IN THE SUPREME COURT OF THE STATE OF OREGON

CRIMSON TRACE CORPORATION, an Oregon corporation, Plaintiff-Adverse Party, v. DAVIS WRIGHT TREMAINE LLP, a Washington limited liability partnership, FREDERICK ROSS BOUNDY, an individual, and WILLIAM BIRDWELL, an individual, Defendants-Relators.	Multnomah County Circuit Court Case No. 1108-10810 Supreme Court No. S061086 **MANDAMUS PROCEEDING**

DEFENDANTS-RELATORS' OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND EXCERPT OF RECORD

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I. STATEMENT OF THE CASE

A. Nature of the Case

This mandamus proceeding arises from the Circuit Court's improper decision to carve an unprecedented "fiduciary exception" out of the attorney-client privilege codified by Oregon Evidence Code 503—an exception that renders otherwise privileged communications between lawyers and their firm's in-house counsel subject to discovery.

This decision was erroneous for myriad reasons. Under basic principles of statutory construction, such communications fall squarely within OEC 503; they do not satisfy any of the exceptions enumerated in the statute or its commentary. Moreover, the OEC bars courts from crafting *ad hoc* exceptions to the attorney-client privilege, "because persisting uncertainty about the availability of the privilege will discourage some communications." OEC 503(1)(d), cmt.; *see also* OEC 514. For these reasons, not a single published decision from a court of this State has ever created or applied a judicially created exception to the attorney-client privilege—only those expressly provided in OEC 503 and its commentary. Furthermore, departing from the plain language of OEC 503 would undercut the bedrock principles underlying the attorney-client privilege—encouraging frank and candid discussions in connection with the provision of legal advice (including to lawyers faced with ethical dilemmas). In fact, many jurisdictions have rejected the so-called

fiduciary exception outright because it undermines these purposes, and others have held that it does not apply in the circumstances presented here. Moreover, the exception itself is analytically flawed. Failing to properly consider all of this, the Circuit Court not only exceeded its authority and jurisdiction, but it also rested its decision on at least two erroneous premises: (1) that a conflict of interest between the law firm and its clients had arisen (which it had not), and (2) that such a conflict vitiated the privilege (which it could not).

Not only are the Circuit Court's conclusions mistaken as a matter of law, but they are also particularly inappropriate under the largely undisputed facts here. Beginning in February 2008, Plaintiff-Adverse Party Crimson Trace Corporation ("Crimson Trace") retained Davis Wright Tremaine LLP ("DWT"), and in particular two of its attorneys, Frederick Ross Boundy and William Birdwell (sometimes referred to collectively as "Defendants"), to bring a patent infringement suit. While they were litigating that patent suit, Crimson Trace secretly retained shadow counsel in June 2010 and subsequently (and still secretly) decided in August 2010 to stop paying DWT's invoices. Crimson Trace wanted to gain "leverage" in its calculated strategy of negotiating a reduced fee. Crimson Trace did not notify DWT of its intention because it was afraid that DWT would "stop working." When Crimson Trace finally told Defendants that it had decided to stop paying—many months later on Christmas Eve 2010—Birdwell and Boundy sought legal advice from DWT's in-house

counsel about their rights and obligations and those of the firm. Yet the Circuit Court held that Defendants should have notified Crimson Trace that their interests were diverging—as Crimson Trace indisputably knew already, having consulted for half a year with shadow counsel. Nevertheless, the Circuit Court held that the internal communications that Crimson Trace's tactical ambush of DWT had triggered were non-privileged and subject to production in this legal malpractice case.

As explained below, this conclusion was wrong as matter of Oregon law and also as a matter of both logic and fairness. Because the communications at issue are protected by the attorney-client privilege, and because Crimson Trace has not carried *its burden* to demonstrate that the communications fall within any exception to the privilege, DWT respectfully requests that this Court issue a peremptory writ vacating the Circuit Court's order compelling the production of the privileged communications.

B. Nature of the Order Under Review

On March 18, 2013, this Court issued an alternative writ of mandamus to review the Circuit Court's February 11, 2013 order. The Circuit Court's order granted Crimson Trace's motion to compel and required Defendants to produce documents (mostly emails) that contained the confidential communications between Defendants and in-house counsel at DWT.

C. Basis for Mandamus Jurisdiction and Relevant Dates

This Court has original jurisdiction over this mandamus proceeding under ORS 34.120(2). The Circuit Court's order compelling production of privileged communications was filed on February 11, 2013. DWT's petition for an alternative or peremptory writ of mandamus was timely filed in this Court on February 12, 2013. On February 14, 2013, this Court issued a stay of the Circuit Court's order. This Court then issued an alternative writ of mandamus to the Circuit Court on March 28, 2013. The Circuit Court responded on April 2, 2013 with a written opinion explaining its prior ruling and declining to vacate its February 11, 2013 order.

D. Questions Presented

1. Did the Circuit Court err in holding that Crimson Trace had carried its burden to establish it was entitled to otherwise undisputedly privileged communications based on a "fiduciary exception" to the attorney-client privilege that does not appear in Oregon's privilege statute?

2. Did the Circuit Court have the authority under Oregon law to create a previously unrecognized "fiduciary exception" to the attorney-client privilege based on a supposed violation of the Oregon's ethical rules?

3. Did the Circuit Court err in concluding that consulting with in-house counsel constituted a conflict of interest and justified application of a judicial exception to a fiduciary who sought legal advice?

4. Did the Circuit Court err in concluding *sub silentio* that the codified attorney work-product doctrine was similarly subject to a fiduciary exception?

E. Summary of Argument

It is undisputed that the communications at issue here fall within the plain language of the attorney-client privilege statute, OEC 503 (ORS 40.225). The Circuit Court recognized, and Crimson Trace has conceded, that as clients, DWT, Birdwell, and Boundy sought confidential legal advice from their attorneys, DWT's in-house counsel. In granting Crimson Trace's motion to compel and holding that Crimson Trace had carried its burden to establish that an exception to the attorney-client privilege applies, the Circuit Court erred for at least six independent reasons:

First, only one source of law—OEC 503—determines the existence and scope of the attorney-client privilege in this State. *See, e.g.*, *State v. Gaines*, 346 Or 160, 171 (2009). Nothing in the text of that statute creates a "fiduciary exception" to the privilege, an exception on which the Circuit Court predicated its ruling.

Second, well-settled canons of statutory construction preclude creating a new exception that was omitted from the statute itself. The OEC precludes courts from imposing judicially crafted, *ad hoc* exceptions to the privilege codified in OEC 503, which creates a floor of protection for privileged communications that circuit courts are barred from weakening.

Third, even if the Circuit Court had authority to create a "fiduciary exception," departing from the plain language of the OEC would undermine the core purposes of the attorney-client privilege by discouraging full and frank discussion between attorneys and their in-house counsel when ethical and other issues arise. Moreover, the "fiduciary exception" is analytically flawed and inevitably leads to undesirable consequences in a variety of contexts where fiduciaries seek confidential legal advice.

Fourth, a "fiduciary exception" would not apply here in any event, because even jurisdictions that have enacted it have recognized that it does not require disclosure of a fiduciary's communications with counsel about the fiduciary's *own* legal duties. Moreover, the Circuit Court premised the "fiduciary exception" on a supposed conflict of interest that simply did not exist—an Oregon State Bar formal ethics opinion confirms that no conflict arises when law firms confidentially seek their own counsel concerning their rights and obligations in connection with client representations.

Fifth, in holding that the attorney-client privilege could be vitiated based solely on Defendants' supposed failure to disclose a perceived conflict of interest and to "screen" trial counsel from in-house counsel, the Circuit Court's order amounts to an improper sanction that intrudes on this Court's exclusive jurisdiction to regulate attorney conduct. The order also ignores that Crimson Trace secretly had retained shadow counsel and withheld payment of

Defendants' fees in order to gain leverage and coerce them to continue working on Crimson Trace's behalf at reduced rates, thereby obviating any need to disclose any supposed conflict.

Sixth, for the same reasons, the Circuit Court erred in holding that the attorney work-product doctrine did not apply to the documents at issue that were created in anticipation of litigation, inasmuch as there is no authority or justification for a fiduciary exception to that doctrine, particularly where the party requesting the documents can receive the underlying information through other means.

F. Statement of Facts

Crimson Trace retained DWT, Boundy, and Birdwell in February 2008 to prepare and file a patent infringement suit against Crimson Trace's competitor, LaserMax, Inc. Crimson Trace's CEO, Lew Danielson, directed Defendants to adopt an aggressive approach, asserting every potential infringement claim in order to achieve an early settlement. Danielson then instructed Defendants to time the filing of Crimson Trace's complaint to correspond with an important industry trade show, and he hired a public relations firm to publicize the lawsuit. At the trade show, Danielson publicly presented LaserMax's president with a copy of the complaint. Danielson's strategy backfired. Instead of settling early, LaserMax took a scorched-earth approach to its defense and attacked the validity of Crimson Trace's patents. Danielson thereafter was

replaced by a new CEO, Lane Tobiassen, who testified that Danielson's aggressive tactics were misguided. (Doc# 101, p. 4).[1]

Crimson Trace began moving against DWT while the representation was ongoing. Beginning in June 2010, and without telling DWT, Crimson Trace retained another patent litigation attorney in connection with the LaserMax litigation. (ER-27). In August 2010, again unbeknownst to DWT, Crimson Trace began withholding its payments for DWT's legal work in order to obtain "bargaining leverage on the ultimate payment on their bill." (ER-5). As Tobiassen admitted in his deposition, Crimson Trace decided not to notify DWT that it was no longer paying, or that it had hired shadow counsel, because of the "downside" that DWT might "stop working" on the LaserMax litigation (contradicting its subsequently-professed concerns about the quality of DWT's work). (ER-6).

