privilege).

73. *See United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996) (implying that a firm's easier access to create in-house counsel does not preclude the privilege from applying).

74. *See Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1190–91 (Or. 2014) (en banc) (“[W]e therefore accept the trial court's conclusion that those communications ‘ordinarily’ would fall within the privilege.”); *see also St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, PC*, 746 S.E.2d 98, 108 (Ga. 2013) (stating the attorney–client privilege applies to a law firm and its in-house counsel); *RFF Family P'ship v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1081 (Mass. 2013) (recognizing the attorney–client privilege between a law firm and its in-house counsel).

75. *See Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 540 (Ill. App. Ct. 2012) (proclaiming protection under the attorney–client privilege between a law firm and in-house counsel).

cases, mostly at the district level, provide guidance, however, on how other states may react to these new state precedents.

A. *Garvy*

Until *Garvy v. Seyfarth Shaw LLP*,⁷⁶ no state appellate court had ruled on intra-firm privilege. In *Garvy*, an Illinois Appellate Court recognized the privilege. The client, Garvy, sued the defendant law firm, Seyfarth Shaw LLP, for legal malpractice, fraud, and breach of fiduciary duty.⁷⁷ Seyfarth had advised Garvy regarding issues of corporate governance and that advice, Garvy alleged, led to a suit in chancery court against Garvy by corporate shareholders.⁷⁸ Garvy asked Seyfarth to defend him in that lawsuit.⁷⁹ The complaint contained a host of allegations against Garvy, with Seyfarth anticipating being added as a defendant.⁸⁰ As directed by in-house counsel, Seyfarth sent a letter to Garvy detailing extensively how various issues in the chancery suit could unfold in court, and making clear that their interests could diverge, as Seyfarth's advice was alleged to have led to Garvy's actions which were the subject of the shareholder suit.⁸¹ The letter stated that before Garvy opted to consent to Seyfarth's continuing representation of him in the chancery suit, Seyfarth strongly recommended that Garvy "seek independent counsel regarding the import of this consent."⁸² Though there was no evidence that Garvy ever signed a letter formally acknowledging consent to continued representation, Seyfarth continued to represent Garvy in the chancery lawsuit while Garvy separately began to pursue Seyfarth for malpractice.⁸³ Garvy's attorney in the malpractice suit against Seyfarth said it was his understanding that Garvy was satisfied with Seyfarth's handling of the chancery lawsuit and that Garvy wished to proceed with Seyfarth's continuing representation.⁸⁴

Subsequently, Seyfarth retained outside counsel, who formally requested a waiver from Garvy of any conflict between him and Seyfarth with respect to the chancery litigation, given that it appeared Garvy had consented to

76. *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012).

77. *See id.* at 526 (relating defendant was sued for fraud, legal malpractice, and breach of fiduciary duty).

78. *See id.* at 526–27 (establishing Garvy was sued in chancery court because of the advised he received from Seyfarth).

79. *Id.* at 527.

80. *See id.* at 528 (discussing various allegations brought against Garvy and the anticipation of Seyfarth being added to the suit).

81. *Id.* at 527.

82. *Id.* at 528.

83. *See id.* at 529 (stressing that no letter was ever signed but representation continued).

84. *Id.*

continuing representation and that his independent counsel had at one time offered to supply the waiver.⁸⁵ No waiver was ever provided, but Garvy insisted throughout that Seyfarth's withdrawal from the chancery litigation would be detrimental to him and inconsistent with the assurance Seyfarth had made regarding its continuing commitment to him.⁸⁶ When settlement discussions proved unsuccessful in the chancery suit, Seyfarth withdrew as Garvy's counsel and Garvy filed suit against Seyfarth for malpractice.⁸⁷

During discovery, Garvy predictably sought Seyfarth's "internal and external communications related to its representation of Garvy" and specifically, communications involving any potential malpractice claims.⁸⁸ Seyfarth asserted privilege, refused to comply with the motion to compel, was held in contempt of court, and appealed.⁸⁹

1. The Fiduciary Duty Exception

Garvy's principal argument was that the attorney–client privilege did not apply because Seyfarth continued to represent Garvy while seeking legal advice regarding such representation, and as such, owed to Garvy a continuing fiduciary duty.⁹⁰ Garvy cited *Thelem Reid* to support his fiduciary duty theory.⁹¹ The court properly made clear that even though the fiduciary duty exception had not been adopted in Illinois, it would not help Garvy even if it was accepted.⁹²

As mentioned, the fiduciary duty exception is a concept from trust law which holds that the beneficiary of a trust owes the privilege of advice rendered by an attorney to the trustee relating to the administration of the trust.⁹³ As the *Garvy* court explained, "[t]he theory behind the exception was that because the advice was obtained using the authority and funds of the trust and the beneficiary was the ultimate recipient of the benefit of the advice, the beneficiary was entitled to discover the communications

85. *See id.* at 529 (justifying the waiver was sent because Garvy had seemingly consented to continued representation).

86. *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 529 (Ill. App. Ct. 2012).

87. *Id.*

88. *Id.* at 530.

89. *See id.* at 530–31 (expressing Seyfarth failed to produce information he was compelled to produce by the court).

90. *Id.* at 534.

91. *Id.* at 536.

92. *See id.* (holding the exception Garvy relied on had not been adopted in Illinois nor would it apply to him).

93. *See Mueller Indus., Inc. v. Berkman*, 927 N.E.2d 794, 806 (Ill. App. Ct. 2010) (detailing the history and scope of fiduciary duties).

between the attorney and the fiduciary.”⁹⁴ The court noted, though, that the fiduciary duty exception does not apply to communications regarding the personal liability of the fiduciary or communications in anticipation of litigation with the fiduciary,⁹⁵ as was the case here.

Although the fiduciary duty exception to attorney–client privilege had previously been applied outside of the trust law context,⁹⁶ the *Garvy* court determined that not only would it decline to adopt the exception, but it would not apply it even if adopted where the legal advice sought by the fiduciary was related to an adversarial proceeding involving the fiduciary and the beneficiary.⁹⁷ The court noted that the United States Supreme Court had recently addressed the issue of the fiduciary duty exception to attorney–client privilege in *United States v. Jicarilla Apache Nation*,⁹⁸ where the Supreme Court considered *Riggs Nat’l Bank of Washington, D.C. v. Zimmer*.⁹⁹ In *Riggs* the court delineated factors to consider when determining to whom the attorney–client privilege belongs, the first being “whether there were any adversarial proceedings pending between the fiduciary and the beneficiary at the time the legal advice was sought.”¹⁰⁰ The *Garvy* court then declared:

This factor was important because, if adversarial proceedings were pending, it would indicate that the fiduciary was seeking legal advice in a personal rather than a fiduciary capacity, and the exception would not apply. This goes to the heart of the purpose behind the fiduciary-duty exception, and, to the extent the cases relied on by *Garvy* do not take this factor into consideration, they misapply the exception. Therefore, even if Illinois did recognize the fiduciary-duty exception, it clearly would not apply here where Seyfarth sought legal advice in connection with *Garvy*’s legal malpractice claims against it, and not in its fiduciary capacity as *Garvy*’s counsel in the chancery litigation.¹⁰¹

This analysis makes clear that the fiduciary duty exception does not justify piercing the attorney–client privilege where an attorney is seeking legal advice regarding the representation of a client, regardless of whether the advice comes from the in-house counsel of the attorney’s firm or from

94. *Garvy*, 966 N.E.2d at 534–35.

95. *Id.* at 535.

96. See generally *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970) (expanding the scope of the fiduciary duty privilege beyond trust law).

97. *Garvy*, 966 N.E.2d at 536.

98. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011).

99. *Riggs Nat’l Bank of Wash. D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976).

100. *Garvy*, 966 N.E.2d at 536.

101. *Id.* (citation omitted).

outside counsel.¹⁰²

2. Other Attorney–Client Privilege Arguments

There was a question at trial of whether “Garvy’s consent to Seyfarth’s continued representation” was informed.¹⁰³ It seems critical that the *Garvy* court found Seyfarth’s letter to Garvy detailing potential conflicts to be a complete disclosure and that Garvy’s sustained insistence on Seyfarth’s continuing representation in chancery constituted fully informed consent.¹⁰⁴ The outcome of *Garvy* likely would have been different if Seyfarth had not provided a thorough disclosure.¹⁰⁵

Garvy also argued that Seyfarth could not have had any expectation of confidentiality regarding its communications with in-house counsel about Garvy’s malpractice claims because of the disclosure requirement within the Illinois Rules of Professional Conduct.¹⁰⁶ However, the Rules state that “[a] lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply with these Rules.”¹⁰⁷ The *Garvy* court noted that the Rules also permit lawyers “to make confidential reports of ethical issues to designated firm counsel.”¹⁰⁸

3. The Work-Product Doctrine

Finally, as to both in-house and outside counsel materials outside of any attorney–client privilege protection, Seyfarth argued there was work-product protection for its opinion work-product (i.e., “theories, mental impressions, or litigation plans”¹⁰⁹) related to Garvy’s malpractice claim against Seyfarth.¹¹⁰ After recognizing that opinion work-product

102. *See id.* at 539–40 (“Under Illinois law, the work-product of both in-house and outside counsel is not discoverable here . . .”).

103. *Id.* at 537.

