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 A. BIRDWELL, an individual,
Defendants-Relators.

Multnomah County Circuit Court
Case No. 1108-10810

Supreme Court No. S061086
61086
MANDAMUS PROCEEDING

PLAINTIFF-ADVERSE PARTY'S ANSWERING BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE CASE

NATURE OF THE ACTION AND ORDER SUBJECT TO REVIEW

This is a legal malpractice case arising out of the representation by defendants-relators Davis Wright Tremaine LLP ("DWT"), Frederick Boundy ("Boundy"), William Birdwell ("Birdwell")[1] of plaintiff-adverse party Crimson Trace Corporation ("Crimson") in patent litigation against a major competitor, LaserMax. During discovery, Crimson requested that DWT disclose internal communications made during defendants' representation of Crimson. DWT objected, and Crimson moved to compel production of the documents. The circuit court ordered DWT to produce a privilege log and the communications at issue for an *in camera* review. After reviewing the requested communications, the circuit court ordered DWT to produce the internal communications to Crimson. ER45–46.

DWT petitioned this Court for a writ of mandamus directing the circuit court to vacate that order and moved this Court for a stay of the order pending this Court's final resolution of this mandamus proceeding. This Court granted a stay and issued an alternative writ of mandamus commanding the circuit court to vacate the order and deny Crimson's motion to compel or, alternatively, to

[1] Unless the context indicates otherwise, where Crimson refers to "DWT" in this brief, the reference includes both Boundy and Birdwell.

show cause for not doing so. The circuit court declined to vacate the order and issued a written opinion explaining its reasoning. ER 47–50.

MANDAMUS JURISDICTION AND RELEVANT DATES

Crimson accepts DWT's statement of mandamus jurisdiction and relevant dates.

QUESTIONS PRESENTED

1. Is an attorney's subjective intent to enter into a prohibited attorney-client relationship with a lawyer in the same firm objectively reasonable, when the advice sought was directly adverse to a current client and both lawyers represented the client, directly and by imputation?

2. Can an attorney reasonably claim to have intended to keep communications confidential from a current client when the attorney charges the client for the communications and makes them in a forum which specifically requires the attorney to disclose the communications to the client?

3. Can a law firm maintain that communications amongst its attorneys, who simultaneously represent the same client, either directly or by imputation, are privileged from disclosure to the client when the attorneys made the communications to secretly advance the interests of the firm over the interests of the client in violation of the attorney's and firm's duties of loyalty?

SUMMARY OF ARGUMENTS

A law firm's duty to its client takes precedence over its duty to itself. Courts from across the country have reached the same conclusion, albeit for various analytical reasons. Oregon, though, demands the very best of its attorneys—that its attorneys provide their clients with the utmost fidelity. Indeed, Oregon's legal system depends upon attorneys faithfully exercising their most basic and time honored duty, one of loyalty. DWT failed to give Crimson its best, far from it. DWT secretly plotted against its client, Crimson, while representing Crimson, and even charged Crimson for its disloyalty. DWT now claims it can hide its disloyalty behind a newly devised fiction that it surreptitiously represented itself against its current client. Oregon cannot allow its attorneys to cloak their disloyalty with the attorney-client privilege.

For DWT to even meet the threshold to invoke the attorney-client privilege, DWT bears the burden to prove (1) that it entered into an attorney-client relationship with itself and (2) that it reasonably believed its conversations with itself were confidential from its then-current client, Crimson. For the formation of the attorney-client relationship, Oregon requires not only that the client subjectively believes it formed an attorney-client relationship, but that the client's subjective belief be objectively reasonable under the circumstances and is supported by objective evidence. DWT asserts that Boundy and Birdwell entered into an attorney-client relationship with in-

house counsel, the so-called "Quality Assurance Committee" ("QAC"), comprised of practicing DWT lawyers. The co-chair of the QAC, Johnson, also directly represented Crimson on the LaserMax suit. DWT even charged Crimson for the alleged legal advice that Boundy and Birdwell received from the QAC. Johnson, Boundy, and Birdwell, therefore, all directly represented Crimson and were expressly prohibited from representing DWT against Crimson. By imputation, so were the rest of DWT's lawyers. Boundy and Birdwell, the putative clients, could not have reasonably believed that they entered into an attorney-client relationship they knew was expressly prohibited by their professional code of ethics. Moreover, DWT has produced no objective evidence that could possibly support a finding that they reasonably believed they could secretly form a prohibited attorney-client relationship against their current client, Crimson.

DWT cannot reasonably claim that it thought its communications with itself while representing Crimson could be withheld from Crimson. DWT charged Crimson for these conversations. Reasonable lawyers do not charge one client (Crimson) for work allegedly performed for another client (DWT).

Most of the allegedly privileged communications occurred in Washington between Washington lawyers working for a Washington company. Washington law prohibits lawyers from claiming privilege against a current client. These Washington lawyers knew or should have known that Washington requires

them to disclose these conversations to their client, Crimson. Consequently, the communications cannot be privileged from disclosure to Crimson.

Even if DWT were able to maneuver the above hurdles, DWT still cannot assert the privilege against its then-current client, Crimson. The legislature explicitly stated that it did not intend the evidence code's articulation of the attorney-client privilege to supplant the common law or its development, leaving the courts to apply the privilege to disparate unique facts in light of the purpose for the privilege. An attorney's duty of loyalty and a client's full and frank disclosure to that attorney go hand-in-hand; without the former, there cannot be the latter. The Court cannot allow lawyers to set up a fiction whereby they wrap themselves in the privilege to hide their disloyalty to their client. DWT breached its most basic duty of loyalty by representing itself against its client. DWT cannot now claim that the very communications that created its disloyalty are privileged from disclosure to the client it betrayed.