In October 2010, Tobiassen settled the LaserMax litigation, despite DWT's expressed reservations, on terms that Crimson Trace's Board of Directors later concluded were unsatisfactory. (Doc# 101, p. 4). Stuck with an unfavorable settlement and the wrath of his Board after having ignored DWT's advice, Tobiassen moved forward with his plan to blame DWT for initiating the lawsuit and for the resulting settlement. By this time, and certainly no later

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[1] "Doc#" refers to the OJIN docket for the case below.

than October 23, 2010, Crimson Trace was engaged in clandestine discussions about "DWT's representation" with its shadow counsel. (ER-26-27).

On Christmas Eve 2010, Crimson Trace finally told DWT's Ross Boundy that it intentionally had been withholding its fees. (ER-5). In response, and in order to determine their rights and obligations under the circumstances—as well as those of the firm—Boundy and Birdwell consulted on behalf of themselves and DWT with the "Quality Assurance Committee" ("QAC")—a defined group of attorneys at the firm who served as DWT's in-house counsel. (ER-18-23). These communications are the subject of the motion to compel at issue here (along with certain billing records from the QAC reflecting a consultation by Boundy after an August 2009 claim by LaserMax that suggested Birdwell might be a potential witness at trial, *see* ER-36-44).

Having little choice in the matter, DWT continued to represent Crimson Trace as the patent proceedings wound down. Defendants performed no substantive litigation work for Crimson Trace after February 18, 2011 (though the Circuit Court erroneously held that the representation did not end until April 13, 2011, when Crimson Trace's malpractice counsel sent Defendants a formal termination letter). (Doc# 101, p. 6). Crimson Trace finally told DWT on February 24, 2011 that it was "hostile" to DWT and would not pay its accumulated fees (which had gone unpaid since August 2010), and that it was considering other "options for a resolution of the matter." (ER-24).

On August 18, 2011, Crimson Trace filed this action against DWT, Boundy, and Birdwell, alleging legal malpractice and breach of contract. (Doc# 1). Crimson Trace's current complaint alleges that it never would have brought the patent infringement suit against LaserMax if DWT had more thoroughly investigated the underlying facts and had advised Crimson Trace of the risks of bringing suit. (Doc# 50). Defendants deny these allegations. (Doc# 56).

In the course of litigating this legal malpractice action, the parties have spent more than a year conducting discovery. DWT has produced more than 75,000 pages of documents from its client files. Crimson Trace nonetheless moved to compel production of DWT's "loss prevention" files and *any* communications between Defendants and in-house counsel. Defendants asserted that all such communications were protected under the attorney-client privilege and that a subset also was protected by the work-product doctrine because they were created after Defendants learned that Crimson Trace planned to assert a claim. (Doc# 101).

The facts underlying Crimson Trace's motion to compel are undisputed: the QAC serves as DWT's in-house counsel and is composed of specific lawyers with whom DWT attorneys and staff may consult confidentially. (ER-22-23; Doc# 91, p. 3). Boundy, Birdwell, and DWT consulted with certain

lawyers on the QAC. (ER-18-21). All of those communications were made for the purpose of seeking legal advice. *Id*.

In response to Crimson Trace's motion to compel, the Circuit Court conducted an *in camera* inspection of the communications at issue and ultimately ordered all of them to be produced. (ER-45-46). The Circuit Court concluded that all of the documents *fell within the scope of the attorney-client privilege* (except three that did not reflect substantive legal advice). Relying on cases from other jurisdictions, however, the court first concluded in an oral ruling that the communications fell within a judicially created exception to the privilege for communications between an attorney at a law firm and that firm's in-house counsel about a current client, largely based on an imputed conflicts rationale. (ER-33-35). Defendants then petitioned this Court, which issued an alternative writ of mandamus. The Circuit Court thereafter provided a written opinion in which it declined to change its ruling but did modify its rationale, now directly relying on a controversial "fiduciary exception" to the privilege. (ER-47-50).

II. ASSIGNMENT OF ERROR

The Circuit Court erred when it granted Crimson Trace's motion to compel production of confidential, intra-firm communications between DWT's in-house counsel and lawyers at DWT.

A. Preservation of Error

The issues presented were fully briefed by the parties as part of Crimson Trace's motion to compel. They were argued in two hearings before the Circuit Court on January 9, 2013 and February 8, 2013. Transcripts of the audio recordings from those hearings were submitted in this mandamus proceeding as Crimson Trace's Second Supplemental Excerpt of Record.

B. Standard of Review

Whether the attorney-client privilege applies to communications between attorneys at a law firm and that firm's in-house counsel is a question of law that this Court reviews for errors of law. *State v. Serrano*, 346 Or 311, 326 (2009) (citing *State v. Rogers*, 330 Or 282, 312 (2000)).

III. ARGUMENT

A. OEC 503 Makes the Communications At Issue Privileged Under Basic Principles of Statutory Construction

1. The Communications Are Privileged Under OEC 503

This State's attorney-client privilege is codified in OEC 503 (ORS 40.225). The privilege analysis must begin with the "text and context" of that statute according to the familiar rules set forth in *State v. Gaines*, 346 Or 160, 171 (2009), and *PGE v. Bureau of Labor & Industries*, 317 Or 606 (1993).[2]

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[2] *See also State ex rel. Oregon Health Services University ("OHSU") v. Haas*, 325 Or 492, 503 (1997) (applying *PGE* statutory construction principles to OEC 503); OEC 101(3) (providing that "ORS 40.225 [OEC 503] to 40.295 [OEC 514] relating to privileges apply at all stages of all actions, suits and proceedings").

Under these rules, the words of the statute are paramount. "[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." *Gaines*, 346 Or at 171 (internal quotation marks omitted); *accord State v. Mullins*, 352 Or 343, 362 (2012); *A.G. v. Guitron*, 351 Or 465, 484 (2011) ("The words of statutes and rules of civil procedure are the best indication of the intent of those who promulgate them."). When construing statutes, this Court consistently has adhered to the Legislature's admonition "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010; *see PGE*, 317 Or at 611 (quoting same); *OHSU*, 325 Or at 503 (same); *State v. Eumana-Moranchel*, 352 Or 1, 24 n.8 (2012) (same).

Here, OEC 503(2) provides the governing language for the privilege:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . [b]etween the client . . . and the client's lawyer[.]

The OEC defines a "client" as "a person . . . association or other organization or entity . . . who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services by the lawyer." OEC 503(1)(a). It also defines a "lawyer" as "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or

nation." OEC 503(1)(c). Under this rule, Defendants' communications with DWT's in-house counsel fall within the privilege.[3]

Indeed, that the communications are otherwise privileged under OEC 503 is undisputed. Birdwell, Boundy, and DWT were clients, as Crimson Trace has "readily . . . concede[d]." (ER-18-23; Doc# 107). And they consulted with members of the QAC, each of whom was clearly a "lawyer" under OEC 503(1)(c), in order to "obtain professional legal services" concerning their rights and obligations. Accordingly, these communications fall directly within the attorney-client privilege as set out in the plain language of OEC 503, as the Circuit Court recognized. (*See* ER-49 ("[C]ommunications among the DWT lawyers ordinarily would be covered by the attorney-client privilege.")).[4] The

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[3] Some of the communications (*i.e.*, those generated after February 24, 2011, when Crimson Trace notified defendants that it was "hostile" to them) are also protected by the work-product doctrine under the plain language of Oregon Rule of Civil Procedure ("ORCP") 36B(3), because they were "prepared in anticipation of litigation." *See infra* Part III.F.

[4] *See also, e.g.*, *United States v. Rowe*, 96 F3d 1294, 1296 (9th Cir 1996) (holding that attorneys at a law firm may function as "in-house counsel," and that their communications are protected by the privilege); *TattleTale Alarm Sys., Inc. v. Calfee, Halter & Griswold, LLP*, No. 2:10-cv-226, 2011 WL 382627, at *4 (SD Ohio Feb. 3, 2011) ("[A]ll of the elements of the attorney-client privilege . . . are present when the typical 'loss prevention communication [with the firm's in-house counsel] takes place."); *Garvy v. Seyfarth Shaw LLP*, 966 NE2d 523, 538-39 (Ill App Ct 2012) ("Seyfarth was receiving legal advice" and "the attorney-client privilege applies to communications with Seyfarth's in-house counsel."); *RFF Family P'ship, LP v. Burns & Levinson, LLP*, No. 12-2234-BLS1, slip op. at 6 (Mass Sup Ct Nov. 20, 2012), *rev. pending* No. SJC-11371 (Mass Jan. 29, 2013) (attached as Appendix ("App")-38-51) ("private communications with the firm's 'ethics counsel' or other in-house attorney, . . . for the purpose of

OEC therefore confers on Birdwell, Boundy, and DWT the right "to refuse to disclose and to prevent any other person from disclosing" their content unless an exception to the privilege applies (which it does not). OEC 503(2)-(3).