104. *Id.*

105. *See id.* at 536–37 (“[Garvy] cannot insist that Seyfarth continue to represent him in the chancery litigation while he has malpractice claims pending against Seyfarth, but then use that continued representation to insist that Seyfarth produce all documents related to legal advice sought in relation to the malpractice claims generated during that time.”).

106. *Id.* at 536; *see* MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(3) & 1.7 (2013). Illinois adopted the ABA Model Rules on February 8, 1990.

107. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(4) & cmt. 9 (2013).

108. *Garvy*, 966 N.E.2d at 538.

109. ILL. SUP. CT. R. 201(b)(2). *See* *Shields v. Burlington N. & Santa Fe Ry. Co.*, 818 N.E.2d 851, 853 (Ill. App. Ct. 2004) (defining “conceptual data” as “the shaping process by which the attorney has arranged the available evidence for use at trial” (quoting *Monier v. Chamberlain*, 221 N.E.2d 410, 416 (1966))).

110. *Garvy*, 966 N.E.2d at 539.

protection is often “broader” than attorney–client communication protection,¹¹¹ the court sustained Seyfarth’s argument because Garvy had not shown the “impossibility” of obtaining “similar information from other sources.”¹¹² It recognized that a comparable work-product privilege may not be sustained as to Seyfarth’s work-product materials prepared for the chancery case (where Garvy was Seyfarth’s client).¹¹³

B. *RFF Family Partnership*

In the first state supreme court case to recognize intra-firm privilege, the Massachusetts Supreme Court delineated specific requirements.¹¹⁴ The court found that the privilege applies when

- (1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel, (2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter, (3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client, and (4) the communications are made in confidence and kept confidential.¹¹⁵

In *RFF Family Partnership v. Burns & Levinson, LLP*,¹¹⁶ RFF made a substantial loan to a third party that was secured by a mortgage, which RFF understood to be a primary mortgage.¹¹⁷ RFF hired the law firm of Burns & Levinson to research the title to the property being mortgaged and to draft documents related to the loan.¹¹⁸ When the third party defaulted on the loan, RFF retained Burns & Levinson to handle the foreclosure.¹¹⁹ During that process, another lender filed an action to enjoin RFF from completing the foreclosure sale because the other lender held a superior mortgage.¹²⁰ An injunction was denied, but the other lender persisted in asserting its lien as superior and sued.¹²¹ RFF was represented by Prince Lobel Tye LLP (Prince) in that action, but kept Burns & Levinson as counsel regarding the sale of the foreclosed upon

111. *Id.*

112. *Id.*

113. *Id.*

114. *RFF Family P’ship v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1068 (Mass. 2013).

115. *Id.*

116. *RFF Family P’ship v. Burns & Levinson, LLP*, 991 N.E.2d 1066 (Mass. 2013).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

property, which prompted lengthy negotiations.¹²² On March 2, 2011, Burns & Levinson was informed by a letter from Prince that RFF had a claim against the firm, alleging that Burns & Levinson had “breached its obligations to RFF” in its handling of its mortgage.¹²³ The letter to Burns & Levinson also demanded that the firm “indemnify RFF for the losses incurred.”¹²⁴

On March 4, 2011, the two attorneys from Burns & Levinson named in the draft complaint (along with the firm itself) consulted a partner of the firm regarding how to “respond to the notice of claim”¹²⁵ The court noted that this partner had been designated by the firm to handle ethical and risk management issues on the firm’s behalf, had not worked on RFF’s case, and that RFF was not billed for any time spent on these intra-firm communications.¹²⁶

On March 7, 2011, Burns & Levinson sent a letter to RFF informing RFF that the firm was withdrawing as counsel due to the impending litigation between the firm and RFF.¹²⁷ RFF responded, saying that Prince “had not been authorized to file or threaten any” legal action against Burns & Levinson, and that RFF wished Burns & Levinson to continue its representation of RFF in the negotiations regarding the foreclosure sale.¹²⁸ Burns & Levinson requested, and received, written confirmation from RFF that it had not hired Prince to sue Burns & Levinson or its attorneys, subsequent to which Burns & Levinson resumed its representation of RFF in the foreclosure sale.¹²⁹

Soon after the foreclosure sale, RFF sued Burns & Levinson and two of the firm’s attorneys claiming legal malpractice, among other allegations.¹³⁰ During discovery, RFF sought the content of communications between the two Burns & Levinson attorneys and the firm’s partner regarding the handling of RFF’s case and RFF’s potential claims against the firm.¹³¹ Burns & Levinson claimed privilege and sought “a protective order to preserve” the confidentiality of those

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *RFF Family P’ship v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1068–69 (Mass. 2013).

127. *Id.* at 1069.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

communications.¹³² That issue then went to the Massachusetts Supreme Court.¹³³

On appeal, RFF claimed it was entitled to discovery of the communications between Burns & Levinson's partner and the associate attorneys that took place between March 2 and March 7.¹³⁴ RFF argued that while intra-firm communications may be privileged, here they were not privileged, as RFF was a current client. RFF urged the firm had neither withdrawn as counsel nor obtained informed consent from RFF regarding the potential conflict.¹³⁵ The reason current clients are excepted, RFF claimed, was due to the fiduciary duty that exists between a law firm and its clients.¹³⁶ RFF argued that the fiduciary duty imposes an obligation to disclose to a client all information relevant to that client's representation and that when a firm represents itself in a matter adverse to a client's interest, a conflict of interest arises that violates the Massachusetts's Rules of Professional Conduct.¹³⁷

1. Law Firms Are Similar to Corporations and Partnerships¹³⁸

The court began its analysis by defining privilege in detail¹³⁹ and then comparing a law firm's in-house counsel to that of a corporation or a governmental entity, both of which enjoy privilege for consultations between their respective employees and in-house counsel.¹⁴⁰ The court also noted that "a large and increasing number of law firms have appointed one or more attorneys within the firm to serve as in-house or ethical counsel,"¹⁴¹ and that firms are doing so under the guidance of "[ABA] Model Rule of Professional Conduct 5.1 by . . . designating an individual lawyer or a committee to counsel the firm or any individual in the firm on questions of professional conduct as applied to the firm or to lawyers

132. *Id.*

133. *Id.* at 1069–70.

134. *Id.* at 1070.

135. *Id.*

136. RFF Family P'ship v. Burns & Levinson, LLP, 991 N.E.2d 1066, 1070 (Mass. 2013).

137. *Id.*

138. See *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981) (expounding principally, at the federal level, that: "Our decision [is] that the communications by Upjohn employees to counsel are covered by the attorney–client privilege"). See generally *Clair v. Clair*, 982 N.E.2d 32 (Mass. 2013) (commenting that a corporate attorney owes a duty to the corporate entity itself, regardless of whether that attorney is in-house counsel or from an outside law firm).

139. RFF Family P'ship, 991 N.E.2d at 1070–71.

140. *Id.* at 1071.

141. *Id.*

within the firm.”¹⁴² A firm having in-house counsel serves a valuable purpose, with ethics compliance being of particular importance.¹⁴³ In disposing of RFF’s claim regarding the Massachusetts Rule of Professional Conduct 1.7, which prohibits a law firm from representing a client whose interests are adverse, the court pointed out that soliciting legal advice from in-house counsel does not inherently create a conflict of interest.¹⁴⁴ The entire purpose of seeking the advice is to be compliant with ethical obligations.¹⁴⁵ Ultimately, clients will benefit when their representing attorneys are well informed, and thus are able to rectify any mistakes and inform clients of any errors or conflicts of interest.¹⁴⁶ Given the similarity of a law firm to a corporation and a government entity, both enjoying privileged intra-office communications, the court found that extending the same privilege to law firms would not conflict with the unique purpose a firm serves and that the privilege did apply to intra-firm communications.¹⁴⁷

2. The Fiduciary Duty Exception

While Massachusetts had not adopted the fiduciary duty exception, the court quickly rejected RFF’s arguments that the state should adopt it.¹⁴⁸ The exception applies to communications between a trustee and her attorney regarding the trustee’s administration of the trust, since the benefits of the advice run to the beneficiary of the trust and the attorney is paid with trust funds.¹⁴⁹ The exception does not apply to trustees seeking legal advice at their own expense regarding personal liability, even when the advice relates to the trustee’s handling of the trust.¹⁵⁰ If the exception was to apply to any situation where a law firm anticipates malpractice claims against it by a current client, firms would have no expectation of

142. *Id.* (quoting ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-453, at 1–2 (2008)).

143. *See id.* at 1072 (describing that a firm’s in-house counsel on ethical compliance is essential for obtaining sound legal advice).

144. *Id.* at 1072–73.

145. *Id.* at 1073.

146. *See id.* at 1072 (discussing that early advice allows for correction of mistakes and alleviation of harm); *see also* Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1730 (2005) (“[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 390–91 (1981))).

147. *RFF Family P’ship*, 991 N.E.2d at 1080.

148. *Id.* at 1073–76.

149. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2321 (2011).