SUMMARY OF FACTS

Since DWT filed its petition for writ of mandamus, the parties have continued discovery and the record regarding the issues before the Court in this mandamus proceeding has continued to develop. Crimson offers some of that additional record for the Court's review, because this is an original proceeding and in response to DWT's unsupported contentions regarding Crimson's

"clandestine discussions" and use of "shadow counsel," which DWT first raised in its opening brief.

Crimson manufactures and sells laser grips for firearms. DWT is an international law firm with its principal place of business in Seattle, Washington. Boundy is a DWT partner in the Seattle office. Birdwell was a DWT partner in the Portland office.

Bruce Johnson is a DWT partner in the Seattle office and Co-chair of the firm's Quality Assurance Committee ("QAC"). DWT claims that the QAC is its in-house counsel. Johnson represented Crimson and charged Crimson for legal services in the underlying case. Other DWT lawyers, including Boundy and Birdwell, charged Crimson for their discussions with Johnson.

In February 2008, Birdwell and Boundy met with Crimson's executives to discuss a possible patent infringement case against LaserMax, Inc., one of Crimson's competitors. SER 2. In January 2009, based upon defendants' advice, Crimson sued Lasermax in federal district court in Portland. SER 2–3.

The complaint alleged that LaserMax was infringing several of Crimson's patents. SER 2. Birdwell had previously prosecuted several of the patents before The United States Patent and Trademark Office ("PTO"). SER 2.

One of the patents Birdwell prosecuted—"the '235 patent"—was controversial due to a dispute about the inventor, *i.e.*, whether Birdwell's client

or his client's brother was the inventor. Birdwell knew that a failure to disclose the issue to the PTO could invalidate the patent on the ground of inequitable conduct. Birdwell decided against disclosure which resulted in his client receiving the patent. SER 2.

On July 27, 2009, LaserMax told DWT that it was planning to attack the '235 patent because the inventor issue had been "deceptively omitted" from the patent application, that LaserMax would invalidate the patents, and that it would seek attorneys' fees based on Crimson asserting an unenforceable patent. SER 19.

Ten days later, August 7, 2009, Boundy, Birdwell, and Johnson discussed "inequitable conduct." ER 36. Birdwell and Boundy both billed Crimson for their discussions with Johnson:

> "8/07/09 W. Birdwell 0.20 Telephone conference with B. Byer regarding Mr. Toole [inventor] attorney-client privilege issue and telephone conference with B. Johnson regarding same.
>
> "8/07/09 R. Boundy 1.20 Intraoffice * * * conference with B. Johnson regarding Toole [inventor] attorney and client issues"

SER 25. Their time entries show that the inventor issue was the focus of the inequitable conduct discussion.[2]

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[2] Defendants claim these August 7, 2009 emails and other communications are subject to privilege and should be kept secret from Crimson.

On August 10, 2009, LaserMax directly accused Birdwell of inequitable conduct in obtaining several of Crimson's patents, including the '235 patent. SER 27–30. Boundy emailed Birdwell about his "conversation with attorney Bruce Johnson regarding inequitable conduct claims." SER 31. Birdwell charged Crimson for both acts. SER 25–26.

Birdwell's concern about disqualification had become real. Birdwell's testimony would be prejudicial to Crimson because he would have to admit he knew about the inventor issue but intentionally decided not to disclose it.

After talking to Johnson and Birdwell, Boundy gave his advice to Crimson:

> "Note, too, that Bill [Birdwell] is also alleged to be part of the deceptive activity. * * * [A]t least part of the intent is to try to drive a wedge between lawyer and client by suggesting Bill did something wrong. Under the circumstances I should advise you that *someone could argue* I have a conflict of interest in that I may be defending my partner at the same time as I am representing Crimson Trace. *I frankly don't see this as an issue*, but I do want you to know that you certainly have the right to consult with independent counsel to fully consider this."

SER 32 (emphasis added).

Boundy did not explain what "defending his partner while representing Crimson" meant. Nor did Boundy connect for Crimson the economics of defending Birdwell on Crimson's nickel or, for that matter, refunding fees

charged for the ill-advised '235 infringement claim. Boundy failed to mention anything regarding disqualification, an issue he just discussed with Johnson.[3]

It is undisputed that DWT never requested nor obtained Crimson's informed consent in writing to continue its representation. Overall, DWT billed Crimson over $1 million dollars in fees and costs. SER 9.

On defendants' advice, Crimson agreed to drop the '235 infringement claim. SER 3. LaserMax refused to stipulate to its dismissal unless, among other things, Crimson paid LaserMax $100,000 for its attorney fees. SER 33. Boundy told Crimson this was "nonsense," and LaserMax's attorneys were "huffing and puffing for the benefit of their client." SER 34.

On October 8, 2009, LaserMax subpoenaed DWT's files to prove its claim for attorneys' fees for asserting the unenforceable '235 patent. SER 35.

The following day, Johnson (DWT's "in-house counsel" or QAC) billed Crimson for reviewing issues raised by the subpoena. Johnson then spoke with Boundy, who also charged Crimson for the discussion. Johnson, therefore, directly represented Crimson.

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[3] After the mandamus petition was filed, defendants sought the return of the August 10, 2009 emails which were produced in discovery. As part of defendants' discovery motion, defendants publicly disclosed quotes and the content from the August 10, 2009 emails. Defendants disclosed that on August 10, 2009, Johnson, Boundy, and Birdwell discussed disqualification, and Boundy instructed Birdwell to notify his carrier.