2. No Recognized Exception to the Attorney-Client Privilege Applies

Because the communications at issue fall within the scope of the privilege, the burden shifts to Crimson Trace as the party seeking disclosure to demonstrate that an exception to the privilege applies. *Frease v. Glazer*, 330 Or 364, 371 (2000). This analysis must begin "by examining the text of OEC [503(4)]," in which the Legislature explicitly listed several exceptions to the

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obtaining legal advice on a matter of common concern to the [attorney] and the firm, are subject to the attorney-client privilege"); *OfficeMax Inc. v. Nixon Peabody LLP*, No. CV-OC-2012-09327, slip op. at 23-24 (Idaho Dist Ct May 13, 2013) (attached as App-1-37) ("[T]he lawyer-client privilege applies to communications . . . between the Nixon attorneys representing OfficeMax . . . and Nixon's in house general counsel . . . ."); *Nesse v. Pittman*, 206 FRD 325, 328 (DDC 2002) (noting that when an attorney in a firm consults with his firm's counsel, "[t]he client for purposes of this discussion is the firm itself" and the communications "are privileged"); *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F Supp 255 (SDNY 1994) ("[n]o principled reason appears for denying [the] attorney-client privilege to a law partnership which elects to use a partner or associate as counsel of record"); D. Richmond & W. Freivogel, The Attorney-Client Privilege and Work Product in the Post-Enron Era, at 23 (2001), at http://www.abanet.org/buslaw/newsletter/0027/materials/11.pdf ("law firms' ability to assert the attorney-client privilege with respect to communications with firm lawyers serving as loss prevention counsel or general counsel is well-settled").

privilege.[5] *Serrano*, 346 Or at 320. The communications at issue here do not fit within any of those enumerated exceptions, contrary to Plaintiff's insinuation.[6]

In the Commentary to OEC 503, the Legislature "recognize[d] two other exceptions to the lawyer-client privilege [that predated the 1981 codification]—

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[5] OEC 503(4) provides:

> There is no privilege under this section:
>
> (a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
>
> (b) As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;
>
> (c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;
>
> (d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
>
> (e) As to a communication relevant to a matter of common interest between 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 any of the clients.

[6] In its opposition to Defendants' mandamus petition, Crimson Trace alluded for the first time to OEC 503(4)(c), but that exception is wholly inapposite. Known as the "self-defense exception," OEC 503(4)(c) protects attorneys' ability *to defend themselves* by preventing clients from alleging malpractice and then invoking the privilege to shield *their* communications from production to the attorney-defendant. *See* Mark J. Fucile, *The Self-Defense Exception to Lawyer Confidentiality: Protecting Yourself*, 72 Or State Bar Bull 32 (2012); Paul R. Rice, Attorney-Client Privilege: State Law § 9:55 (2010). OEC 503(4)(c) does not apply here because a different attorney-client relationship—the one between DWT and its counsel on the QAC—protects the communications at issue.

an exception for assets left with the attorney, and an exception for the fact of employment and name and address of the client. By the adoption of OEC 503, the Legislative Assembly does not intend to affect these latter exceptions." OEC 503(4) cmt. (citations omitted); *see also* 1981 Oregon Laws ch. 892 § 32 (enacting OEC 503). Those historical exceptions remain viable because they do not constitute "confidential communications" as defined in OEC 503(1)(b). The communications at issue here do not remotely fall within any such well-established exception. Even the Circuit Court did not hold otherwise.

The Circuit Court, instead of confining itself to the statutorily recognized exceptions to the privilege, fashioned a new exception that previously had never been applied in any known decision by an Oregon court—the so-called fiduciary exception. That judicially created "exception" purports to nullify the privilege when the privilege-holder fiduciary (*i.e.*, the law firm) has a conflict of interest with the party seeking access to the privileged information (*i.e.*, the client). (ER-49). As detailed below, however, the Circuit Court lacked the authority to fashion a new exception to the privilege, and doing so would be unwarranted and inappropriate in any event, particularly because the exception itself is analytically flawed and its underlying premise of a conflict of interest is inconsistent with Oregon law.[7]

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[7] As discussed below, Oregon Formal Ethics Opinion 2005-125 recognizes a lawyer's right to refuse to disclose written communications with the lawyer's own counsel, even if the communications relate to the

B. Circuit Courts in This State Have No Authority to Create a "Fiduciary Exception" to the Attorney-Client Privilege

1. A New, Judicially Created Exception to OEC 503 Is Contrary to This Court's Rules of Statutory Construction

Judicial creation of additional exceptions not mentioned in the OEC or its commentary violates well-settled rules of statutory construction. As this Court has recognized on several occasions, the canon *expressio unius est exclusio alterius* ("the expression of one is the exclusion of the other") counsels that where the Legislature has enumerated several specific exceptions to a rule, it is appropriate to infer that the Legislature intended to omit all other exceptions. *See, e.g., Waddill v. Anchor Hocking, Inc.*, 330 Or 376, 382 (2000) (applying maxim to text of statute at first level of analysis); *Oregon Bus. Planning Council v. Dep't. of Land Conservation & Dev.*, 290 Or 741, 749 (1981); *Rosentool v. Bonanza Oil & Mine Corp.*, 221 Or 520, 527 (1960). To do otherwise would be to do what is forbidden: "insert what has been omitted, or to omit what has been inserted." ORS 174.010.

This Court has applied this maxim specifically when construing OEC 503. In *OHSU*, this Court considered whether a school's faculty member was covered by the privilege as a "[r]epresentative of the client" within the meaning

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representation of the lawyer's client. Moreover, the Circuit Court specifically found that the in-house counsel "were not directly involved in the firm's ongoing representation of Crimson Trace," so they could not have been operating under a conflict of interest either. *See infra* Parts III.C.2, III.D.3.

of OEC 503(1)(d)(B), which applies to "an employee . . . [w]ho, as part of such person's relationship with the client . . . seeks, receives, or applies legal advice from the client's lawyer." 325 Or at 502. Construing the privilege broadly, this Court reasoned that *expressio unius* counseled against creating an exception for low-level employees because it should not "'insert what has been omitted' from a statute." *Id.* at 503.

Here too the OEC plainly did not include the fiduciary exception; nor had the fiduciary exception been adopted in Oregon prior to the OEC's enactment.[8] Accordingly, *exclusio unius* establishes that the Legislature *intended* to omit the fiduciary exception from Oregon law. The Circuit Court's creation of the fiduciary exception thus runs contrary to legislative intent and this Court's jurisprudence—unlike the oft-quoted case adopting a fiduciary exception, *Riggs National Bank v. Zimmer*, 355 A2d at 709, where the jurisdiction lacked a privilege statute and thus the court was not compelled to consider legislative intent.

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[8] The drafters of OEC 503 unquestionably were aware of the fiduciary exception, further bolstering the inference that the Legislature's omission of it from OEC 503 was intentional. *See* 1981 Oregon Laws ch. 892 § 32. British common law courts began to develop a fiduciary exception—which would not apply in these circumstances, as discussed below—as early as the nineteenth century. *See United States v. Jicarilla Apache Nation*, 131 S Ct 2313, 2321 (2011). Other states began to consider whether to adopt this exception in the mid-twentieth century. *See, e.g.*, *Riggs Nat'l Bank v. Zimmer*, 355 A2d 709 (Del Ch 1976). Several states already had rejected it. *See, e.g.*, *Arney v. George A. Hormel & Co.*, 53 FRD 179, 182 (D Minn 1971); *In re Prudence-Bonds Corp.*, 76 F Supp 643, 647 (EDNY 1948).

Although the text of OEC 503 is dispositive, a comparison with other privilege statutes provides useful context. As this Court has held, the Legislature's choice of language in "other provisions of the same or other related statutes" can and should inform the interpretation of statutory language to the extent there is any ambiguity (there is none here in any event). *In re Polacek*, 349 Or 278, 284 (2010). The Legislature's intent is particularly clear because related provisions of the OEC—specifically OEC 504 (ORS 40.230), the psychotherapist-patient privilege, and OEC 504-1 (ORS 40.235), the physician-therapist privilege—explicitly state that their enumerated exceptions are "nonexclusive." No such caveat appears in OEC 503(4) or its commentary, further demonstrating the Legislature's intent to make OEC 503(4)'s list of exceptions *exclusive*.

This Court employed this same reasoning when it held that OEC 505 (ORS 40.255), which governs the spousal privilege, permitted no exception beyond those enumerated in its text. *Serrano*, 346 Or at 319-321. In *Serrano*, the issue was whether OEC 505 included an exception for communications concerning "marital health." 346 Or at 319-320. Notably, OEC 505(4) contains statutory language nearly identical to OEC 503(4)—both subsections introduce the enumerated exceptions by stating that "[t]here is no privilege under this section" in the circumstances enumerated. Neither OEC 503(4) nor OEC 505(4) has a caveat that the list of exclusions contained therein is

"nonexclusive." This Court accordingly rejected the argument—similar to Crimson Trace's position here—that "communications regarding the dissolution of a marriage should not be privileged because they do not further the historical purpose of the marital privileges, which is to preserve marriages." *Serrano,* 346 Or at 319. The issue was "easily resolved by examining the text of OEC 505," because the enumerated exceptions to the spousal privileges were exclusive:

> [T]he Legislature set out three specific exceptions to the marital privileges, but did not provide for any "marital health" exception. . . . *In our view, the omission of a 'marital health' exception in OEC 505(4) is decisive*.

Id. at 320-21 (citing ORS 174.010) (emphasis added).[9]

This textual approach applies with equal force to OEC 503. Though the Legislature *could* have adopted the so-called fiduciary exception, it chose not to do so. Moreover, the Legislature declined to enable courts to create new exceptions to the attorney-client privilege by pointedly deviating from its practice in OEC 504 and 504-1 of deeming its exceptions "nonexclusive." All of this "decisive[ly]" demonstrates the Legislature intended *not* to adopt the fiduciary exception in this State. *Serrano*, 346 Or at 320-21. By compelling disclosure on this ground, the Circuit Court ran afoul of the plain language of

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[9] In fact, this Court has held that the omission of a legislative exception to a privilege is evidence that "the Legislature has struck the balance in favor of protecting [the] communications," even when the Legislature suggested that additional exceptions *could* apply. *State v. Miller*, 300 Or 203, 216 (1985) (declining to imply a future crimes exception to the psychotherapist-patient privilege).