150. *RFF Family P’ship*, 991 N.E.2d at 1075.

privacy for communications related to such claims, regardless of whether such communications took place with in-house or outside counsel.¹⁵¹

Such an exception would incentivize law firms to act in one of several ways, none of which are beneficial to clients.¹⁵² A firm could proceed with in-house consultations knowing that they will not be privileged from the client.¹⁵³ This would incentivize the consultations to be ill informed and less than candid, which could lead to mishandling of the client's case, issues that privilege law is meant to eliminate.¹⁵⁴ Alternatively, the firm could simply not seek counsel, which could also lead to uninformed legal representation.¹⁵⁵ The firm could immediately seek a withdrawal, thereby ensuring its communications with in-house counsel would be protected.¹⁵⁶ However, this could clearly be detrimental to the client, depending on the case and the amount of time the firm had invested in representation.¹⁵⁷ The firm might leave the client without representation at a critical point in litigation where not having the lawyers most intimately acquainted with the case would harm the former client.¹⁵⁸ Of course, the firm could always seek a waiver from the client, but obtaining such a waiver is not guaranteed.¹⁵⁹ A waiver request also could negatively

151. *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, PC*, 212 F.R.D. 283, 286 (E.D. Pa. 2002) (holding the law firm failed to meet the burden of proof for attorney-client privilege). The court does not specifically address the question of whether the privilege would be recognized for such communications taking place with outside counsel. However, the court's lengthy discussion of the alleged conflict of interest created by the firm representing itself would not have been necessary had Burns & Levinson retained outside counsel. See *RFF Family P'ship*, 991 N.E.2d at 1077-79 (discussing the relationship between law firm in-house counsel and conflicts of interest).

152. *RFF Family P'ship*, 991 N.E.2d at 1074.

153. *Id.*

154. See *id.* ("[T]he risk that the information provided to in-house counsel will be withheld . . . because of the risk of disclosure to the client, and the advice received will suffer from the lack of candor.")

155. See *id.* (noting that the lawyer may not fully understand the conflict without consulting the in-house attorney).

156. *Id.* at 1073-74.

157. See *id.* at 1074 (considering the consequences when a firm receives notice of a potential claim and sends a letter to a client immediately withdraws representation); see also *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 529 (Ill. App. Ct. 2012) ("[W]ithdrawal would not only be contrary to prior commitments but could sabotage settlement prospects.")

158. See *RFF Family P'ship*, 991 N.E.2d at 1069 (considering a situation where a firm requested written confirmation that a client had not engaged in bringing a claim against them before resuming representation); see also *Garvy*, 966 N.E.2d at 529 (examining case law regarding tolling of the malpractice claim). In both cases, the representing firm, against which the client maintained a cause of action for malpractice, was asked to continue representation until the matter concluded. Secondary, independent counsel found doing so to be in the client's best interest.

159. See *Garvy*, 966 N.E.2d at 529 (addressing that a law firm informed client and sought

affect the relationship between the firm and the client's case even where, upon investigation, there is no conflict or the conflict has been rectified.¹⁶⁰ Clearly, none of these alternatives are in clients' best interest.¹⁶¹

As the court noted, a privilege protection is not inconsistent with a firm's duty to keep its clients fully apprised of all pertinent information.¹⁶² If an internal investigation leads to a finding of a conflict of interest or the commission of legal malpractice, the information would not be kept from the client.¹⁶³ Rather, the client would be informed and either a waiver would be requested or the firm would seek withdrawal from representation.

3. Other Possible Exceptions

The Massachusetts Rules of Professional Conduct mirror the American Bar Association's Model Rules regarding the imputation of conflicts to a firm.¹⁶⁴ In the situation of a law firm representing itself by providing in-house counsel to advise its attorneys representing outside clients, it would appear initially that such a rule is being violated.¹⁶⁵ The firm has as clients both itself and an outside client; their interests diverge upon the outside client's allegation of malpractice by the firm or upon the firm's finding of malpractice.¹⁶⁶ The purpose of imputing a conflict to a firm is to protect the confidentiality of a client's information from adverse parties, thereby ensuring the firm's loyalty to its client.¹⁶⁷ However, that purpose is not better served by denying a privilege to a firm seeking counsel from within its own walls.¹⁶⁸ In this context, the firm is already in possession of the adverse party's information and is even permitted to disclose that information to the extent necessary to defend itself against allegations of

consent; client requested representation continue, but did not sign the waiver).

160. See *RFF Family P'ship*, 991 N.E.2d at 1073 (“[A] law firm may need to consider how to minimize the potential adverse consequences of withdrawal to the client . . .”).

161. *Id.* at 1074.

162. *Id.* at 1076.

163. *Id.* at 1075.

164. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2013) (“[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”). Massachusetts adopted the ABA Model Rules on June 9, 1997.

165. *RFF Family P'ship*, 991 N.E.2d at 1077–78. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2013) (defining the existence of concurrent interests).

166. *RFF Family P'ship*, 991 N.E.2d at 1077–78.

167. *Id.* at 1078.

168. Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1747 (2005).

malpractice.¹⁶⁹ The potential conflict of interest is inherent and cannot be avoided.¹⁷⁰ The firm must both rectify any malpractice and seek a waiver to continue representation or withdraw as counsel.¹⁷¹ Imputation of conflicts would not protect the client to any greater extent here since the same information would be exchanged with outside counsel in preparation for defense.¹⁷² The Massachusetts Supreme Judicial Court pointed out that even in instances where a firm improperly represents two clients with adverse interests, the “failure to avoid a conflict of interest should not deprive the client of the privilege.”¹⁷³ Additionally, for firms that do violate the rule, the list of sanctions provided by the Restatement (Third) of the Law Governing Lawyers does not include forced revelation of privileged information.¹⁷⁴

The *RFF Family Partnership* ruling provides a solid framework to assess whether attorney–client privilege should apply in the context of intra-firm communications.¹⁷⁵ Its reasoning, coupled with its safeguards to ensure ethical treatment of the client and compliance with the firm’s fiduciary duty to the client, will provide other courts a clear roadmap for deciding how best to assess asserted privileges for intra-firm communications.¹⁷⁶

169. See MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(5) (2013) (allowing a lawyer to disclose information necessary to establish a defense).

170. *RFF Family P’ship*, 991 N.E.2d at 1078 (“[W]here a law firm is already representing a client and that client threatens to bring a claim against the law firm, the potential conflict between the law firm’s loyalty to the client and its loyalty to itself cannot be avoided . . .”).

171. *Id.* at 1079.

172. *Id.* at 1078–79; N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 789 (2005); Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1747 (2005). See MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(4) (2013) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to secure legal advice about the lawyer’s compliance with these Rules.”); *id.* R. 1.6(b)(5) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . or to respond to allegations in any proceeding concerning the lawyer’s representation of the client . . .”).

173. *RFF Family P’ship*, 991 N.E.2d at 1079 (quoting *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 369 (3d Cir. 2007)).

174. See *id.* (noting that the last sanction was a “catch all” that allowed a court to impose any other sanction it found appropriate, which could conceivably be used to force disclosure); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §6 (2000) (“[J]udicial remedies include . . . entering a procedural or other sanction.”).

175. See generally *RFF Family P’ship*, 991 N.E.2d 1066 (exploring the attorney–client privilege within the intra-firm context).

176. *Id.* at 1080–81.

C. *St. Simons Waterfront*

The day after the *RFF Family Partnership* was decided, the Georgia Supreme Court upheld the intra-firm attorney–client privilege in *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, PC*.¹⁷⁷ The decision utilized the same analysis it would apply for any dispute regarding privilege.

Several attorneys from the law firm (Hunter Maclean), who were representing St. Simons Waterfront (SSW) in the pre-sale of condominiums, were informed by SSW that several of SSW’s customers had sought to rescind the pre-sale contracts drafted by Hunter Maclean attorneys.¹⁷⁸ The attorneys representing SSW promptly notified the firm’s in-house counsel, suspecting that SSW would seek to hold Hunter Maclean liable for any damages resulting from the rescinded contracts.¹⁷⁹ Hunter Maclean’s in-house counsel discussed the circumstances with the representing attorneys and requested advice from outside counsel.¹⁸⁰ SSW subsequently retained another firm to take over negotiations with its customers seeking rescission, as well as to pursue a malpractice action against Hunter Maclean.¹⁸¹ The new law firm requested continuing representation from Hunter Maclean in any ongoing closings, to which Hunter Maclean agreed.¹⁸²

SSW filed suit after Hunter Maclean’s representation of SSW ended.¹⁸³ During discovery, SSW sought communications between Hunter Maclean’s in-house counsel and its representing attorneys, as well as communications between the firm and its outside counsel.¹⁸⁴ At trial, the intra-firm communications were ordered disclosed, but the communications with outside counsel were deemed privileged.¹⁸⁵ At the appellate level, the court offered a new method of analysis for intra-firm privilege, which the Georgia Supreme Court restructured in its own opinion, specifically omitting from its analysis the Georgia Rules of Professional Conduct.¹⁸⁶

177. *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, PC*, 746 S.E.2d 98 (Ga. 2013).

178. *Id.* at 102.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 103.

186. *Id.* at 102.