On October 12, 2009, Johnson again billed Crimson for reviewing "additional subpoena issues." On October 13, 2009, Johnson discussed the strategy for responding to the subpoena with DWT attorney Eleanor Chin who represented Crimson. On October 21, 2009, Chin billed her time for discussing with Johnson the discovery issues and strategy raised by the subpoena.[4] SER 36–39.

On March 2, 2010, the district court found merit in LaserMax's request for discovery to support its attorney fee claim and ordered DWT to cooperate with LaserMax in its discovery efforts. SER 3.

Crimson was concerned about the pre-filing due diligence which resulted in the loss of two patents, including the '235. Crimson obtained a second opinion from Johnathan Mansfield, a patent infringement attorney at Schwabe Williamson & Wyatt. SER 40–41. After reviewing only the pleadings, Mansfield concluded that defendants had properly advanced legal arguments and that Crimson "has been ably served [] so far." SER 41.

In October 2010, Crimson settled with LaserMax. SER 4–5. Crimson agreed to pay $100,000 to LaserMax for settlement of the attorney fee claim.

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[4] Crimson first received DWT's privilege log after the first hearing before the circuit court on Crimson's motion to compel. The privilege log revealed the identities of the QAC members with whom DWT claimed a privileged communication. Crimson later was able to match the QAC member Johnson to time entries he billed Crimson. Crimson did not discover Johnson's time entries and billing until after the second hearing before the circuit court.

SER 5–6. Crimson also gave LaserMax an irrevocable royalty-free license to use the patents at issue. Crimson did not want the settlement published and negotiated with LaserMax to keep the settlement agreement confidential. Defendants knew about Mansfield's involvement because Boundy asked Mansfield for assistance in drafting the settlement agreement. SER 42–43.

When a dispute about the settlement language arose, both sides filed motions to enforce what each viewed as the final settlement agreement. To protect confidentiality, LaserMax filed its motion under seal. On October 21, 2010, Boundy filed a similar motion, not under seal, which publically disclosed some of the settlement terms but gave a false impression of the terms. SER 5.

In December 2010, the district court ordered Crimson to show cause why the court should not impose sanctions on Crimson for Boundy's public disclosure of the settlement terms. On January 12, 2011, DWT began communicating about "opposing court sanctions" and "court sanction."[5] ER 41–42. During January 2011, DWT billed Crimson for work on the show cause order caused by Boundy's blunder.

On February 3, 2011, the district court concluded that Crimson's arguments for publicly filing the confidential terms "approach[ed] frivolity," that Crimson had failed to "justify its gross breach of the confidentiality terms,"

[5] These are among the communications that DWT now claims are privileged.

and had "acted in bad faith" in disclosing the terms. SER 15–16. Based on those and other detailed findings, the court sanctioned Crimson $10,000, ordered Crimson to pay the sanction to LaserMax, publicly filed the order, and publicly disclosed the unfavorable terms of the settlement agreement, including: no finding of liability on the part of LaserMax, no payment made by LaserMax to Crimson, and the grant by Crimson to LaserMax of irrevocable royalty-free licenses for the patents. SER 18. Crimson's own counsel defeated its objective of a confidential settlement.

In the fall of 2010, Crimson stopped paying the DWT fee bills. This could hardly be a secret to DWT—Birdwell knew about it because he reviewed every pre-bill and final bill. SER 44–45.

DWT continued to represent Crimson and billed Crimson for legal services through April 2011. SER 46. Crimson's legal malpractice counsel first contacted DWT on April 13, 2011. SER 47.

RESPONSE TO DEFENDANTS-RELATORS' ASSIGNMENT OF ERROR

The circuit court properly granted Crimson's motion to compel production of non-privileged, internal communications between DWT lawyers.

I. PRESERVATION OF ERROR

Crimson agrees that the issues presented in this case were fully briefed and argued before the circuit court.

II. STANDARD OF REVIEW

This Court reviews a trial court's legal conclusions supporting an order to disclose documents during discovery for errors of law. *State ex rel. OHSU v. Haas*, 325 Or 492, 498, 942 P2d 261 (1997). This Court is bound by the trial court's factual findings so long as the record contains evidence to support them. *State v. Serrano*, 346 Or 311, 326, 210 P3d 892 (2009). To the extent that the circuit court did not make explicit factual findings, this Court views the record in the light most favorable to the order of disclosure. *Haas*, 325 Or at 498 (citing *State ex rel Ware v. Hieber*, 267 Or 124, 128–29, 515 P2d 721 (1973) ("[M]andamus lies to require inferior courts to act, but it will not compel them to decide disputed questions of fact in a particular way").

III. ARGUMENT

To hide its communications, DWT bears the burden of establishing that the communications are subject to the attorney-client privilege. *State v. Moore*, 45 Or App 837, 841–42, 609 P2d 866 (1980). First, DWT must prove that it had an attorney-client relationship between Boundy and Birdwell on the one hand, and other lawyers in the firm on the other. To prove the relationship existed, DWT must establish that it reasonably believed that DWT could represent itself adversely to Crimson while simultaneously representing Crimson, and that reasonable belief must be supported by objective evidence.

Second, DWT must prove that it was reasonable for DWT to believe its communications amongst its lawyers would not be disclosed to Crimson, despite billing Crimson for those communications and despite binding authority in the forum where the communications were made that requires disclosure to Crimson. Even if DWT were to establish both elements, DWT should be precluded from maintaining the privilege because the privilege conflicts with DWT's most basic duty to Crimson—the duty of loyalty.

A. DWT cannot claim that its communications with itself during its representation of Crimson are privileged.

Lawyers cannot legitimately claim that they represent themselves adversely to their actual current clients. Consequently, they cannot legitimately claim that communications between themselves are privileged from disclosure to their clients.