OEC 503, and it contravened both legislative intent and this Court's jurisprudence.

2. Circuit Courts Are Barred from Weakening OEC 503 With *Ad Hoc* Exceptions

The Circuit Court's order also ignores that the OEC provides a minimum level of protection for the attorney-client privilege. Courts therefore have no authority to craft exceptions that would weaken this statutory floor—much less on an *ad hoc* and unpredictable basis. OEC 514 (ORS 40.295) provides that "all existing privileges either created under the Constitution or statutes of the State of Oregon or developed by the courts of Oregon are recognized and shall continue to exist until changed or repealed according to law." As this Court explained in *John Deere Co. v. Epstein*, 307 Or 348 (1989), OEC 514 provides that the statutorily codified privilege rules are "rule[s] of *inclusion*." *Id.* at 353-54 (emphasis in original). That is, a privilege should not be narrowed unless there is "convincing evidence that the Legislature intended to exclude" a particular group of communications from its protection. *Id.* at 355.

The need for an "inclusi[ve]" approach is especially apparent with regard to the attorney-client privilege, which is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 US 383, 389 (1981). As both the U.S. Supreme Court and this Court have noted, the primary purpose of the attorney-client privilege "is to 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." *Id.*; *Frease*, 330 Or at 370. "[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." *Upjohn*, 449 US at 390. Importantly,

> if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. *An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.*

449 U.S. at 393 (emphasis added); *see also, e.g.*, *OHSU*, 325 Or at 500 n.6 ("[The privilege] rest[s] on the utilitarian theory that encouraging clients to make the fullest disclosure to their attorneys enables attorneys to act more effectively, justly and expeditiously . . . .") (quoting 3 Weinstein's Federal Evidence § 503.03(1) (2d ed. 1997)).

In light of this profound need for "certainty," this State's Legislature was particularly wary of permitting courts to weaken the attorney-client privilege by employing an *ad hoc* and unpredictable analysis, explicitly rejecting a "case by case . . . approach." OEC 503(1)(d), cmt. "An *ad hoc* approach to privilege . . . achieves the worst of possible worlds: harm in the particular case because information may be concealed; and a lack of compensating long-range benefit because persisting uncertainty about the availability of the privilege will discourage some communications." *Id.* OEC 514 therefore prohibits the

Circuit Court's *ad hoc* approach because it will create unwanted and privilege-defeating uncertainty. By providing that the privilege is to be interpreted *inclusively* unless and until it is expressly repealed, OEC 514 requires courts to err on the side of the privilege unless the party seeking disclosure points to "convincing evidence" that the Legislature intended to exclude a certain communication. *John Deere*, 307 Or at 355.

This State is not unique in prohibiting courts from creating *ad hoc* exceptions to codified privileges. For example, the California Supreme Court declined to imply a fiduciary exception to the detailed privilege statute enacted by the California Legislature in *Wells Fargo Bank, N.A. v. Superior Court*, 22 Cal 4th 201, 209 (2000), which involved a trustee who obtained confidential legal advice paid for with trust funds. In so doing, the California Supreme Court noted that "[t]he privileges set out in the Evidence Code are legislative creations; the courts of this state have no power to . . . recognize implied exceptions." *Id.* at 206. Accordingly, like the courts of this State, California courts are absolutely prohibited from "restrict[ing] [the state]'s statutory attorney client privilege" through implied exceptions "based on notions of policy or ad hoc justification." *Id.* at 209, 214.

The Texas Supreme Court is in accord. *Huie v. DeShazo*, 922 SW2d 920, 925 (Tex 1996) (holding that the fiduciary's "expectation" of privilege "was justified considering the express language of Rule 503 protecting

confidential attorney-client communications" and rejecting invitation to "thwart such legitimate expectations by retroactively amending the rule through judicial decision"). *See also Murphy v. Gorman*, 271 FRD 296, 319 (DNM 2010) ("New Mexico law is that the Court is 'not free to engage in ad hoc rule-making,' and in light of New Mexico's rule-bound law of privilege, the Court cannot properly [adopt the fiduciary exception]."); *OfficeMax Inc. v. Nixon Peabody LLP*, No. CV-OC-2012-09327, slip op. at 27 (Idaho Dist Ct May 13, 2013) ("In effect, OfficeMax is seeking to add to the exceptions enumerated in [Idaho Rule of Evidence] 502(d). The court is not satisfied that Idaho would recognize this additional exception.").

Against this backdrop, neither the Circuit Court nor Crimson Trace has pointed to *any* evidence (let alone "convincing evidence") that Oregon's Legislature affirmatively provided for a fiduciary exception to the attorney-client privilege. Indeed, the plain language of OEC 503 compels the opposite conclusion—that the Legislature intended to *omit* that exception. As the California Supreme Court aptly stated, "[i]f the Legislature had intended to restrict a privilege of this importance it would likely have declared that intention unmistakably, rather than leaving it to courts to find the restriction by inference and guesswork . . . ." *Wells Fargo*, 22 Cal 4th at 207. At the very least, the Oregon Legislature would have expressly noted that its list of exceptions to the privilege was "nonexclusive," as it did with OEC 504. But it

did not. And no other court of this State has published any opinion purporting to carve out additional exceptions to the attorney-client privilege beyond those in OEC 503 and the commentary thereto. Accordingly, by nonetheless creating a "fiduciary exception" based on a forbidden, *ad hoc* approach, the Circuit Court weakened the privilege below the floor of protection that OEC 503 and 514 obliged it to provide.

C. Departing from the Plain Meaning of OEC 503 Would Undermine Effective Consultation When Lawyers Are Faced with an Ethical Issue

Even if the Circuit Court had authority to create a "fiduciary exception" to this State's attorney-client privilege statute out of whole cloth, this Court should reject that exception because it would improperly constrict "one of the oldest and most widely recognized evidentiary privileges." *Frease*, 330 Or at 370. The Circuit Court's decision to rewrite the plain language of the privilege statute is particularly troubling because it risks undermining a core purpose of the privilege in this context—ensuring that attorneys have the benefit of full and candid legal advice concerning their ethical obligations.

1. Creating a "Fiduciary Exception" Would Undermine the Core Purpose Behind the Attorney-Client Privilege

The U.S. Supreme Court in *Upjohn* recognized that the attorney-client privilege was particularly important in the corporate context. 449 US at 392. So too with law firms. In addition to conform their conduct to the law, attorneys have an acute need for legal advice because, in recent years, they have

been faced with an increasingly "vast and complicated array of" ethical obligations—one with increased risks of liability, disqualification, discipline and sanctions. *Id.* The complexity of these requirements is reflected, for example, by the need for the Restatement (Third) of the Law Governing Lawyers. And as attorneys in law firms are forced to specialize, firms increasingly have turned to in-house counsel to provide the firm's attorneys with critical legal advice that may be outside of their specialization. Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 Ariz L Rev 559, 560 (2002). Similarly, as firms grow larger or increase the scope of their practices, the need for in-house counsel to keep track of rules and regulations has become increasingly important. *Id.*

In-house counsel also "encourage[] lawyers to raise questions that they might otherwise ignore." Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 Notre Dame L. Rev. 1721, 1757 (2005). In particular, in-house counsel can help attorneys ensure they comply with various disclosure obligations required in statutes like the Sarbanes-Oxley Act, and they can provide advice in response to an attorney's mistakes that can help avoid or alleviate harm to clients. Such advice "may dramatically improve the quality of [firms'] self-regulation." *Id.* at 1758. In-house counsel are especially helpful for such tasks, because they allow attorneys to seek advice without the added delay, cost, and inconvenience

of outside counsel, which, if it were a law firm's only option, would discourage firms from seeking early advice when potential issues arise. *See, e.g.*, *TattleTale*, 2011 WL 382627, at *5 ("[B]y the time . . . outside counsel are called in, it may be too late to protect the client from damage.");[10] *OfficeMax*, No. CV-OC-2012-09327, slip op. at 23 ("[A]ny requirement to seek advice from outside counsel would add a cost factor, and easily could discourage the identification and resolution of potential or actual conflicts."). Indeed, there is no reason that a client would be better served when a law firm seeks advice of outside as opposed to in-house counsel, who "tend to be strongly committed to ethics and regulatory compliance" and therefore "contribute enormously to effective self-regulation by firms." Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. Rev. 1515, 1520, 1568 (2006).

For in-house counsel (like those on DWT's QAC) to provide reasoned and useful advice, however, all of the firm's attorneys and the QAC must be able to seek and to provide, respectively, legal advice without fear that their communications will be disclosed. If attorneys and in-house counsel must worry about whether their communications are subject to civil discovery, the ability to have a "full and frank" discussion necessarily would be chilled.

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[10] The magistrate's decision in *TattleTale* was adopted by the district court as "well-reasoned." No. 2:10-cv-00226, Doc. No. 90 (SD Ohio Sept. 29, 2011).

"[C]onfidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services." Restatement (Third) of the Law Governing Lawyers, § 68 cmt. c.