After acknowledging the importance of privilege, the high court declared “that the best course [was] simply to analyze the privilege issue here as [it] would in any other lawsuit in which the privilege is asserted.”¹⁸⁷ The relevant factors were (1) whether an attorney–client relationship existed, (2) whether legal advice was being sought, (3) whether the communications were made and kept in confidence, and (4) whether there were any applicable exceptions to the privilege.¹⁸⁸ For the existence of an attorney–client relationship to be recognized, the court said the relationship should be clearly established by acts such as billing the firm or maintaining a separate file for the in-house communications.¹⁸⁹ While the court acknowledged that the Georgia Rules of Professional Conduct would not allow an attorney to represent herself in adversity to a current client, it declared the Rules irrelevant to the assessment of attorney–client privilege communication based on the Georgia State Bar’s statement¹⁹⁰ that the rules were not intended to bind judges in applying the privilege.¹⁹¹ Analysis of the second factor drew a comparison of a law firm to a corporation; the court found that the requirement of seeking legal advice is met when a firm attorney consults with the firm’s in-house counsel in that capacity and does so “regarding matters within the scope of the attorneys’ employment with the firm.”¹⁹² For the confidentiality factor, the court said that in the context of a law firm, such communications should only involve “in-house counsel, firm management, firm attorneys, and other firm personnel with knowledge about the representation that is the basis for the client’s claims against the firm.”¹⁹³ While seemingly broad, the court ensured that in-house counsel could communicate with anybody from the firm potentially involved in the

187. *St. Simons Waterfront, LLC, v. Hunter, Maclean, Exley & Dunn, PC*, 746 S.E.2d 98, 104 (Ga. 2013).

188. *Id.*

189. *See id.* at 105 (discussing the Georgia Rules of Professional Conduct). Additionally, the court said the level of scrutiny regarding questioning the existence of an attorney–client relationship will rise as the level of formality of the relationship falls. *Id.*

190. *Id.* at 106 (stating in the Preamble to the Georgia Rules of Professional Conduct that the Rules “are not intended to govern or affect judicial application of either the attorney–client or work-product privilege”).

191. *Id.* The court also noted the similar holdings in both *TattleTale Alarm Systems*, where that court found that ethics violations should not deprive the client of the privilege, and *Garvy*, which held that the ethics violations are not relevant to a judicial determination regarding the applicability of privilege. *Id.* at 105–06.

192. *Id.* at 106 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 403 (1981) (Burger, C.J., concurring)).

193. *Id.* at 107.

anticipated litigation.¹⁹⁴ Regarding possible exceptions to privilege, the court discussed but declined to adopt and apply the fiduciary duty exception.¹⁹⁵

In specially applying the general attorney–client communication privilege to the intra-firm context, the court in *St. Simons Waterfront* suggests that even a standard privilege analysis would support protections for law firms who utilize in-house counsel to gain advice when clients complain or when issues with earlier client representation otherwise arise.¹⁹⁶

D. *Crimson Trace Corporation*

A year after the Georgia and Massachusetts rulings, the Oregon Supreme Court likewise recognized an intra-firm privilege for questioned attorneys seeking counsel.¹⁹⁷ In *Crimson Trace Corp. v. Davis Wright Tremaine LLP*,¹⁹⁸ Crimson Trace (Crimson) retained a law firm, Davis Wright Tremaine (DWT), to prosecute patents on Crimson’s behalf and subsequently to represent it in a related patent dispute concerning a competitor, Lasermax.¹⁹⁹ Crimson sued Lasermax for patent infringement and Lasermax counterclaimed, alleging that Crimson’s patent had been filed fraudulently.²⁰⁰ Lasermax named one of DWT’s attorneys, which prompted that attorney to consult with DWT’s Quality Assurance Committee—DWT’s designated in-house counsel—regarding potential conflicts of interest between the companies.²⁰¹ Subsequently, Crimson and Lasermax reached a settlement that was to remain confidential, but a DWT attorney filed the settlement in a manner that disclosed certain details.²⁰² A judge sanctioned Crimson for the incident based on bad faith and the settlement proceeded; Crimson then disputed the fees

194. *Id.*

195. *Id.* at 107–08. The court found the exception did not apply based on the same reasoning as in *Garvy*, specifically that when a fiduciary seeks legal advice regarding her own liability, the ultimate beneficiary is herself and not her client to whom she owes a fiduciary duty. *Id.* See *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 536 (2012) (declining fiduciary duty exception).

196. See generally *St. Simons Waterfront*, 746 S.E.2d 98 (recognizing intra-firm privilege).

197. *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1195 (Or. 2014) (en banc).

198. *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181 (Or. 2014) (en banc).

199. *Id.* at 1183.

200. *Id.*

201. *Id.*

202. *Id.* at 1184.

charged by DWT.²⁰³ The DWT lawyers had continued to communicate with their in-house counsel throughout, but DWT was eventually sued by Crimson for malpractice and breach of contract.²⁰⁴

During discovery, Crimson sought all communications among DWT attorneys that took place before representation ended that involved potential conflicts of interest.²⁰⁵ DWT asserted privilege under Oregon statutory law, saying that consultations with in-house counsel were meant to be confidential, made for the purpose of seeking legal advice and thus any documents generated were not part of an outside client's file.²⁰⁶ The trial court ordered production of all documents,²⁰⁷ finding that a conflict of interest between DWT and Crimson existed and that a fiduciary exception applied because DWT's obligations to Crimson were paramount.²⁰⁸ DWT subsequently appealed.²⁰⁹

The Oregon Supreme Court looked to a state statute,²¹⁰ "emphasiz[ing] that, in this case, the issue is governed by statute . . . [and] our task is to determine what the legislature intended."²¹¹ The court found that the communications between DWT attorneys and in-house counsel fit the statutory definition of privileged communications.²¹² The statute had three requirements.²¹³ The first was the existence of a privileged communication between the client and lawyer.²¹⁴ The court found nothing in the statute to suggest that a firm attorney could not have another attorney within the firm provide representation.²¹⁵ The second requirement was that the communications be confidential.²¹⁶ The intention of confidentiality was established by the affidavits of the involved attorneys.²¹⁷ A third requirement was that the communications be "made for the purpose of facilitating the rendition of professional legal services to

203. *Id.*

204. *Id.*

205. *Id.* at 1184–85.

206. *Id.* at 1185.

207. *Id.*

208. *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1186 (Or. 2014) (en banc).

209. *Id.*

210. *Id.* at 1187.

211. *See Id.* (emphasizing that Oregon Evidence Code 503 governs the application of the attorney–client privilege).

212. *Id.* at 1188–89.

213. *Id.* at 1187.

214. *Id.*

215. *Id.* at 1189.

216. *Id.* at 1190.

217. *Id.* at 491.

the [client].”²¹⁸ The court found that DWT attorneys and the firm’s in-house counsel had a “separate interest,”²¹⁹ DWT’s own liability, rather than their representation of Crimson.²²⁰

After determining that statutory privilege applied, the court considered whether the legislature intended any exceptions to apply.²²¹ The court rejected the fiduciary exception applied at trial because Oregon has “legislatively adopted privilege,”²²² rendering courts powerless to impose exceptions not intended by the legislature.²²³ The court noted that the statute providing protection for attorney–client communications specified certain exceptions, but that none of them applied.²²⁴ In addition, the high court determined that the legislative history indicated that the list of exceptions was exhaustive.²²⁵

The court rejected an argument by the Oregon Trial Lawyers Association advocating a new current client exception.²²⁶ The court reiterated that it was bound by statute and could not consider policy arguments.²²⁷ The court also declined to entertain arguments based on professional conduct norms, saying that while those norms “require or prohibit certain conduct, and the breach of those rules may lead to disciplinary proceedings,” they have no bearing on the “application of a rule of evidence that clearly applies.”²²⁸

IV. MODEL RULE PROTECTING INTRA-FIRM COMMUNICATIONS ABOUT QUESTIONABLE ATTORNEY CONDUCT

Where there are no direct precedents, rules, or statutes, how should discovery or evidentiary requests for intra law firm confidential communication requests be resolved? The following proposed law seems suitable for protecting intra-firm communications involving law firm concerns about legal work earlier done for clients, though it differs a bit

218. *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1190 (Or. 2014) (en banc).

219. *Id.*

220. *Id.*

221. *Id.* at 1191.

222. *Id.* at 1192.

223. *Id.*

224. *Id.* at 1191.

225. *See id.* at 1193 (“[T]he legislature fairly may be understood to have intended to imply that no other [exceptions] are to be recognized . . .”).

226. *Id.* at 1189.

227. *Id.*

228. *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1186, 1195 (Or. 2014) (en banc).

from the precedents to date.²²⁹

A privilege should apply to consultations between attorneys within a law firm who represent outside clients and that firm's in-house designated ethics counsel where

- (1) the in-house ethics counsel has not performed any work for the client on the matter at issue or on any substantially related matter; the time spent in consultations is not billed to any outside client; the communications are made for the purpose of obtaining legal advice and are to be kept confidential; and
- (2) upon any finding of potential liability implicating a conflict of interest between the firm as client and the outside client, the outside client is timely and fully informed of such potential liability;
- (3) the firm does not continue its representation of the outside client after a finding of a conflict of interest prior to obtaining a waiver of the conflict via written consent from the client; and
- (4) the outside client is advised to seek independent counsel before consenting to continued representation.

This model reflects the growing consensus that law firms should have the option to employ in-house counsel where certain consultations regarding firm work are privileged.²³⁰ Despite the fiduciary duty of a lawyer and a law firm to a client, assessments by a lawyer and firm of their representations of—and potential liabilities to—outside clients should be incentivized.²³¹ A privilege well serves law firms, their lawyers and their clients. A law firm must be able to assess its representation of an outside client internally as well as through outside counsel. Retention of outside

229. See Douglas R. Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 SYRACUSE L. REV. 69, 104–06 (2004) (providing practical advice for law firms regarding intra-firm communication).