1. *DWT could not represent DWT against Crimson while representing Crimson.*

An elemental requirement for a communication to be confidential and thus protected by the attorney-client privilege is that an attorney-client relationship must exist. OEC 503(2) (stating that "[a] *client* has a privilege to refuse to disclose . . . confidential communications") (emphasis added); *see State v. Bilton*, 36 Or App 513, 516, 585 P2d 50 (1978) ("Apart from statute, the courts have held uniformly that since the privilege presupposes the

existence of the attorney-client relationship, it does not attach to its creation or existence.").

A party cannot expect the creation of an attorney-client relationship when the attorney is already representing a client adverse to the party, and the party knows that the establishment of an attorney-client relationship would then create a multiple client conflict. *See In re Complaint of Weidner*, 310 Or 757, 769–70, 801 P2d 828 (1990). In *Weidner*, the Court decided whether the borrower's attorney also represented the lender, thereby creating an impermissible conflict of interest. *Id.* at 769. The Court stated that to find the existence of an attorney-client relationship, the lender must reasonably believe under the circumstances that the lender is entitled to look to the lawyer for advice, and that the lawyer appreciated that he represented the lender. *Id.* at 770. "[T]o establish that the lawyer-client relationship exists based on reasonable expectation, a putative client's subjective, uncommunicated intention or expectation must be accompanied by evidence of objective facts on which a reasonable person would rely as supporting existence of that intent." *Id.*; *see also The Ethical Oregon Lawyer* § 6.3 (Oregon CLE 1991) (*quoted by In re Spencer*, 335 Or 71, 84, 58 P3d 228 (2002) ("The modern trend in Oregon and elsewhere is to find the existence of an attorney-client relationship whenever the would-be client reasonably believes under the circumstances that the client is entitled to look to the lawyer for advice.")). Because the lender

understood that the attorney represented the borrower and that the attorney was prohibited from representing multiple clients in conflict, the Court found that the lender could not have objectively looked to the attorney for advice, and therefore could not have formed an attorney-client relationship with the borrower's attorney. *Id.* at 773. "[A] person cannot at once create a lawyer-client relationship and a conflict of interest * * *." *Id.*

Attorneys are charged with knowledge of and must abide by the Rules of Professional Conduct. ORS 9.49(1) ("Such rules shall be binding upon all members of the bar."); *Kidney Ass'n of Or, Inc. v. Ferguson*, 315 Or 135, 142, 843 P2d 442 (1992) (The Rules of Professional Conduct "have the status of law in Oregon."). Communications between lawyers of the same firm adverse to a current client create both direct and imputed conflicts of interest under the Rules of Professional Conduct:

> "[A] lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
>
> "(1) the representation of one client will be directly adverse to another client;
>
> "(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."

Or Rule of Prof'l Conduct (ORPC) 1.7(a); *see also* Wash Rule of Prof'l Conduct (WRPC) 1.7(a); *In re Reciprocal Discipline of Page*, 326 Or 572, 576,

955 P2d 239 (1998) (observing with respect to previous ethics rules that "Oregon's disciplinary rules do not vary significantly from the Washington rules") (citations omitted).

Most conflicts are "imputed" to all other lawyers in the firm to protect clients from disloyal lawyers. *See Restatement (Third) of the Law Governing Lawyers* §123, comment b (2000). "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." ORPC 1.10; *see* WRPC 1.10. Among confidentiality and other concerns, imputed conflicts exist in part because

> "lawyers in a law firm * * * ordinarily share each other's interests. A fee for one lawyer in a partnership, for example, normally benefits all lawyers in the partnership. Where a lawyer's relationship with a client creates an incentive to violate an obligation to another client, an affiliated lawyer will often have similar incentive to favor one client over the other."

Restatement at §123, comment b.

Each and every DWT attorney identified in the Privilege Log knew, or at least will be charged with knowledge of, their professional and fiduciary duties prohibiting them from simultaneously representing both Crimson and a client adverse to Crimson, themselves. "Loyalty to [Crimson] is among the most basic of [DWT's] duties," "perhaps the most basic of counsel's duties." *U.S. v. Wallace*, 276 F3d 360, 366 (7th Cir 2002), *cert den*, 536 US 924, 122 S Ct

2592, 153 L Ed 2d 781 (2002) (First Quote); *Strickland v. Washington*, 466 US 668, 692, 104 S Ct 2052, 80 L Ed 2d 674 (1984) (Second Quote).

DWT could not simultaneously represent itself and Crimson. To establish an attorney-client relationship between DWT attorneys, under *Kidney Ass'n* and *Weidner*, DWT must establish that it reasonably believed under the circumstances that it could look to itself for advice against Crimson. All DWT attorneys, including Boundy and Birdwell, knew that the RPCs prohibited them from forming an attorney-client relationship with a client adverse to Crimson while simultaneously representing Crimson. US Dist Ct Local R 83-7 ("Every attorney admitted to general or special practice * * * must [b]e familiar and comply with the standards of professional conduct required of members of the Oregon State Bar."[6]). Specifically, Boundy and Birdwell could not reasonably believe that they were entering into an attorney-client relationship adverse to Crimson with other lawyers in the firm because they knew that such a relationship is strictly prohibited by the Rules of Professional Conduct. The would-be "lawyers" of the lawyers would then have both direct and imputed conflicts of interest, as would the firm, which actually represented Crimson. Johnson and Waggoner were both partners with DWT, each earning money based upon the fees paid by Crimson, thereby giving them a vested interest in

[6] The Lasermax case was in Federal Court for the District of Oregon.

keeping Crimson as a client, just as the *Restatement* contemplates. Consequently, Johnson and Waggoner not only had imputed conflicts under ORPC 1.10, but direct conflicts under ORPC 1.7 because there was a significant risk that Johnson and Waggoner's representation of DWT would be materially limited by their personal interests.