Indeed, the Oregon State Bar has recognized the need to allow attorneys to seek confidential legal advice. Oregon Formal Ethics Opinion 2005-125 recognizes a lawyer's right to refuse to disclose written communications with the lawyer's own counsel, even if the communications relate to the representation of the lawyer's client:

> At times, lawyer files also may contain documents such as personal notes made by the lawyer that do not so much bear on the merits of the client's position in a matter as they do on the lawyer-client relationship. A lawyer might, for example, note in a file that the lawyer has consulted the lawyer's own counsel to explore the lawyer's potential exposure to discipline or to explore malpractice liability to the client. *Documents reflecting matters of this type need not be produced to the client. Cf.* Oregon RPC 1.6(b)(3) (lawyer may reveal confidential client information "to secure legal advice about the lawyer's compliance with these Rules").

Ethics Opinion 2005-125 at 332-33 (emphasis added).[11] The opinion makes no distinction between in-house and outside counsel.

The Oregon Rules of Professional Conduct ("RPC") also exempt lawyers from certain ethical obligations, *i.e.*, the obligation to keep client information

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[11] To the same effect is the commentary to the Model Rules of Professional Conduct ("MRPC"), upon which the ORPC are largely based. *See generally* MRPC 1.6 cmt. 9 (permitting an attorney to secure confidential legal advice about the attorney's personal ethical obligations); MRPC 5.1 cmt. 3 (permitting an attorney in a law firm confidentially to refer an ethical issue to in-house counsel).

confidential, in order "to secure legal advice about the lawyer's compliance with these Rules." RPC 1.6(b)(3). As noted in the Restatement (Third) of the Law Governing Lawyers, § 46 cmt. c, "[t]he need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping [certain internal communications] secret from the client involved." Therefore, "[a] lawyer may refuse to disclose" these internal documents "to the client," without violating any duty of loyalty or candor. *Id.*

Likewise, the American Bar Association ("ABA"), the New York State Bar Association, and the Illinois State Bar Association all have issued formal opinions specifically recognizing the need for attorneys to consult confidentially with other attorneys at their firm. ABA Standing Comm. on Ethics & Prof'l Resp., Formal Op No. 08-453, at 8 (2008) ("Consent of the client is not required before a lawyer consults with in-house ethics counsel, nor must the client be informed of the consultation after the fact."); NY Ethics Op 789, 2005 WL 3046319 (Oct. 26, 2005) (same); Ill Advisory Ethics Op. 94-13, 1995 WL 874715, at *4 (Jan. 1995) (same). As these authorities recognize, compelling disclosure of confidential communications with in-house counsel would chill such communications; it would unduly restrict attorneys from retaining lawyers of their own choosing; and it would ultimately prevent attorneys from obtaining informed legal advice.

Restricting lawyers' ability to obtain legal advice also would hurt clients, who ultimately would receive less timely, well-counseled advice from their lawyers when difficult situations arise. "[T]he client's interests may be seriously harmed by encouraging the firm to withdraw at the first hint of a problem because withdrawal limits the firm's opportunity to mitigate harm to the client." Chambliss, 80 Notre Dame L. Rev. at 1747.

As the U.S. Supreme Court has observed, many state courts have "altogether rejected the notion that the attorney-client privilege is subject to a fiduciary exception," which originated in the trustee/beneficiary context, because the exception unduly limits the fiduciaries' ability to seek legal advice. *Jicarilla Apache*, 131 S Ct at 2321 n.3 (citing *Wells Fargo*, 990 P2d at 595-97; *Huie v. DeShazo*, 922 SW2d 920, 924 (Tex 1995)); *see also Garvy*, 966 NE2d at 536; *Murphy*, 271 FRD at 319-20; *Pakoski v. Johnson*, 626 So2d 338 (Fla App 4th 1993). As the Texas Supreme Court explained in *Huie*:

> The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships. A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee's actions. Alternatively, trustees might feel compelled to blindly follow counsel's advice, ignoring their own judgment and experience.

922 SW2d at 923-24.[12]

These concerns apply with the same force to an attorney who seeks legal advice from the firm's in-house counsel. If the attorney cannot seek legal advice in confidence during the course of a representation, that attorney "might be inclined to forsake legal advice, thus adversely affecting" the client. *Id.* at 924. This Court likewise should reject an order compelling production of an attorney's privileged communications with in-house counsel.

2. The "Fiduciary Exception" Is Analytically Flawed and Inappropriate Even Under Its Own Terms.

Additionally, the Circuit Court's "fiduciary exception" is analytically flawed for numerous reasons, including because it rests on a misunderstanding

[12] Similar reasoning has led courts to reject the related "*Garner*" doctrine, which allows shareholders purporting to act in a fiduciary capacity to compel disclosure of a company's privileged documents on the theory that they act for the lawyer's real client. *See Garner v. Wolfinbarger*, 430 F2d 1093, 1103-04 (5th Cir 1970). The doctrine "ignore[s] the genuine need of management in the ordinary course for confidential communications and advice" because "[a]n uncertain and unpredictable rule . . . is little better than no privilege at all." *Shirvani v. Capital Investing Corp.*, 112 FRD 389, 391 (D Conn 1986); *see also, e.g.*, *Milroy v. Hansen*, 875 F Supp 646, 651-52 (D Neb 1995) (declining to apply the *Garner* doctrine); *Nat'l Football League Props., Inc. v. Superior Court*, 65 Cal App 4th 100, 107 (1998) (same); *Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P3d 454, 463 (Colo App 2003) (same). In both the trustee and the shareholder contexts, the fiduciary exception also frustrates the primary benefits of the attorney-client privilege, by "creat[ing] perverse incentives" for trustees and corporate employees to act without the benefit of counsel, ultimately risking harm to the client or beneficiary. Chambliss, 80 Notre Dame L. Rev. at 1723-24.

of the "common interest" doctrine and would undermine the attorney-client privilege in a variety of other contexts.

The principal cases Crimson Trace has cited in support of a "fiduciary exception" have improperly relied upon the "common interest" doctrine, which provides that "where an attorney serves two clients having common interest and each party communicates to the attorney, the communications are not privileged in a subsequent controversy between the two." *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 FRD 283, 284-85 (ED Pa 2002) (citing *Valente v. PepsiCo, Inc.*, 68 FRD 361, 368 (D Del 1975); *In re Sunrise Sec. Litig.*, 130 FRD 560, 597 (ED Pa 1989)).

To state that argument is to refute it—the law firm and the current client cannot simultaneously have both a conflict and a common interest with respect to the privileged communications. Indeed, neither Crimson Trace nor the Circuit Court argued or relied on the common interest exception as codified in OEC 503(4)(e) because it does not fit the facts here. The alleged conflict is simply irreconcilable with any theory that Crimson Trace and DWT shared a "common interest" with respect to the privileged documents—"those communications were not made in the course of [Defendants'] representation" of Crimson Trace. *Eureka Inv. Corp. v. Chicago Title Ins. Co.*, 743 F2d 932, 937 (DC Cir 1984) (rejecting common interest argument when law firm advised insured about claim against insurer that retained law firm). Moreover, "[t]here

is no co-client or joint client relationship on which to premise a common interest exception," Douglas Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 Syracuse L. Rev. 69, 100 (2004), particularly because the Circuit Court *specifically found* that "[t]he DWT lawyers on the [QAC] *were not* directly involved in the firm's ongoing representation of Crimson Trace." (ER-48 (emphasis added)).[13]

Because the QAC's representation of DWT "did not involve a common interest" with Crimson Trace, the common interest or "dual representation doctrine is not applicable here," and therefore there is no basis for applying a "fiduciary exception" to "the attorney-client privilege [that] applies to communications with [DWT]'s in-house counsel. . . ." *Garvy*, 966 NE2d at 538-39. This Court therefore should reject the reasoning of *Koen Bookstores*, *In re Sunrise*, and their progeny as fatally flawed.

Moreover, adopting a "fiduciary exception" would have deeply problematic consequences in numerous other areas. In addition to the trustee

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[13] Nor could the Circuit Court have concluded that the QAC somehow *indirectly* represented Crimson Trace through its consultations with Birdwell and Boundy. Oregon Formal Ethics Opinion 2005-62 specifically has recognized (in the trustee context) that the lawyer for a fiduciary *does not* also represent the fiduciary's clients simply because it provides the fiduciary with legal advice: "a lawyer for a [trustee] represents the [trustee] and not the estate or the beneficiaries as such." *See also Roberts v. Fearey*, 162 Or App 546, 550 (1999); Chambliss, 80 Notre Dame L. Rev. at 1749 ("Courts also should not impute a conflict to part-time firm counsel where the lawyer who serves in that capacity does so on a formal, ongoing basis . . . ."); *infra* Part III.D.3.

context, where numerous courts have rejected the exception as impinging on trustees' ability to obtain legal advice, *see supra* Part III.C.1, the Circuit Court's rule would chill and potentially eviscerate confidential dialogue in the contexts of corporate directors consulting with their attorneys, attorneys consulting with their malpractice carriers, and insurer's counsel communicating with the insurer. *See, e.g.*, *In re Grand Jury Proceedings*, 156 F3d 1038, 1041 (10th Cir 1998) ("a corporate officer's discussion with his corporation's counsel may still be protected by a personal, individual attorney-client privilege"); *Travelers Ins. Co. v. Superior Court*, 143 Cal App 3d 436, 452 (1983) (rejecting client's demand for privileged documents between attorney and malpractice carrier); *Aetna Cas. & Sur. Co. v. Superior Court*, 153 Cal App 3d 467, 474 (1984) (rejecting client/insured's demand for privileged documents between insurer's counsel and carrier). Future plaintiffs also may seek—erroneously—to apply the holding to communications involving a law firm's outside (as contrasted with in-house) counsel, inasmuch as the law firm holds the privilege irrespective of whether in-house or outside counsel provided the privileged advice. *See In re Sealed Case*, 737 F2d 94, 99 (DC Cir 1984); Restatement (Third) of the Law Governing Lawyers, § 73 cmt. i (stating that "[t]he privilege under this Section applies without distinction to lawyers who are inside legal counsel or outside legal counsel for an organization"). These are some of the

dangers of a rule that exposes a fiduciary's own privileged communications to production, untethered from any principled basis.