230. See generally *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, PC*, 746 S.E.2d 98 (Ga. 2013) (denoting that the privilege applies if there is an attorney–client relationship); *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012) (holding fiduciary exception does not apply); *RFF Family P'ship v. Burns & Levinson, LLP*, 991 N.E.2d 1066 (Mass. 2013) (holding protection from in-house counsel by attorney–client privilege); ABA House of Delegates, Formal Op. 103 (2013) (applying attorney–client privilege to in-house counsel); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 789 (2005) (considering attorney–client privilege with in-house counsel); Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721 (2005) (discussing when in-firm communications are protected); Susan Fortney, *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer's Lawyer*, 53 U. KAN. L. REV. 835 (2005) (reviewing ways to protect in-firm communications); Jeremy Gogel, *Intra-Firm Communications About Potential Legal Malpractice Claims: An Exception to Attorney–Client Privilege*, FOR THE DEFENSE, Apr. 2012, at 66, 66 (examining in-house counsel and applying attorney–client privilege).

231. See generally MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013) (discussing the duty of lawyers to clients to avoid conflicts of interest).

counsel often entails an unnecessary expense and waste of time for both lawyers and clients. A distinction should be drawn between a law firm actively representing two adverse parties and a law firm assessing its own representation of a single client. If an internal investigation leads to a finding that the firm's interests are, or may be, significantly adverse to the outside client, the firm should inform the outside client²³² and either withdraw as counsel or obtain a waiver in order to continue representation.²³³ The approach should be the same regardless of whether a conflict is discovered by in-house or outside counsel. A firm using in-house counsel to evaluate the firm's work on behalf of a client—current or former—should not constitute a breach of the firm's fiduciary duty to the client. Rather, the firm's reaction to its findings will determine whether the firm is compliant with its professional duties. If there is no conflict, no action need be taken. On the other hand, if a conflict, including an act of malpractice, is discovered, the firm must inform the outside client promptly.²³⁴ The client, its law firm, and a firm lawyer are best served by quick and inexpensive access to informed legal counsel.

As a law firm using in-house counsel does not necessarily prompt a conflict of interest with a client, a privilege should be maintained for such intra-firm communications. Given that a firm can employ in-house counsel ethically and without compromising its fiduciary duties to an outside client, there is no reason why intra-firm communications should not enjoy the same attorney–client communication privilege as communications between lawyers from two law firms. The absence of confidentiality would dissuade an attorney from seeking informed and expeditious legal advice on how to best proceed on a client's behalf.²³⁵ Intra-firm advice helps lawyers avoid and discover malpractice. This advice allows timely rectification of errors, which benefits both lawyers and clients.²³⁶ It is in the best interests of both a law firm and its client for the

232. *See id.* R. 1.4(a)(3) (“A lawyer shall . . . keep the client reasonably informed about the status of the matter.”); *see also* Benjamin P. Cooper, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 BAYLOR L. REV. 174, 176–77 (2009) (regarding a lawyer's and a firm's duty to report their own possible malpractice to their clients).

233. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2013) (outlining required elements under which a lawyer may represent her client).

234. *See id.* R. 1.7(a)(2) (discussing when concurrent conflicts of interest exist).

235. *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071, 2007 WL 578989, at *7 (N.D. Cal. Feb. 21, 2007) (“A rule requiring disclosure of all communications relating to a client would dissuade attorneys from referring ethical problems to other lawyers, thereby undermining conformity with ethical obligations.”).

236. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(3) (2013) (“A lawyer shall . . . keep the client reasonably informed about the status of the matter.”); *see also id.* R. 4.1 (“In the course of

law firm to be able to seek counsel quickly and inexpensively when questions arise regarding legal representations.

V. RESOLVING FUTURE CASES

So, what should other states do when confronted with former client requests for intra-law firm communications? In many American states, including Illinois and Texas, to date, there are no written laws or high court precedents.²³⁷ We now explore what Illinois and Texas precedents, as well as rules and statutes, suggest about any intra-law privilege. These examinations should help to guide other jurisdictions where there is no written law or precedent as the two states provide significant variations in their general privilege laws, including both attorney–client communication and work-product. These, and comparable variations elsewhere, should prompt at least some interstate differences on the compelled disclosure of intra-firm communications and work-product involving the questionable conduct of a law firm member while representing a law firm client.

A. *Illinois*

Since *Garvy*, the Illinois Supreme Court has not addressed through court rule or otherwise the intra-law-firm communications privilege.²³⁸ Likely, there will be common law development.²³⁹ While the high court has generally “concluded that the extension of an existing privilege or establishment of a new one is a matter best deferred to the legislature,”²⁴⁰ this deference does not extend to attorney conduct.

Historically, the Illinois Supreme Court has construed the attorney–client privilege very narrowly, maintaining “a strong [public] policy of

representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.”)

237. See generally Brief of the Illinois State Bar Ass’n & the Chicago Bar Ass’n as Amici Curiae Supporting Defendants, *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012) (No. 11-0115) (serving as a starting point, but not precedent for intra-firm communication privileges). Though no formal opinion has been issued by either group, the Illinois State Bar Association and the Chicago Bar Association jointly submitted a brief in *Garvy* supporting intra-firm privilege. *Id.*

238. See ILL. SUP. CT. R. 201(b)(2) (speaking only to how claims of privilege are to be made).

239. See *People v. Sanders*, 457 N.E.2d 1241, 1244–45 (Ill. 1983) (“The source of all privileges currently applicable in Illinois, with the exception of the attorney–client privilege which has a long-standing common law existence, is statutory.”). Privileged communications under Illinois law, other than attorney–client, are chiefly statutory. See, e.g., 735 ILL. COMP. STAT. 5/8–801–803.5 (2013) (discussing privileges between husband and wife, physician and patient, informant and police, and informant and reporter).

240. *People ex rel. Birkett v. City of Chicago*, 705 N.E.2d 48, 51 (Ill. 1998).

encouraging disclosure, with an eye toward ascertaining [the] truth.”²⁴¹ When a claim of privilege is made during discovery or at trial, judicial analysis begins from the viewpoint “that it is the privilege, not the duty to disclose, that is the exception.”²⁴² The party asserting the attorney–client privilege must establish the elements of privilege.²⁴³ Illinois courts have defined the privilege as including consultations

(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.²⁴⁴

Once the party asserting the privilege has established the elements, the burden shifts to the opponent to demonstrate the existence of an exception.²⁴⁵ In a basic way, the appeals court in *Garvy* established that there is an attorney–client relationship in the intra-firm consultation setting.²⁴⁶ As discussed, the court readily disposed of the fiduciary duty since it neither existed in Illinois, nor would have applied if it did.²⁴⁷ The current client exception was implicitly disposed of as well.²⁴⁸ The court acknowledged that the Rules of Professional Conduct allow lawyers to seek confidential legal advice regarding ethics compliance and to make confidential reports on ethical issues.²⁴⁹ To force disclosure of such consultations would be inconsistent with the Rules, which imply that an

241. *Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 327 (Ill. 1991).

242. *Id.* (quoting *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 252 (Ill. 1982)).

243. *See Krupp v. Chicago Transit Auth.*, 132 N.E.2d 532, 537 (Ill. 1956) (stating the burden rests on the party invoking the privilege).

244. *People v. Adam*, 280 N.E.2d 205, 207 (Ill. 1972) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2292, at 554 (John T. McNaughton rev. ed., 1961)). Some Illinois courts have condensed the definition. *See, e.g., Pietro v. Marriott Senior Living Servs.*, 810 N.E.2d 217, 226 (Ill. App. Ct. 2004) (“To be entitled to the protection of the attorney–client privilege, a claimant must show that (1) the statement originated in confidence that it would not be disclosed; (2) it was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and (3) it remained confidential.”).

245. *Hitt v. Stephens*, 675 N.E.2d 275, 279 (Ill. App. Ct. 1997) (emphasizing the opponent’s burden).

246. *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 534 (Ill. App. Ct. 2012) (holding a privilege exists for intra-firm consultation communications).

247. *Id.* at 536 (“Illinois has not adopted the fiduciary-duty exception to the attorney–client privilege.”).

248. *Id.* at 538–39 (emphasizing the inapplicability of the dual-representation doctrine).