Boundy and Birdwell knew that neither of them could represent DWT against Crimson because such representation would be "directly adverse," under Rule 1.7. Knowing and being bound by the Rules of Professional Conduct, Boundy and Birdwell likewise knew that every lawyer in their firm shared their prohibition from representing DWT adverse to Crimson, as stated in ORPC 1.10.

Boundy, Birdwell, and Johnson *all* represented Crimson in the patent infringement suit. Boundy, Birdwell, and Johnson *all* billed Crimson for the very conversations DWT now seeks to hide. Consequently, Johnson—the QAC co-chair and primary DWT lawyer who DWT now claims represented it against Crimson while DWT represented Crimson—actually represented Crimson in the LaserMax suit, the same as Boundy and Birdwell. Under ORPC 1.7(a)(1), Johnson would have had the most fundamental of current client conflicts—he

would have represented one client against the other.[7] DWT's alleged representation of itself is akin to a litigation team chatting strategy amongst themselves and later claiming they represented themselves to avoid disclosing their strategy to their client. Boundy, Birdwell, and Johnson were "lawyers representing the client" under OEC 503—the client being Crimson, not DWT.

No party to any of the communications to which DWT claims privilege *reasonably* believed that they could enter into an attorney-client relationship adverse to Crimson. They all knew the Rules expressly prohibited such representation. Boundy and Birdwell could not have *reasonably* believed that they could form an attorney-client relationship with other DWT lawyers when such a relationship was explicitly prohibited by the Rules of Professional Conduct. *See Weidner*, 310 Or at 769–70.

Furthermore, DWT has not proffered objective evidence from which a *reasonable attorney* could form a belief that Boundy and Birdwell believed they were entering into an attorney-client relationship with other DWT lawyers, as is required by *Weidner*. The only evidence in this record actually runs contrary.

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[7] Johnson then was required to "contend for something on behalf of one client that [Johnson had] a duty to oppose on behalf of another client," as stated in RPC 1.7(b)(3). Johnson had a duty to advise Crimson of DWT's potential malpractice, which would be something he had a duty to avoid on behalf of DWT. If DWT's recently devised assertion that Johnson represented it in malpractice claims against Crimson were true, then Johnson's RPC 1.7(a)(1) disloyalty could not even be waived by informed consent.

Boundy and Birdwell, as well as certain of the lawyers with which they allegedly entered an attorney-client relationship, billed Crimson for some of the communications. Lawyers do not charge clients for legal services rendered to another, as an ethical matter, without gaining informed consent. ORPC 1.8(f); WRPC 1.8(f). Concordantly, for Boundy and Birdwell's recently stated subjective belief to be objectively reasonable, the Court would expect DWT to produce evidence that Boundy and Birdwell, or even DWT, gave informed consent to the payment of their legal fees by "one other than the client," as required by ORPC 1.8(f). Had Johnson believed he represented DWT at the same time he represented Crimson in the Lasermax suit, the Court would expect DWT to produce, at the very least, its informed consent to that adverse representation, as required by ORPC 1.7(b)(4).

The complete dearth of objective evidence supporting DWT's assertion that it represented itself, coupled with the unreasonableness of Boundy and Birdwell's apparent subjective belief that they could form an attorney-client relationship that is expressly prohibited by the Rules of Professional Conduct, unequivocally demonstrates, under *Kidney Ass'n* and *Weidner*, that DWT had not entered into an attorney-client relationship with itself.

On the contrary, DWT objectively believed that these conversations "between lawyers representing [Crimson]" were privileged from disclosure to

all the world *except* Crimson,[8] under OEC 503(2)(e). Crimson was the client; it was paying for these communications. Crimson owns the privilege, not DWT. Because DWT could not be adverse to Crimson, under and *Bilton*, communications amongst Crimson's attorneys cannot be privileged from disclosure to Crimson.

One of the cases cited by many law firms claiming their intra-firm communications are protected by the attorney-client privilege is *U.S. v. Rowe*, 96 F3d 1294 (9th Cir 1996). However, as the decisions discussing the issue in this case have held, *Rowe* has no applicability to the present situation because *Rowe* only discussed whether the attorney-client privilege covered intra-firm communications when the government subpoenas the firm during a criminal investigation; *Rowe* did not address "whether the attorney-client privilege can be asserted against the firm's then-current client." *VersusLaw, Inc. v. Stoel Rives, L.L.P.*, 127 Wn App 309, 333–34, 111 P3d 866 (2005), *rev den*, 156 Wn 2d 1008, 132 P3d 147 (2006); *see also Asset Funding Group, L.C.C. v. Adams & Reese, L.L.P.*, 2008 US Dist LEXIS 96505, *6–7 (ED La 2008), *recons den*, 2009 US Dist LEXIS 48420 (ED La 2009) (stating same); *Thelen Reid & Priest*

[8] By communicating amongst themselves about their duties to Crimson, DWT actually acted as ethical lawyers should. That an attorney may fear losing the client or needing to withdraw does not deter ethical and loyal attorneys from talking amongst themselves when they have questions about their representation.

LLP v. Marland, 2007 US Dist LEXIS 17482 (ND Cal 2007) (stating same); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F Supp 2d 283, 287 (SDNY 2002) (stating same). Law firms may have in-house counsel like any other corporation, but the law firm is fundamentally different than all other entities—law firms owe the highest duties of loyalty to their current clients and are prohibited from representing interests adverse to their current clients.