3. Compelling Disclosure of the Communications Would Permit Clients to Ambush Attorneys

Even worse, under the Circuit Court's rule, an attorney who is unable to end his or her representation, but who suspects that his or her client may bring a malpractice suit, is faced with an untenable choice. The attorney may either: (1) terminate the representation and face potential sanctions for doing so without the consent of court or client;[14] (2) proceed apace without the benefit of ethics and other advice from in-house counsel about the issues raised; or (3) consult with in-house counsel knowing that such communications could be disclosed in the impending suit. Placing an attorney in this quandary obviously works to the benefit of a manipulative client who can wield the attorney's ethical obligations as a weapon against the lawyer.

That is precisely what happened here. Crimson Trace secretly retained shadow counsel to advise it about the patent litigation and "DWT's representation" as part of Crimson Trace's scheme to secretly stop paying DWT's fees and "accumulate leverage" on an ultimate fee adjustment without the "downside" of risking that DWT would "stop working" on the patent litigation. (ER-6). And now, after implementing its plan to deceive Defendants

[14] The ORPC limits an attorney's ability to withdraw from a representation depending on the needs and interests of the client and whether a court will permit withdrawal. ORPC 1.16(b)-(c).

in order to maximize its "leverage," Crimson Trace seeks the very same privileged communications that its scheme triggered.

When it declined to compel disclosure in a similar case, the Illinois Appellate Court noted this quandary, concluding that a client should *not* be able to "insist that [an attorney] continue to represent him . . . while he has malpractice claims pending against [the attorney], but then use that continued representation to insist that [the attorney] produce all documents related to legal advice sought in relation to the malpractice claims generated during that time." *Garvy*, 966 NE2d at 537. This Court likewise should decline to facilitate a client's ability to abuse the rules of professional conduct and the attorney-client privilege by employing them as weapons in a malpractice suit. MRPC Preamble cmt. 20 (1983). It can do so simply by adhering to the plain language of the OEC, which leaves no room for the "fiduciary exception."

D. The "Fiduciary Exception" Does Not Apply Here In Any Event

By departing from OEC 503 on the purported basis that Defendants had violated ethical rules concerning conflicts of interest, the Circuit Court also ignored that the fiduciary exception, even if accepted, does not apply here for three independent reasons—(1) no violation of the ethical rules can vitiate a privilege under the Evidence Code; (2) the communications at issue related to the fiduciaries' (Defendants') own potential liability; and (3) there was no sanctionable conflict of interest in any event.

1. No Ethical Violation Can Trump the Evidence Code

As an initial matter, whether a privileged communication should be disclosed under the so-called fiduciary exception depends solely on this State's privilege statutes. *See supra* Part III.A. There is no basis for concluding that OEC 503 somehow is trumped because an attorney supposedly has violated an ethical rule. As this Court has held, "[i]t is important to distinguish between the evidentiary privilege . . . to prevent disclosure of confidential information at trial, and . . . any ethical obligation" that a party claiming the privilege may have had. *State v. Miller*, 300 Or 203, 215-16 (1985).[15] As in *Miller*, any ethical breach by DWT is irrelevant to the ultimate question of whether the privileged communications at issue here must be disclosed. *Id.*; *see also Garvy*, 966 NE2d at 538 ("while a violation of [Illinois's ethical] rules may have relevance to the underlying [malpractice] claims, it has no relevance to the issue of whether the documents in question are protected by the attorney-client privilege"); *TattleTale*, 2011 WL 382627, at *6 (finding "no evidence that an Ohio court would exclude certain communications from the ambit of the

[15] In *Miller*, this Court considered whether to compel a psychotherapist to disclose privileged information because the psychotherapist had an ethical obligation to provide police with information that could aid the victim of a crime. *Miller*, 300 Or at 215-16. This Court held that the psychotherapist's alleged ethical breach by failing to disclose this information was entirely distinct from the court's authority to compel production of privileged communications between the psychotherapist and her client. *Id.*; *see also supra* n.9.

attorney-client privilege simply due to the lawyer's alleged misconduct or breach of an ethical duty").

Not only is it analytically incorrect to allow supposed ethical violations to curtail the attorney client privilege, it is also bad policy:

> It makes no sense to craft a conflict of interest exception to the attorney-client privilege, or to otherwise abrogate the privilege based on some sort of conflict analysis [because] to do so would have the perverse effect of discouraging law firms from appointing in-house general counsel and ethics counsel who in all likelihood spend far more time dispensing prophylactic advice valuable to their firms and to their firms' clients alike than they do conducting internal investigations after potential problems are alleged to arise.

Richmond, 54 Syracuse L. Rev. at 101. Plainly, both lawyers and their clients benefit when lawyers may consult confidentially with in-house counsel.

2. Communications Relating to the Fiduciary's Own Potential Liability Are Protected

Even courts that *have* recognized a fiduciary exception to the attorney-client privilege also have recognized that communications relating to the fiduciary's *own potential liability*—as opposed to communications related to a potential course of action to take on behalf of the client/beneficiary—do not fall within the exception (although some courts simply have glossed over or failed to recognize this distinction, *see infra* n.20). For example, in *United States v. Mett*, 178 F3d 1058, 1065 (9th Cir 1999), the Ninth Circuit held in the ERISA context that "where a fiduciary seeks legal advice for her own protection, the core purposes of the attorney-client privilege are seriously implicated and

should trump the beneficiaries' general right to inspect documents relating to plan administration." *See also Garvy*, 966 NE2d at 535 (holding that the fiduciary exception does not apply to "legal advice concerning the personal liability of the fiduciary or in anticipation of adversarial legal proceedings against the fiduciary"); *Wachtel v. Health Net, Inc.*, 482 F3d 225, 233 (3d Cir 2007) (documents relating to a fiduciary's actual or potential liability to a beneficiary are not discoverable). Indeed, the U.S. Supreme Court recently stated that when the fiduciary exception is invoked to compel disclosure of communications by a trustee with counsel, the exception only encompasses "legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation[.]" *Jicarilla Apache*, 131 S Ct at 2321. In contrast, "'legal advice produced at the trustee's *own* expense and for his *own* protection' . . . remain[s] privileged . . . ." *Id.* at 2322 (emphases in original).

Courts specifically have noted the impropriety of applying a "fiduciary exception" to an attorney's consultations with in-house counsel concerning ethical issues arising in a client representation. For example, in *TattleTale*, 2011 WL 382627, the plaintiff sought to compel privileged communications between its attorneys and others in the attorneys' law firm made for the purpose of preparing for the plaintiff's impending malpractice suit. The court denied plaintiff's motion to compel, holding that Ohio would not exempt these communications from the privilege. *Id.* at *10. The court emphasized that

requiring production of privileged communications about the attorneys' own potential liability would inhibit "attorneys' ability promptly to seek advice and to obtain it based on a complete disclosure of the circumstances." *Id.*

Likewise, in *RFF Family Partnership, LP v. Burns & Levinson, LLP*, No. 12-2234-BLS1, slip op. at 9 (Mass Sup Ct Nov. 20, 2012), the court departed from the Massachusetts federal authorities Crimson Trace has relied upon, *see infra* n.20, concluding that the fiduciary exception would *not* "apply to an attorney's . . . otherwise privileged consultation with a second attorney (in-house or outside) concerning what steps the first attorney should take in response to a client's claim or potential claim of malpractice." A contrary holding would prevent "the first attorney [from] mak[ing] a fully informed decision concerning the appropriate course" with the benefit of "consult[ing] counsel who may be better schooled in ethical rules, and will almost certainly be better capable of dispassionate analysis of the problem at hand." *Id.*; *see also Garvy*, 966 NE2d at 537 ("[T]he [fiduciary] exception would not even apply where, as here, the legal advice sought was in connection to an adversarial proceeding between the fiduciary and the client.").[16]

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[16] Similarly, even though it ultimately did compel the defendant law firm to produce some communications between the defendant firm's attorneys and the firm's in-house counsel (erroneously but understandably, as the parties had not cited *Wells Fargo*, 22 Cal 4th at 209), the Northern District of California has recognized that applying the fiduciary exception under these circumstances would create perverse incentives that may actually *harm* clients:

To the extent there can be any fiduciary exception carved out of OEC 503—which as discussed above there cannot—such an exception should be limited in the manner described by the courts in *TattleTale*, *RFF*, and *Garvy*, and carefully circumscribed in light of the Legislature's and this Court's broad and inclusive views of the attorney-client privilege. *See, e.g.*, *OHSU*, 325 Or at 503; *John Deere*, 307 Or at 353-54; *see also Mett*, 178 F3d at 1065 ("[W]here attorney-client privilege is concerned, [even] hard cases should be resolved in favor of the privilege, not in favor of disclosure.") (citing *Upjohn*, 449 U.S. at 393). Accordingly, any "fiduciary exception" could not apply to communications here made on the fiduciary's (Defendants') own behalf.

3. Consultation With In-House Counsel Did Not Constitute a Sanctionable Conflict of Interest In Any Event.

The Circuit Court's predicate finding of a conflict of interest was incorrect. It suggested that a conflict was created simply because DWT sought legal advice. (ER-45-46). But consulting with counsel *does not* suggest that there is a conflict of interest, as the Oregon State Bar has recognized. Ethics

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> 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. Such a rule would also make conformity costly by forcing the firm either to retain outside counsel or terminate an existing attorney-client relationship to ensure confidentiality of all communications relating to that client.