249. *Id.* at 538 (“[A] lawyer’s confidentiality obligations do not preclude a lawyer from securing *confidential* legal advice about the lawyer’s personal responsibility to comply with these Rules” (quoting ILL. RULES OF PROF’L CONDUCT R. 1.6(b)(4) cmt. 9 (2010))).

attorney's fiduciary duties to a client do not supersede her right to seek counsel regarding that representation.²⁵⁰ The court also addressed the common interest exception, pointing out that Seyfarth as a client did not have any interest in common with Garvy.²⁵¹ The only remaining consideration is the issue of the illusory conflict of interest; consistent with the Illinois Rules of Professional Conduct, there was no inherent conflict recognized in *Garvy* that was created by the law firm employing in-house counsel.²⁵²

Until the Illinois Supreme Court addresses the intra-firm privilege, *Garvy* stands as precedent in one appellate district.²⁵³ Yet, the *Garvy* decision has shortcomings, which should be considered by other Illinois courts. In particular, the *Garvy* court did not elaborate on the import of the narrow attorney–client communication privilege doctrine in corporate settings or of the limited attorney work-product doctrine.²⁵⁴

As noted, the Illinois Supreme Court has historically construed the attorney–client communication privilege more narrowly than many other jurisdictions, finding that the privilege is “the exception” to the duty to disclose relevant information.²⁵⁵ One example of the narrower construction involves communications between attorneys and the agents of the attorneys' corporate clients. Here, the Illinois Supreme Court, in rejecting the federal law approach, adopted in the corporate client setting what has been described as the “control group” test.²⁵⁶ That test dictates the attorney–client privilege only applies to an attorney's communications with certain corporate employees. The control group test has been described generally as follows:

[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision

250. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (recognizing an attorney is entitled to seek legal advice regarding representation).

251. See *Garvy*, 966 N.E.2d at 538–39 (refusing to characterize the relationship as one involving a common interest).

252. See ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(4) cmt. 9 (2010) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to secure legal advice about the lawyer's compliance with these Rules . . .”).

253. See generally *Garvy*, 966 N.E.2d 523 (providing for an intra-firm privilege for lawyers to use in regard to conflicts of interest issues).

254. See generally *id.* (failing to increase the latitude of the privilege into other arenas).

255. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 253 (Ill. 1982).

256. *Id.* at 257 (“The control-group test appears to us to strike a reasonable balance by protecting consultations with counsel by those who are the decision[-]makers or who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery.”).

about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.²⁵⁷

The test was applied by the Illinois Supreme Court this way:

In our judgment, it is clear that Sailors was not a member of B-E's corporate control group. As one of several engineers within his department, he supplied information to those whose opinions were sought and relied upon by others such as Hansson who occupied an advisory role and substantially contributed to decision[-]making. It is this fact which is critical, for it seems clear that Sailors'[s] role was one of supplying the factual bases upon which were predicated the opinions and recommendations of those who advised the decision[-]makers. While those who directly advise the decision[-]makers could, conceivably, come within the control group, it is evident that Sailors did not.²⁵⁸

By contrast, in rejecting the control group test in corporate client settings, the United States Supreme Court has found attorney–client communications involving any corporate employee and the corporation's in-house counsel when the communications are undertaken in order for counsel to gain information facilitating the delivery of later legal advice to the corporation.²⁵⁹ The rationale underlying the broader scope of privileged communications was said to encourage “communication of relevant information by [corporate] employees” to the corporate lawyers so that lawyers may more easily “convey full and frank legal advice to the employees who will put into effect the client corporation's policy;”²⁶⁰ lawyers will be better able to provide counsel to control group members as they can more easily “ascertain[] the factual background and sift[] through the facts with an eye to the legally relevant;”²⁶¹ and, lawyers can better “ensure their client's compliance with the law.”²⁶²

With this narrow view of attorney–client communications in corporate client settings in Illinois, seemingly the privileged intra-firm

257. *Id.* at 255 (quoting *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962)).

258. *Id.* at 258.

259. *Upjohn Co. v. United States*, 449 U.S. 383, 403 (1981).

260. *Id.* at 392.

261. *Id.* at 390–91.

262. *Id.* at 392.

communications regarding questionable attorney conduct would likely involve communications between attorneys and corporate executives related to the actual legal advice rendered to the corporation, and not communications relating only to the “factual background” on which any later legal advice would depend.²⁶³ After *Garvy*, an Illinois court recognizing the intra-firm privilege must distinguish between the different topics of any otherwise privileged attorney–client communications.²⁶⁴ Communications involving what particular conduct prompted questions about legal work differ from communications involving what to do about the particular conduct uncovered, including, how to remedy, correct, or mitigate harm.

In Illinois the work-product doctrine, similar to the attorney–client communications privilege, operates more narrowly than other state and federal courts.²⁶⁵ Under the Federal Rule of Civil Procedure 26, ordinarily, there are protections against compelled disclosures of material “prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney)” with even stronger—if not absolute—protections of such material containing “mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”²⁶⁶ By contrast, under Illinois Supreme Court Rule 201, “[m]aterial prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party’s attorney.”²⁶⁷ Therefore, in the absence of an attorney–client communication privilege, as when there is no confidentiality or when an attorney communicates with a non-client, the work-product doctrine is less available in Illinois trial courts than in federal trial courts.²⁶⁸ In Illinois, only opinion work-product is significantly protected,²⁶⁹ and perhaps, given the language of the court rule, there is more protection for material assembled in preparation for actual litigation, with less protection for material prepared in anticipation of later litigation. As noted earlier, the

263. *Id.* at 390.

264. *See Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 538 (Ill. App. Ct. 2012) (“[L]awyers are permitted to make confidential reports of ethical issues to designated firm counsel . . .” (quoting ILL. RULES OF PROF’L CONDUCT R. 5.1 cmt. 9 (2010))).

265. *See* ILL. SUP. CT. R. 201(b)(2) (discussing the work-product doctrine).

266. FED. R. CIV. P. 26(b)(3).

267. ILL. SUP. CT. R. 201(b)(2).

268. *See generally id.* (laying down the rule for the work-product doctrine).

269. *See Garvy*, 966 N.E.2d at 539 (indicating no protection if impossible to secure “similar information from other sources”).

Garvy court found only the opinion work-product of the outside counsel and in-house counsel of the law firm, relating to *Garvy*'s malpractice claim against the law firm, protected from compelled disclosure.²⁷⁰

B. *Texas*

As in Illinois, the Texas Supreme Court has not yet addressed the attorney–client communication or work-product privilege for exchanges within a law firm regarding questionable attorney conduct.²⁷¹ When it does,²⁷² the Texas court will need to take account of its different privilege principles. Unlike Illinois, the Texas guidelines parallel federal court privilege principles in significant, but not all ways.²⁷³ The Texas courts have looked to federal court precedents to guide many attorney–client communication and work-product issues.²⁷⁴

On attorney–corporate client communications, a 1998 Texas Evidence rule clearly and expressly adopts the “subject matter” approach employed by the federal courts, having jettisoned the earlier used control group test, still used in Illinois.²⁷⁵ While the Texas and federal approaches are

270. *Id.* at 539–40.

271. *See generally* Brief of the Illinois State Bar Ass'n & the Chicago Bar Ass'n as Amici Curiae Supporting Defendants, *Garvy*, 966 N.E.2d 523 (No. 11-0115) (noting that the highest court in Illinois has yet to recognize a work-product privilege).

272. It is unlikely the Texas General Assembly will speak as current Texas guidelines on attorney–client communication and work-product appear in high court rules. *See* TEX. R. EVID. 503 (defining the lawyer–client privilege and who may claim invoke its use). *See* TEX. R. CIV. P. 192.5 (stating the work-product privilege rule and how the rule is applied).

273. *See generally* Brief of the Illinois State Bar Ass'n & the Chicago Bar Ass'n as Amici Curiae Supporting Defendants, *Garvy*, 966 N.E.2d 523 (No. 11-0115) (discussing the work-product privilege in Illinois).

274. *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 198 (Tex. 1993) (indicating that TEX. R. EVID. 503 “clearly adopts the control group test” in attorney–corporate client communication settings which expressly rejected the United States Supreme Court ruling in *Upjohn*); *id.* at 202 (stating that they “have in the past looked to federal precedent in deciding work-product questions” under TEX. R. CIV. P. 166). *But see id.* at 201 (recognizing that “[i]t is important to note that the work-product exemption has played a much lesser role in Texas than in the federal system . . . due to the separate privilege in Texas that protects communications between a party's representatives,” per TEX. R. CIV. P. 166b(3)(d), which was repealed effective January 1, 1999). The changed language appears in *Turbodyne Corp. v. Heard*, 720 S.W.2d 802, 803 (Tex. 1986) and TEX. R. EVID. 503(a)(2)(B) and accompanying Notes and Comments in 1998. Five years after *Brotherton*, the *Upjohn* approach was adopted.

275. TEX. R. EVID. 503(a)(2) (wherein “a representative of the client is” defined as someone with “authority to obtain professional legal services . . . or to act on advice thereby rendered,” but “who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client”). *Id.* R. 503(a)(2)(A). While the Texas rule clearly contemplates a subject matter test, the United States Supreme Court in *Upjohn* refused to expressly adopt the test, though the guidelines in *Upjohn* and

comparable, the federal guidelines derive from precedents—per Federal Evidence Rule 501 (at least when federal law claims are resolved)—while the Texas guidelines derive from a specific court rule, Texas Rule of Evidence 503 (TRE), on lawyer–client privilege. In fact, the United States Supreme Court is barred from promulgating a new court rule on privilege without Congressional approval,²⁷⁶ while the Texas General Assembly, by statute in 1939, is generally recognized as having “confer[red] upon and relinquish[ed] to [the Texas Supreme Court] full rule-making power [on laws] governing civil procedure and evidence,” thereby implicitly, at least, acknowledging the high court’s constitutional “authority.”²⁷⁷

The broad subject matter approach is recognized in the Texas Evidence Rule, which deems a lawyer’s communication with a “representative” of a corporate client²⁷⁸ to be privileged, with such a representative including not only “a person having authority to obtain legal services . . . rendered on behalf of the [corporation (i.e., control group member), but also] any other person who, for purposes of effectuating legal representation . . . makes or receives a confidential communication while acting in the scope of employment for the [corporation (i.e., subject matter test)].”²⁷⁹

As in the federal courts, work-product in Texas, both opinion and ordinary, are privileged,²⁸⁰ though broader exceptions seemingly exist as to the latter.²⁸¹ Ordinary work-product is defined to include “material prepared” and “a communication made in anticipation of litigation or for trial,” but does not encompass, “core work-product” (i.e., opinion work-product) which includes prepared material or a communication “contain[ing] the attorney’s or the attorney’s representative’s [mental] impressions, opinions, conclusions, or legal theories.”²⁸²

A few explicit exceptions in Texas to both attorney–client communication and work-product privileges may be germane to a client’s attempt to discover her attorney’s communication with outside or in-house counsel regarding the attorney’s questionable conduct on behalf of the

the Texas rule are comparable. *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981).