2. *DWT did not reasonably intend for its communications regarding Crimson to be confidential.*

Communications that DWT now seeks to hide are not confidential communications within the meaning of OEC 503. The bulk of these communications were between Washington lawyers practicing law within a Washington company (DWT) in Washington. DWT could not reasonably believe that they would be able to prevent Crimson from discovering these communications because the law in Washington prohibits lawyers from asserting such communications are privileged as to the current client.

Only communications between an attorney and a client that are intended to be confidential are privileged. OEC 503(1)(b). "Confidential communication means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* "The application of the privilege

hinges on both the intent of the parties to shield the communication from disclosure and the purpose for which the communication is made. Both factors must be met in order for defendant successfully to assert the privilege." *State v. Ogle*, 297 Or 84, 87, 682 P2d 267 (1984).

Washington does not allow its lawyers to assert that internal communications are privileged from disclosure to current clients. In *VersusLaw*, the Washington Court of Appeals stated that "[t]he question is whether a law firm can maintain an adverse attorney-client privilege against an existing client." 127 Wn App at 333. The court reasoned that:

> "[C]ommunications between lawyers in a firm that conflict with the interest of the firm's client may not be protected from disclosure to the client by the attorney-client privilege. When a law firm seeks advice from its in-house lawyer concerning potential malpractice in its representation of a client, the law firm's position can be adverse to or limit the law firm's representation of its client and create a conflict of interest."

Id. at 334 (citations omitted). The court remanded for determination of when the client terminated the attorney-client relationship and when the law firm knew its client had a potential claim for malpractice against it. *Id.* at 335.

VersusLaw was decided in 2005. DWT's allegedly privileged communications took place between 2009 and 2011 and were largely amongst Washington lawyers practicing in Washington within a Washington law firm. Johnson and Boundy did not intend to keep these communications secret from Crimson because Washington does not allow Johnson and Boundy—both

Washington attorneys—to assert a privilege to these communications. Consequently, under OEC 503's definition of "confidential communication" and *Ogle*, these communications are not privileged because DWT could not have reasonably intended to keep such communications confidential.

The circuit court properly found that DWT could not assert the attorney-client privilege against Crimson for in-house communications made while representing Crimson. For simplicity and argument's sake, the circuit court and Crimson assumed that DWT could represent itself but that DWT could not assert the privilege against Crimson, an analysis addressed in detail below.[9] On mandamus, though, this Court should follow each step in a privilege analysis under OEC 503, beginning with whether DWT legitimately formed an attorney-client relationship with itself adverse to its then current client, Crimson—a predicate to the privilege—and then determining whether DWT reasonably expected to keep its communications secret from Crimson, given the applicability of Washington's *VersusLaw* decision. DWT may now assert that it subjectively believed it was representing itself, but that belief was not objectively reasonable under the circumstances; no lawyer could objectively

[9] No matter which analysis the Court chooses to adopt, the result is the same—these communications are not privileged. The analysis undertaken by Crimson and the circuit court below was simply "for argument's sake" to streamline oral argument and preserve precious judicial resources. *See* Pl's Reply In Support of Mot to Compel, Jan 7, 2013, at 2; 1/9/13 Tr 27–29.

believe he could form an attorney-client relationship that is explicitly prohibited by the Rules of Professional Conduct and the attorney's own conduct in billing the client for the communications. The Court should affirm the circuit court's decision to prohibit DWT from asserting the attorney-client privilege to hide communications which in-and-of-themselves, establish DTW's breach of duty to Crimson.

B. A law firm cannot assert privilege to shield its internal communications from a current client.

Assuming the Court finds it objectively reasonable for a lawyer to intentionally enter into a prohibited attorney-client relationship to the detriment of themselves and a current client, the Court should not allow a lawyer to assert an attorney-client privilege against a then-current client in violation of the most basic of professional duties. The analysis of OEC 503, in light of its purpose and in accordance with the authority of this Court to develop the common law of the attorney-client privilege, must involve weighing DWT's privilege claim with the professional duties DWT owes Crimson.

1. *The legislature intended OEC 503 to preserve this Court's authority to develop the common law of the attorney-client privilege.*

DWT attempts to shift the Court's focus from DWT's violations of its professional duties to a then-current client by myopically arguing that OEC 503 does not provide a specific distinction for in-house law firm counsel. The text

of OEC 503 does not set out an exclusive list of factual scenarios in which the attorney-client privilege does not apply.

OEC 503 provides in pertinent part:

> "(2) 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:
>
> > "(a) Between the client * * * and the client's lawyer * * *;
> >
> > "* * * * *
> >
> > "(e) Between lawyers representing the client."

As with any statute, this Court's goal in construing OEC 503 is "to pursue the intention of the legislature if possible." ORS 174.020(1)(a); *State v. Gaines*, 346 Or 160, 165, 206 P3d 1042 (2009); *PGE v. Bureau of Labor & Indus.*, 317 Or 606, 610, 859 P2d 1143 (1993). This Court determines the legislature's intent by considering the text, context, and useful legislative history of the particular statute at issue, as well as general maxims of statutory construction if necessary. *Gaines*, 346 Or at 165; *PGE*, 317 Or at 610–12.

Oregon's evidence code "shall be construed * * * to the end that the truth may be ascertained and proceedings justly determined." OEC 102. This Court has concluded that the attorney-client privilege statute "is merely declaratory of the common law attorney-client privilege, and with our practice of construing the statute in light of the underlying policies which it is intended to serve."