Thelen Reid & Priest LLP v. Marland, No. C 06-2071 VRW, 2007 WL 578989, at *7 (ND Cal Feb. 21, 2007).

Opinion 2005-125 at 333. Similarly, the New York State Bar Association has opined that a consultation with a firm's in-house counsel, and thus the formation of "an attorney-client relationship [by the firm] with one or more of its own lawyers," *does not* create a problematic conflict of interest:

> A lawyer's interest in carrying out the ethical obligations imposed by the Code is not an interest extraneous to the representation of the client. It is inherent in that representation and a required part of the work in carrying out the representation. . . . It is too much a part of the fabric and tradition of legal practice to require specific disclosure and consent.

NY Ethics Op 789, 2005 WL 3046319, ¶ 12 (Oct. 26, 2005).

Contrary to Crimson Trace's contention, ER-13, the Circuit Court's conflicts concern could not have been that *trial counsel* (Birdwell and Boundy) would have placed their own interests and those of DWT before Crimson Trace's. As commentators have noted, the firm's "duty of loyalty to the client does not prevent the firm from attempting to defend against client claims" because the effort to defend "is no more 'disloyal' when it involves inside rather than outside counsel." Chambliss, 80 Notre Dame L. Rev. at 1748. The Circuit Court stated that the supposed conflict of interest could have been avoided if "the lawyers seeking advice regarding a potential malpractice claim . . . hire[d] outside counsel." (ER-50 n.5). So trial counsel was not the issue.[17]

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[17] "To the extent that the denial of privilege is based on the law firm's duty to the client, this denial logically should extend to any attempt by the firm to prevent or assess client claims, including communication with outside counsel." Chambliss, 80 Notre Dame L. Rev. at 1723. Of course, that result

Rather, the Circuit Court erroneously held that a conflict of interest existed based solely on the role of DWT's *in-house* counsel (*i.e.*, the QAC). But this makes little sense, because the Circuit Court *specifically found* that "[t]he DWT lawyers on the [QAC] *were not* directly involved in the firm's ongoing representation of Crimson Trace." (ER-48 (emphasis added)). Because the court was able to conclude that in-house counsel "*were not*" performing any legal work at all on behalf of Crimson Trace—let alone work that was materially limited by their other ethical duties or personal interests—the finding of a conflict of interest was contradicted by the facts as specifically found by the court.

The Circuit Court appears to have believed that a conflict of interest nonetheless existed because the lawyers on the QAC "were not *screened* from the lawyers who were representing Crimson Trace." (ER-48 (emphasis added); *see also* ER-50 n.5). However, the Circuit Court cited no provision of Oregon law, nor any other authority, for the proposition that a prophylactic "screen[]" of in-house counsel is always required, even when the in-house lawyers as a factual matter "were not" performing any work for the outside client. (ER-48; *see also* RPC 1.10(c) (discussing when "screening" may be required)). The Circuit Court also gave no indication of how a screen would operate—the ability "to secure legal advice" would inherently require some disclosure of

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would be untenable, as it would "leave the firm without recourse to privileged advice." *Id.* at 1724.

information concerning Defendants' representation of Crimson Trace, as the RPC specifically contemplates. RPC 1.6(b)(3).

In fact, in the sole case the Circuit Court cited, the Georgia Court of Appeals made clear that there would be no imputed conflict of interest arising from a part-time, in-house counsel's advice (such as the QAC's) "[s]o long as counsel in this position has had 'no involvement in the outside representation at issue and the firm is clearly established as the client before the in-firm communication occurs.'" *Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC*, 730 SE2d 608, 622 (Ga App 2012) (citing Chambliss, 80 Notre Dame L. Rev. at 1745).[18] While "the same lawyer who represents the outside client cannot simultaneously represent the firm in a dispute between the firm and that client without the informed consent of both parties, *id.* (citing Chambliss, 80 Notre Dame L. Rev. at 1745), as even the Circuit Court found,

[18] *Hunter* ordered a remand for "additional fact-finding" regarding the possibility of a conflict of interest. 730 SE2d at 624. This disposition is currently being reviewed by the Georgia Supreme Court. *See St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, No. S12G1924 (cert. granted Aug. 2, 2012). The Washington Court of Appeals similarly has addressed the issue without ruling on it, instead remanding to the trial court with minimal guidance. *See VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wash App 309, 332-35 (2005). In any event, *Hunter* and *VersusLaw* do not support the Circuit Court's ruling here. For one thing, they emphasized the "narrow construction" of the attorney-client privilege that applies under Georgia and Washington law, which contrasts sharply with the "rule of inclusion" for privileges under Oregon law. *John Deere*, 307 Or at 353-54. Moreover, the Georgia and Washington courts apparently have authority to create exceptions to the attorney-client privilege based on supposed conflicts of interest, which, as explained above, the Oregon courts do not. *See supra* Part III.B.

there was no such simultaneous representation.[19] This finding not only defeats the "common interest" doctrine, *see supra* Part III.C.2; it also makes clear that there was no conflict of interest.

Indeed, this fact distinguishes this case from the authorities invoked by Crimson Trace—*In re Sunrise Sec. Litig.*, 130 FRD 560, 572 n.35 (ED Pa 1989), and its progeny.[20] *Sunrise* uncritically imported the "fiduciary exception" from the shareholder/corporation context in a case where some of the individuals acting as in-house counsel *simultaneously represented* the

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[19] Defendants note that long before the communications triggered by Crimson Trace's Christmas Eve 2010 revelation of its scheme, in October 2009, Bruce Johnson billed a *de minimis* amount of time (.5 hours total) to Crimson Trace in connection with work he performed overseeing *DWT's* response to a subpoena that *LaserMax* issued *to DWT* in connection with an attorney's fee issue in the underlying patent litigation. This work, performed for DWT in Mr. Johnson's capacity as a QAC member, has no relevance to the analysis here.

[20] Crimson Trace has relied on *Sunrise* and a handful of other cases that adopted it or its progeny without meaningful analysis. *See Koen Bookstores*, 212 FRD at 284-85 (quoting *Sunrise*); *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, 220 F Supp 2d 283, 287 (SDNY 2002) (same); *Asset Funding Grp., L.C.C. v. Adams & Reese, L.L.P.*, Civ. No. 07-2965, 2008 US Dist LEXIS 96505, at *9-10 (ED La Nov, 14, 2008) (same); *Burns v. Hale & Dorr LLP*, 242 FRD 170, 172 (D Mass 2007) (relying on *Bank Brussels* and *Koen Book*); *Cold Spring Harbor Lab. v. Ropes & Gray LLP*, Civ. No. 11-10128-RGS, 2011 US Dist LEXIS 77824, at *4-5 (D Mass 2011) (relying on *Burns*). Two other cases that Crimson Trace has relied on leave open the possibility that some in-house consultations, even when relating to the representation of current clients, could remain privileged. *See Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 WL 578989, at *7 (ND Cal Feb. 21, 2007); *SonicBlue Claims LLC v. Portside Growth & Opportunity Fund*, Adv. No. 07-5082, 2008 Bankr LEXIS 181, at *31, *34 (Bankr ND Cal Jan. 18, 2008) (also recognizing privilege for firm's communications with outside counsel).

outside client. In fact, *Sunrise* itself relied heavily on *Valente v. PepsiCo, Inc.*, 68 FRD 361 (D Del 1975)—a case denying the privilege to corporations in suits brought by minority shareholders (in a decision described by some courts as "aberrant," *see Deutsch v. Cogan*, 580 A2d 100, 106 (Del Ch 1990)). In *Valente*, the court held that Pepsi's general counsel could not assert the privilege against the shareholders because "he owed separate fiduciary obligations to two separate entities and their interests," *i.e.*, the corporation and the shareholders. 68 FRD at 368 (citing *Garner*, 430 F2d at 1103-04). Here, the attorneys who represented DWT were not representing Crimson Trace.

Moreover, any supposed conflict should not have been imputed to the firm as a whole. Imputation of conflicts is not automatic, RPC 1.10(a), and there are sound reasons not to impute a conflict to DWT. Chambliss, 80 Notre Dame L. Rev. at 1748; *see also Hunter*, 730 SE2d at 620 ("[W]e reject the Draconian rule adopted in other jurisdictions that automatically imputes conflicts of interest to in-house counsel . . . ."). First, imputation would penalize DWT, who is the actual holder of the privilege, for the supposed failure of any individual attorney to avoid a conflict. The D.C. Circuit's decision in *Eureka Investment Corp.* illustrates this point perfectly. There, a law firm represented an insured concerning a potential claim against an insurer, even though the firm was jointly defending both the insured and the insurer against third-party claims. 743 F2d at 934. The insured then sought to compel

privileged conversations between the insurer and the law firm based on this conflict of interest. The court agreed that there was a conflict of interest but refused to compel disclosure, holding that it would be excessive and unfair to penalize the insurer, who actually held the privilege over the privileged communications, for the failures of individual attorneys. *Id.* at 938. In reaching its conclusion, the court cited Wigmore's hornbook principle that "[t]he privilege, being the client's, should not be defeated solely because the attorney's conduct was ethically questionable." *Id.* (citing 8 J. Wigmore, Evidence § 2312, at 608). The Third Circuit agreed with this "black-letter" rule in a thoughtful opinion in *In re Teleglobe Communications Corp.*, 493 F3d 345, 368 (3d Cir 2007); *accord TattleTale*, 2011 WL 382627, at *4; *OfficeMax*, No. CV-OC-2012-09327, slip op. at 26. So too here—decisions made by attorneys should not deprive law firm clients of their right to exercise the privilege.