276. 28 U.S.C. § 2074(b) (2012).

277. *In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex. 2001) (citing TEX. CONST. art. V, § 31).

278. TEX. R. EVID. 503(b)(1)(A).

279. *Id.* R. 503(a)(2)(A)–(B).

280. TEX. R. CIV. P. 192.5(a)(1).

281. While all work-product is subject to certain exceptions, only ordinary “work[-]product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.” *Id.* R. 192.5(b)(2).

282. *Id.* R. 192.5(a), (b)(1).

client.²⁸³ The exception wherein there is no privilege involving “a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients” is not likely germane.²⁸⁴ Seemingly this exception would only allow the client (or former lawyer) in a malpractice action to introduce a communication by the former lawyer to outside or in-house counsel when counsel was “retained or consulted in common”²⁸⁵ into evidence—an unlikely event, at least in settings where only the lawyer seeks counsel after the client has raised issues with the lawyer as to the lawyer’s questionable conduct. A second exception involves “a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer.”²⁸⁶ A lawyer seeking counsel for past conduct seemingly involves no breach of duty to a client—as when outside or in-house counsel conferences are privileged—though the past conduct may constitute a breach.

VI. PRIVILEGE FOR COMPARABLE COMMUNICATIONS GOING BEYOND OUTSIDE OR IN-HOUSE COUNSEL?

Clients and others, including the lawyers themselves, sometimes question the conduct of lawyers who do not work in law firms or who do not work in law firms with designated in-house ethics counsel. When such questions arise, how should these questioned lawyers respond? Must they only use outside counsel in order to safeguard their client confidences, or are there other ways for the questioned lawyers to gain counsel without jeopardizing their own client confidences?

When questioned lawyers attend conferences with other lawyers who are neither outside counsel nor in-house ethics counsel, privileges should be available when these questioned lawyers consult other lawyers using hypotheticals in a manner that does not identify the questioned lawyers’ clients. In a comment to the ABA Model Rule on lawyer confidentiality regarding “information relating to the representation of a client,” it is recognized that “[a] lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable

283. See TEX. R. EVID. 503(d) (citing rules regarding attorney–client communication). The exceptions to attorney–client communication privilege in TEX. R. EVID. 503(d) also constitute exceptions to the work-product privilege per TEX. R. CIV. P. 192.5(c)(5).

284. *Id.* R. 503(d)(5).

285. *Id.*

286. *Id.* R. 503(d)(3).

likelihood that the listener will be able to ascertain the identity of the client or the situation involved.”²⁸⁷

The so-called self-analysis, or critical self-analysis, or deliberative process doctrine, which sometimes shields internal investigations from discovery by service providers as to their own earlier questionable conduct, is not relevant, at least when undertaken to improve service provider effectiveness in the future. In finding a hospital's minutes and reports of hospital staff non-discoverable in a malpractice suit concerning an earlier death at the hospital, one court said this:

The minutes and reports of the boards or committees of the Hospital are records of medical staff reviews by committees of doctors acting pursuant to the requirements of the Joint Commissions on Accreditation of Hospitals. The Commission was organized in 1952 to effectuate standardized hospital practices throughout the nation. While lacking legal licensing authority, it is prestigious and can substantially affect the standing of hospitals on a professional basis. Accreditation by the Commission can be gained only by following its recommendations.

Among the recommendations are a number which set out procedures to improve hospital and medical standards through the use of committee review proceedings. These committee proceedings take the form of “staff meetings” of the professional personnel involved in the care and treatment of patients in the hospital. The Commission has said that the “sole objective” of such staff meetings is the “improvement” in the available care and treatment.

“This is facilitated by a thorough review and analysis of the clinical work done in the hospital on at least a monthly basis. It includes consideration of selected deaths, unimproved cases, infections, complications, errors in diagnosis, and results of treatment of patients in the hospital as well as those recently discharged.

The improvement in care and treatment of hospital patients is the responsibility of the medical staff. To accomplish this, meetings of the medical staff are required to review, analyze, and evaluate the clinical work of its members.”

This committee work is performed with the understanding that all communications originating therein are to be confidential.

Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. . . . To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would

287. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 4 (2013).

result in terminating such deliberations. . . .

The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not a part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures.²⁸⁸

Any such privilege is irrelevant to intra-firm and similar communications regarding questionable attorney conduct because these communications are not retrospective.

VII. FURTHER THOUGHTS ON LAWYERS WHO INVESTIGATE QUESTIONABLE ATTORNEY CONDUCT BY OTHERS

Whether conferring with outside counsel, in-house counsel, or some other counsel,²⁸⁹ public policy should support a privilege against involuntary nondisclosure of conferral communications involving the questionable conduct of a conferring lawyer. Lawyers providing such counsel may also need to communicate with others, as well as assemble additional information and prepare other materials in order to provide good counsel. Here, as there often is no attorney–client communication, are there nevertheless other possible privilege sources? In a few of the earlier-noted cases, work-product protections were raised; however, those courts, as well as most commentators,²⁹⁰ have yet to grapple significantly with how—if at all—work-product operates.

Work-product clearly operates when counseling lawyers undertake certain work in anticipation of or preparation for trial. Lawyers conferring with questioned lawyers may, in fact, be obligated to investigate and prepare tangible materials in order to avoid their own malpractice. As noted, work-product doctrines vary significantly interstate with respect to discoverability and admissibility of ordinary work-product. In states like Illinois, where there is no protection of ordinary work-product, or in states where exceptions to any such protections are easy to establish, conferring lawyers should prepare mostly tangible materials that only—or

288. *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970) (citations omitted), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

289. *See* TEX. R. EVID. 503(d)(5) (noting an exception to attorney–client privilege where a matter of common interests among joint clients has been communicated to an attorney).

290. *See, e.g.*, Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1730 n.60 (2005) (“This article does not specifically address the scope of in-firm work-product privilege. However, much of my analysis of the attorney–client privilege applies to the work-product privilege as well.”). *But see* Douglas R. Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 SYRACUSE L. REV. 69, 75–77 (2004) (referencing various courts at the state and federal level which recognize the work-product privilege).

predominantly—constitute opinion work-product, keeping their ordinary work-product (i.e., witness statements), as best they can, in their heads. As observed in the seminal ordinary work-product case of *Hickman v. Taylor*,²⁹¹ decided by the United States Supreme Court in 1947, the Court expressed:

But as to oral statements made by witnesses to Fortenbaugh, [a lawyer,] whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.²⁹²

Granted, reliance on memory is a dangerous route.

Where the privileges involving attorney–client communications and work-product provide shields against current or former clients seeking discovery or evidence to law firms, those shields need not be employed. Privileges are waivable by privilege holders. Whether outside, in-house, or other counsel is employed, the law firms, and not the individually questioned lawyers who obtain counsel will usually be the privilege holders.²⁹³ Counseling lawyers should make sure that conferring questioned lawyers understand this.²⁹⁴ In somewhat comparable settings, non-lawyer corporate employees who have talked with corporate in-house counsel investigating questionable employee conduct have been surprised to learn later that the corporations can waive their available privileges,

291. *Hickman v. Taylor*, 329 U.S. 495 (1947).

292. *Id.* at 512–13 (providing rationale for protection of undocumented attorney work-product, such as mental impressions).