State ex rel North Pacific Lumber Co. v. Unis, 282 Or 457, 462–63, 579 P2d 1291 (1978) (citing *State ex rel Hardy v. Gleason*, 19 Or 159, 23 P 817 (1890)). Furthermore, the privilege is "strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 J. Wigmore, *Evidence*, § 2291 at 554 (McNaughton rev. 1961) (*quoted by* Laird C. Kirkpatrick, *Oregon Evidence* §503.03 (5th ed 2007)); *see also Ogle*, 297 Or at 90 ("[B]ecause the effect of the assertion of the attorney-client privilege is to withhold relevant information from the finder of fact, the privilege is to be applied only when necessary to achieve its purpose of encouraging clients to make full disclosure to their attorneys." (citation and quotation omitted)).

a. The circuit court correctly applied Oregon's legal principles governing the attorney-client privilege and an attorney's duty of loyalty to his client.

A lawyer's common law duty of loyalty to his or her client informs the proper interpretation of OEC 503 and application of the attorney-client privilege. It is well-established at common law that lawyers owe their clients the duty of loyalty. *See Kidney Ass'n*, 315 Or at 143 (observing that "representing opposing clients was recognized as improper conduct long before the existence of disciplinary rules"); *Silbiger v. Prudence Bonds Corp.*, 180 F2d 917, 920 (2d Cir), *cert den*, 340 US 831 (1950) ("Certainly by the beginning of the Seventeenth Century it had become common-place that an attorney must not

represent opposed interests"). Indeed, the duty of loyalty is perhaps the most basic and fundamental of those that a lawyer—who acts as a fiduciary for his client—owes to his client. *See Strickland*, 466 US at 692 (characterizing an attorney's duty of loyalty to his client as "perhaps the most basic of counsel's duties"); *Wallace*, 276 F3d at 366 (same). A client's ability to trust from the outset and throughout the representation that his lawyer's advice is based solely on the client's best interests is critical not only to the attorney-client relationship, but to the proper functioning of the legal system itself. *See Reynolds v. Schrock*, 341 Or 338, 349, 142 P3d 1062 (2006) ("[S]afeguarding the lawyer-client relationship protects more than just an individual or entity in any particular case or transaction; it is integral to the protection of the legal system itself.").

From that common law duty of loyalty flows the lawyer's obligation to refrain from representing a client where the lawyer has an undisclosed disloyalty or conflict of interest. *See Restatement* at § 121 comment b (explaining that the law prohibits "lawyer conflicts of interests" because "the law seeks to assure clients that their lawyers will represent them with undivided loyalty. A client is entitled to be represented by a lawyer whom the client can trust."). As this Court has recognized, "lawyers cannot serve their clients adequately when their own self-interest * * * pulls in the opposite direction." *Reynolds*, 341 Or at 350; *see also Schroeder v. Schaefer*, 258 Or 444, 450, 477

P2d 720 (1970), *mod on other grounds*, 258 Or 462, 483 P2d 818 (1971) (quoting *Allstate Ins. Co. v. Keller*, 17 Ill App 2d 44, 52, 149 NE 2d 482, 486 (1958)) ("[A]n attorney is required to disclose to his client all facts and circumstances within his knowledge, which, in his honest judgment, might be likely to affect the performance of his duty for that client. * * * A client may presume from an attorney's failure to disclose matters material to his employment that the attorney has no interest which will interfere with his devotion to the cause confided in him, or betray his judgment.").

Based on an *in camera* review of the documents that Crimson seeks, the circuit court found that a conflict of interest arose between DWT and Crimson, DWT communicated internally about Crimson, and the communication involved "adverse litigation" to Crimson, all while DWT continued to represent Crimson and purported to act in Crimson's best interest. SSER 86–87. The circuit court then properly concluded that Oregon's attorney-client privilege statute does not apply to the law firm's internal communications in the particular circumstances of this case and ordered DWT to produce the documents reflecting DWT's internal communications.

DWT does not and cannot deny that it had conflict of interest in simultaneously representing both Crimson and itself, *both* imputed and direct. Neither does DWT argue that it attempted to address any of its conflicts with Crimson by disclosing the conflicts and obtaining Crimson's informed consent

to DWT's continued representation, insofar as that was possible given Johnson's dual representation. Instead, DWT contends that any breach of its duty of loyalty to Crimson, its client, is immaterial to the analysis of whether DWT's internal communications are privileged. In other words, DWT takes the position that a lawyer may breach his duty of loyalty to his client, compound the conflicts of interest by communicating with other lawyers in his firm that not only indirectly through imputation represent the client, but actually and directly represent the client on the very same matter, and then shield those internal communications from disclosure to the client through the attorney-client privilege. Oregon's legislature did not intend such an absurd result, particularly when the law and regulatory scheme governing lawyers provides the means for harmonizing the lawyer's duties to the client and the lawyer's own self-interest. *See State v. Vasquez-Rubio*, 323 Or 275, 282–83, 917 P2d 494 (1996) (recognizing the maxim of statutory construction that the legislature would not have intended that a statute produce absurd results).

An attorney's duty of loyalty is so basic, fundamental, and well-recognized that it is unlikely that the legislature seriously considered circumstances such as those presented in this case. Had this set of circumstances come before the legislature, it would have stated the obvious and reconciled the lawyer's duty to his client with the lawyer's own self-interest. *See PGE*, 317 Or at 612 (recognizing the maxim of statutory construction that

the court "will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue"). Indeed, *the legislature explicitly guided courts to look to the Rules of Professional Conduct in interpreting and applying OEC 503.*[10] As with any other conflict of interest a lawyer may face, all that Oregon law requires in that situation is that the lawyer be honest with and loyal to his client, adequately disclose the conflict, and provide his client the opportunity to make an informed decision. *See* ORPC 1.7; ORPC 1.8(b).