Second, imputing a conflict under these circumstances could actually harm a client's interests. If law firm attorneys are unable to obtain privileged advice about possible ethical violations and steps that might be taken to minimize or reverse a violation, law firms will be faced with uncertain exposure to malpractice claims or other forms of sanctions. Caution will lead some attorneys and firms simply to seek to withdraw from a representation in order to consult with counsel about potential liability rather than risk exposure. *See* Chambliss, 80 Notre Dame L. Rev. at 1747.

Compelling disclosure of DWT's privileged communications also was excessive and unwarranted given the limited scope and immateriality of the QAC's alleged ethical breach. The Circuit Court reasoned that by not disclosing the supposed conflict arising from the request for legal advice from the QAC and not also obtaining Crimson Trace's consent, DWT violated the RPC and therefore lost the benefit of the attorney-client privilege that would ordinarily apply. (ER-48; ER-50 n.4). This reasoning was mistaken for reasons beyond what has been discussed in earlier sections of this Petition. Although RPC 1.7(b)(4) nominally provides that consent is required in order to continue with a representation involving a conflict of interest, this Court has held that these requirements should be considered on a case-by-case basis and should not be applied so rigidly as the Circuit Court's application of the "fiduciary exception":

> Many errors by a lawyer may involve a low risk of harm to the client . . . thereby vitiating the danger that the lawyer's own interests will endanger his or her exercise of professional judgment on behalf of the client. Even if the risk of some harm to the client is high, the actual effect of that harm may be minimal, or, if an error does occur, it may be remedied with little or no harm to the client. In those circumstances, it is possible for a lawyer to continue to exercise his or her professional judgment on behalf of the client without placing the quality of representation at risk. . . . It simply does not follow, then, that any error made during the course of a lawyer's representation will or reasonably may affect his or her professional judgment in a way that requires consent after disclosure under [the predecessor statute to RPC 1.7(b)(4)].

In re Conduct of Knappenberger, 337 Or 15, 28-29 (2004). Sometimes strict compliance with the rules is not feasible, desirable, or realistic. As the ABA has cautioned, "[u]nder some circumstances it may be impossible to make the disclosure necessary to obtain consent." MRPC 1.7 cmt 19. It is "not realistic" to adopt a rule requiring disclosure or written conflict waivers whenever a lawyer intends to consult with in-house counsel. Chambliss, 80 Notre Dame L. Rev. at 1754.

Indeed, this case illustrates why imposing the strict disclosure and waiver requirements of the "fiduciary exception" verges on the absurd. Beginning as early as June 2010—even before Crimson Trace stopped paying its legal bills—Crimson Trace began to consult clandestinely with another attorney about the case. In August 2010, Crimson Trace decided to stop paying its bills without informing DWT in order to maximize its "leverage" against DWT. And Crimson Trace decided to keep all of this a secret to guard against the possibility that DWT would "stop working." (ER-6). By October 2010, in other words, Crimson Trace already was anticipating a conflict with DWT and had implemented a plan of consulting with shadow counsel to ensure that DWT's representation of it would nonetheless continue. As recognized even in the sole opinion cited by the Circuit Court in support of its order, no conceivable purpose would be served by the formality of disclosing a conflict that Crimson Trace clearly already knew about and had decided to exploit

because of its eagerness "to continue the representation" on more favorable terms. *Hunter*, 730 SE2d at 623; *cf. Garvy*, 966 NE2d at 537 (finding no impermissible conflict of interest when client "insisted" that the attorney "remain in the case" following disclosure).

Crimson Trace, as a sophisticated client with shadow counsel in tow, was fully aware that its interests could (and surely would) diverge from DWT's—the inevitable result of a secret plan to manipulate DWT and induce their continued work on the matter, all while concealing their intent to withhold payment of DWT's fees for "leverage." Indeed, Crimson Trace was in a better position to know of this potential conflict than DWT itself. Crimson Trace hardly can claim surprise when, after it finally revealed its scheme on Christmas Eve 2010, DWT consulted with its in-house counsel about its rights and obligations.

E. The Circuit Court Lacked Authority to Penalize DWT for a Supposed Disciplinary Violation

The Circuit Court based its decision to compel disclosure *solely* on its conclusion that "DWT's simultaneous representation of DWT and Crimson Trace presented a conflict of interest for the firm . . . and that DWT's fiduciary duties" took precedence over all else. (ER-49). This supposed conflict (and the resulting lack of disclosure and consent to continue) was the Circuit Court's entire basis for invoking the fiduciary exception. However, by compelling disclosure of the communications as a remedy for these supposed violations, the

Circuit Court exceeded its jurisdiction under *Kidney Association v. Ferguson*, 315 Or 135, 140-41 (1992), which prohibits circuit courts from imposing sanctions for attorneys' alleged ethical breaches.

In *Kidney Association*, this Court reaffirmed that "[e]nforcement of [disciplinary] rules is reserved to this court and the Disciplinary Board appointed by the court. No other court has jurisdiction to investigate, review, or sanction disciplinary rule violations, as such." 315 Or at 141 (citation and internal quotation marks omitted). This Court ultimately held that circuit courts "may consider whether the lawyer has breached a fiduciary duty owed to the client" when making a fee award. *Kidney Ass'n*, 315 Or at 144. However, the Court made clear that it was not "authoriz[ing] the direct enforcement of disciplinary rules by lower courts . . . [which] do not have the authority to determine disciplinary rule violations, as such, and to impose a sanction for the violation thereof." *Id.* at 143; *see also State ex rel. Bryant v. Ellis*, 301 Or 633, 636-37 (1986); *Brown v. Oregon State Bar*, 293 Or 446, 451-52 (1982).

Since *Kidney Association*, the Court of Appeals has held that lower courts lack jurisdiction to deprive an attorney of a valuable legal right based on a violation of the RPC. *Cf. Vavrosky MacColl Olson Busch & Pfeifer PC v. Employment Dep't*, 212 Or App 174 (2007) (finding no jurisdiction to discharge employee for violating ethical rules); *Lamonts Apparel v. SI-Lloyd & Assocs.*, 153 Or App 227 (1998) (consideration of duties independent of ethics rules for

recusal purposes did not usurp Supreme Court jurisdiction); *Frost v. Lotspeich*, 175 Or App 163 (2001) (jurisdiction to consider breaches of duty for attorney's fees purposes); *Welsh v. Case*, 180 Or App 370 (2002) (noting that violation of ethics rule does not give rise to a private cause of action or defense).

But that is precisely what the Circuit Court did here. It compelled disclosure of Defendants' privileged communications solely because it believed they had operated under a "conflict of interest." (ER-49). Under *Kidney Association*, the Circuit Court simply lacked jurisdiction to make that assessment, which the Circuit Court got wrong in any event by, for example, failing to account for applicable Oregon ethics rules and rules of statutory construction.

Moreover, even if the Circuit Court had authority to sanction DWT under the OEC and ethical rules, and even if DWT's conduct constituted a conflict—none of which is true—the Circuit Court nonetheless should not have handed Crimson Trace the benefit of this sanction. After all, the communications were prompted by Crimson Trace's scheme to continue to solicit legal advice from DWT despite clandestinely plotting to stop paying its bills in order to obtain leverage to coerce a fee reduction. The same is true to the extent Crimson Trace was deceiving DWT while secretly preparing for a possible malpractice suit. Crimson Trace's actions were serious and prejudicial misconduct, and no injustice will result from allowing Defendants to maintain the privilege over

communications precipitated by Crimson Trace's carefully timed, strategic revelation of its scheme.

Moreover, Crimson Trace already has the actual underlying communications relevant to its malpractice claims. It has made no showing that piercing the privilege is somehow necessary to its claims. As the court in *TattleTale* explained, "[i]t is simply not the case that a legal malpractice plaintiff will be functionally unable to prove negligence without gaining access to intra-firm communications" with in-house counsel. 2011 WL 382627, at *6. "There are other sources of proof" if any negligence in fact occurred. *Id.* at *10.

The Circuit Court therefore should not have paved the way for Crimson Trace to coerce its way to a settlement by orchestrating the evisceration of Defendants' attorney-client privilege.

F. There is Likewise No Fiduciary Exception to the Work-Product Doctrine

The Circuit Court erred in compelling the production of the attorney work product for the same reasons that it erred as to the attorney-client privilege. As with the privilege statute, Oregon Rule of Civil Procedure 36B(3) contains no exception based on the rules of professional conduct or fiduciary duties; it covers all documents "prepared in anticipation of litigation." Moreover, Crimson Trace has not even argued that it had a "substantial need" to compel disclosure of these documents, or that it was "unable without undue

hardship to obtain the substantial equivalent of the materials by other means." ORCP 36B(3). "Thus, the circuit court erred in ordering the disclosure of [Defendants'] counsel's work product." *Garvy*, 966 NE2d at 539-40; *see also TattleTale*, 2011 WL 382627, at *10.

IV. CONCLUSION

This Court should issue a peremptory writ vacating the Circuit Court's February 11, 2013 order compelling the production of the intra-firm communications with in-house counsel at DWT. Those communications are protected from disclosure under the plain language of the OEC, and are not subject to any exception recognized in Oregon.

DATED this 23rd day of May, 2013.

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I HEREBY CERTIFY that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 13,843 words.

DATED this 23rd day of May, 2013.

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CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that I filed and served the foregoing OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, EXCERPT OF RECORD, and APPENDIX by electronically filing to:

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