293. See MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2013) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

294. At some point, a duty arises for counseling lawyers. See, e.g., *id.* R. 1.13(f) ("In dealing with an organization's . . . employees . . . a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."); see also *Yanez v. Plummer*, 221 Cal. Rptr. 3d 309, 311 (Ct. App. 2013) (highlighting potential malpractice arising from a conflict of interest between employer and employee when both are represented by in-house counsel).

which effectively puts the cooperating employees (who wished to keep their jobs) in the cross-hairs. Corporate waivers are sometimes prompted when investigating governments offer leniency to corporations (but not their individual current or former employees) that cooperate during investigations.²⁹⁵

In addition, lawyers who investigate questionable conduct by other lawyers within their law firm should be wary of potential client–law-firm conflicts, law-firm-attorney–law-firm conflicts, and law-firm-attorney–client conflicts. Investigating in-house firm lawyers may include talking with colleagues within the firm about work done for current clients in settings where the conduct of the client, the firm, and another firm attorney may have each been questioned and where courts might act against one, two or three of these parties. Consider a law firm attorney who filed a complaint in a federal district court on behalf of a law firm client and who later faces, together with the law firm and the client, a possible court sanction if the complaint is deemed frivolous, or worse, filed in bad faith, after the twenty-one-day safe-harbor period runs.²⁹⁶ In-house counsel for the law firm who confers with the filing attorney must tread cautiously, and may well need to withdraw from any further representation of the firm attorney and the firm client.²⁹⁷

Lawyers who counsel and investigate questionable conduct by other lawyers, be they outside, in-house or other, must also look ahead, both before and while working toward potential choice-of-law issues regarding both the attorney–client communications privilege and the work-product privilege they might employ later when discovery or evidentiary requests relating to confidential materials are resisted. Of course, choices between the privilege and other information-protection laws of two or more interested jurisdictions are unnecessary where all laws are similar. However, as demonstrated earlier with Illinois and Texas, all American state laws are not alike. Where there are clearly at least two significantly interested jurisdictions, counseling lawyers should undertake their work, if possible, in ways which will most likely immunize the work from the most

295. See Peggy Aulino, *Attorneys Still at Odds Regarding Waiver of Corporate Attorney–Client Privilege*, 25 *Laws. Man. on Prof. Conduct* (ABA/BNA) 630 (Nov. 11, 2009) (discussing then recent revisions to the U.S. Attorneys’ Manual so “that federal prosecutors ‘are directed not to’ ask corporations to waive privileges” still noting, “a corporation remains free to convey non-factual or “core” attorney–client communications or work-product”).

296. *E.g.*, FED. R. CIV. P. 11(c)(1) (providing for the possibility of sanction against a responsible party for violation and that a law firm may not always be held jointly responsible).

297. See MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2013) (forbidding attorneys from representing a client if such representation creates a concurrent conflict of interest).

narrow privilege laws.²⁹⁸

Sometimes the choice between competing and differing privilege laws is guided by a written privilege law. Under Federal Evidence Rule 501 as to the attorney–client communications privilege, in an Article III federal court, the federal common law is used when determining a federal law claim, but state privilege law is employed when determining a state law claim.²⁹⁹ Some state evidence rules, which otherwise track much of the Federal Evidence Rules, do not comparably require their state courts to employ the federal—or some other state—attorney–client communication privilege law when hearing foreign law claims.³⁰⁰

A different written law guiding the choice between competing privilege doctrines appeared in an earlier version of Federal Rule of Civil Procedure 43(a), which preceded the promulgation of the Federal Rules of Evidence, which itself took a different approach than current Federal Rule of Evidence 501; it said:

All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.³⁰¹

298. Comparably, lawyers must tread carefully due to differences in privilege laws between two or more interested countries. *See, e.g.*, Steven C. Bennett, *International Issues in Privilege Protection: Practical Solutions*, 82 U.S.L.W. 708 (Nov. 12, 2013) (discussing jurisdictions “that protect a much narrower range of attorney–client communications”).

299. FED. R. EVID. 501 (“The common law . . . governs a claim of privilege But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”). Yet, Federal Rule of Evidence 502 adds that “disclosure of a communication or information covered by the attorney–client privilege or work-product protection . . . made in a federal proceeding or to a federal office or agency” is governed by the Rule 502 waiver standards “even if state law provides the rule of decision.” *Id.* R. 502(a)–(b), (f) (distinguishing between inadvertent disclosures and intentional waivers). By comparison, the Uniform Rules of Evidence, as amended in 2005, say nothing in their privilege provisions about choice of law. UNIF. R. EVID. 501–11 (outlining rules governing privileges).

300. *See* W. VA. R. EVID. 501 (“The privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law except as modified by the Constitution of the United States or West Virginia, statute or court rule.”); *see also* MONT. R. EVID. 501 (“Except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state, no person has a privilege to . . . refuse to disclose any matter . . .”).

301. *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388, 394 (5th Cir. 1961) (quoting the rule and describing it as “liberal” and as “affirmatively expand[ing] the scope of

In the absence of a written law in the forum, when choosing between the differing privilege doctrines of two or more interested jurisdictions, courts will typically apply principles from one of the Restatements of Law from the American Law Institute.³⁰² However, the principles differ between the varying Restatements that have been issued over the years.³⁰³ State courts have employed differing Restatements and thus varied guidelines on choice of privilege law.³⁰⁴ Of course, this often makes the task of the counseling lawyer—in looking ahead—quite difficult. For example, instances where there are possible federal and state forums for any future litigation and there are varying locations where counsel is given or where necessary investigations are undertaken.

Finally, should greater clarity in attorney–client privilege communication matters be sought via new written laws, locating the lawmaker can be difficult. In some states, one should look to the legislature, as is the case in Oregon under *Crimson Trace*.³⁰⁵ For the Article III courts, U.S. Supreme Court rulemaking can be employed but congressional approval is likely needed.³⁰⁶ Elsewhere, high court rulemaking can be employed with no need for General Assembly approval, oversight, or independent initiative, as where privilege laws are deemed within the exclusive authority of the judiciary to regulate the practice of law.³⁰⁷ On at least one occasion, given uncertainties regarding the locus

admissibility”).

302. See *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices and Prods. Liab. Litig.*, No. 3:09-md-02100, 2011 WL 1375011, at *8–15 (S.D. Ill. Apr. 12, 2011) (detailing the application of varying Restatements and the associated privilege principles across jurisdictions).

303. See *id.* (indicating the existence of differing privilege principles from one Restatement to another).

304. See, e.g., *id.* (reviewing differing state approaches and the varied Restatement guidelines).

305. See *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1191 (Or. 2014) (en banc) (examining Oregon Evidence Code to determine exceptions to the attorney–client privilege); see also MO. CONST. art. V, § 5 (authorizing the Supreme Court of Missouri to make rules of practice and procedure, but clarifying that it “shall not change . . . the law relating to evidence”).

306. See 28 U.S.C. § 2074(b) (2012) (“Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”).

307. See *People ex rel. Brazen v. Finley*, 519 N.E.2d 898, 902 (Ill. 1988) (emphasizing the high court’s “exclusive rulemaking and disciplinary authority” regarding the practice of law); see also *Op. of the Justices (Prior Sexual Assault Evidence)*, 688 A.2d 1006, 1010–16 (N.H. 1997) (examining substance and procedure dichotomies relating to court rulemaking and separation of powers) *abrogated by In re S. N.H. Med. Ctr.*, 55 A.3d 988 (N.H. 2012). But see Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 174–75 (2010) (“The first step . . . is to abandon the simplistic assumption that judges should regulate lawyers. . . . The next step is to conduct a contextual comparative institutional analysis scrutinizing the promulgation and enforcement abilities of the judiciary broken into various elements . . . and to contrast them with those of alternative regulatory bodies.”).

of lawmaking authority, both the high court via court rulemaking, and the legislature via statute, adopted new privilege laws.³⁰⁸

VIII. CONCLUSION

When questions are raised regarding a law firm attorney's representation of a firm client, the questioned attorney often wishes to seek legal counsel where a conferral will often benefit the attorney, the firm, and the client. Conferences regarding questioned conduct should be encouraged, not discouraged. To encourage these beneficial conferrals, a broad attorney-client communication privilege and a broad work-product protection (or privilege) should be available, with availability not dependent upon whether in-house, outside, or other legal counsel is employed. While earlier federal precedents were split regarding the availability of the attorney-client communication privilege, in the in-house counsel setting, increasingly therein, the privilege is recognized. In addition, work-product protections should also be available to legal counsel advising questioned attorneys. Yet, because of federal-state and interstate differences in the two immunities under law from compelled involuntary disclosure, legal counsel must proceed cautiously. Available privileges and protections vary in the questionable attorney conduct setting as they do in other settings where legal counsel is provided.

308. In Kentucky, when first adopted in the early 1990s, the evidence rules were a "joint effort" by the legislature and high court. See *Mullins v. Commonwealth*, 956 S.W.2d 210, 211 (Ky. 1997) (examining the creation of the Kentucky rules of evidence). This "joint effort" [was] a polite fiction which recognized that some parts of the rules fell within the sole purview of the legislature (substantive law), whereas others fell within the sole purview of [the Kentucky Supreme] Court (practice and procedure), but avoided fighting over which was which." *Commonwealth v. Chauvin*, 316 S.W.3d 279, 285 (Ky. 2010) (commenting on the rulemaking ability shared by the legislature and judiciary with regard to evidentiary rules). The rules were passed by the legislature and then adopted by the court "to the extent that they may have constituted a rule of practice or procedure." *Chauvin*, 316 S.W.3d at 285 (expanding upon the adoption of such rules). For some time, the Kentucky Supreme Court has had exclusive authority to enact "rules of practice and procedure for the Court of Justice." See KY. CONST. § 116 (defining the Court's power to promulgate rules pertaining to practice and procedure, among others). Since initial enactment, Kentucky's evidence rules require the high court to report possible evidence rule amendments to the legislature—which may be disapproved—and recognize that the legislature "may amend any proposal reported by the Supreme Court . . . and [] adopt amendments or additions to the Kentucky Rules of Evidence not reported." KY. R. EVID. 1102. Legislative changes, however, are limited by the exclusive judicial authority over rules of practice and procedure. See *Chauvin*, 316 S.W.3d at 284–85 (discussing limitations of judicial authority as they relate to rules of practice and procedure).