Moreover, DWT's incorrect interpretation of OEC 503 defeats the purpose of the privilege. *State ex rel OHSU v. Haas*, 325 Or 492, 505, 942 P2d 261 (1997) (stating its purpose 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"). The privilege and the duty of loyalty go hand-in-hand; without one, there cannot be the other. Clients communicate fully with their attorneys because they believe their attorneys are

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[10] "The lawyer may not claim the privilege on the lawyer's own behalf. However, the lawyer may claim it on behalf of the client—indeed, it is assumed that the lawyer will do so except under the most unusual circumstances. An Oregon attorney is prohibited by the ethics of the profession from divulging a client's secrets or confidences. The attorney would therefore be bound to claim the privilege on behalf of the attorney's client if called to testify. See DR 4-101(2) and 7-102(B) of the American Bar Association Code of Professional Responsibility; Canon 37 of the American Bar Association Canons of Professional Ethics." OEC 503(3) Commentary.

absolutely loyal advocates and counselors. Under *North Pacific Lumber*, Wigmore, Kirkpatrick, and *Ogle*, the attorney-client privilege should be narrowly interpreted in such a way as to *not* drive a wedge between client and lawyer, and discourage *clients* from speaking freely with their attorneys out of concern for their lawyer's loyalty.

b. OEC 503 does not contain an "exhaustive list" of all factual scenarios courts face in applying the attorney-client privilege.

DWT's position on mandamus largely turns upon its incorrect assertion that OEC 503 contains an exhaustive list of "exceptions" to the attorney-client privilege, and that the circuit court therefore incorrectly found a "fiduciary exception." Opening Br at 15–26. The circuit court did not create a generalized "fiduciary exception" to the attorney-client privilege, but rather applied OEC 503 to the facts of this case, namely an attorney that intentionally and secretly attempts to enter a prohibited representation directly adverse to a current client, and then prohibits the client from discovery of the very communications the attorney has a duty to disclose.

DWT largely rests its statutory construction that OEC 503 contains an exclusive list of exceptions to the privilege on two maxims of construction. First, DWT asserts the oft abused maxim *expressio unius est exclusio alterius*. However, "[B]oth [the Court of Appeals] and the Supreme Court have

repeatedly warned the bench and bar that *expression unius* [*est exclusion alterius*, ('the expression of one is the exclusion of another')] is not a rule of law but is instead a guide to understanding legislative intent." *State ex rel City of Powers v. Coos County Airport Dist.*, 201 Or App 222, 234, 119 P3d 225 (2005), *rev den*, 341 Or 197, 140 P3d 580 (2006) (citations omitted); *see also Cabell v. City of College Grove*, 170 Or 256, 281, 130 P2d 1013 (1942) (stating the maxim "is to be applied with *caution* and merely as an auxiliary rule to determine the legislative intention" (emphasis added)). The maxim is defeated, though, because the legislature itself stated that OEC 503 does not contain an exclusive list of every conceivable factual scenario a court could encounter in the admission of evidence.

OEC 503(4) sets out a number of factual situations in which there is no attorney-client privilege, including a "communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer." OEC 503(4)(c). However, in enacting OEC 503(4), the legislature specifically contemplated that the subsection's provisions were not an exhaustive list of factual scenarios in which there is no privilege. *See* OEC 503 Commentary, Subsection (4) (1981).[11] Other situations too fail to appear in the text of OEC

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[11] "Oregon law recognizes two other exceptions to the lawyer-client privilege—an exception for assets left with the attorney, *State ex rel Hardy v. Gleason*, 19 Or. 159, 23 P. 817 (1890), and an exception for the fact of employment and

503 but are nonetheless excepted from a client's claim of privilege. The Rules of Professional Conduct allow attorneys to disclose otherwise privileged communications to prevent "reasonably certain death or substantial bodily harm" and to discuss the lawyer's compliance with the Rules, under ORPC 1.6.

Second, DWT asserts that because OEC 504, the psychotherapist-patient privilege, and OEC 504-1, the physician-patient privilege, contain language indicating those privileges' enumerated exceptions are not exclusive, the absence of similar language in OEC 503 indicates the legislature's intent that OEC 503's enumerated exceptions are exclusive. Opening Br 20–22. Again, the legislature merely intended OEC 503 to supplement, not supplant, common law and explicitly stated in official commentary that unenumerated exceptions existed. Nonetheless, the language of the medical privileges lends the Court little to no guidance.

Related statutes can provide contextual evidence that aids this Court in determining the legislature's intent in a particular statute, particularly when they are enacted prior to or at the same time as the statute being construed. *PGE*, 317 Or at 610–12; *Stull v. Hoke*, 326 Or 72, 79–80, 948 P2d 722 (1997); *Davis*

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name and address of the client, *Cole v. Johnson*, 103 Or. 319, 205 P. 282 (1922); *In re Illidge*, 162 Or. 393, 91 P.2d 1100 (1939). By the adoption of Rule 503 the Legislative Assembly does not intend to affect these latter exceptions." OEC 503(4) Commentary; *see also OHSU*, 325 Or at 506 n 10 (stating that Legislative Commentary on the Oregon Evidence Code should be considered part of legislative history).

v. Wasco Intermediate Education Dist., 286 Or 261, 273, 593 P2d 1152 (1979). Courts presume that statutes enacted at the same time "are imbued by the same spirit and actuated by the same policy" and, thus, "should be construed each in light of the other." *Daly v. Horesfly Irr. Dist.*, 143 Or 441, 445, 21 P2d 787 (1933).

Contrary to DWT's assertions, OEC 504, the psychotherapist-patient privilege, and OEC 504-1, the physician-patient privilege, provide little helpful context in interpreting OEC 503. The language in each of those statutes to which DWT points—that "[t]he following is a nonexclusive list of limits on the privilege"—was not included in those statutes when the legislature originally enacted the Oregon Evidence Code—including OEC 503. Instead, the legislature added the nonexclusivity language to the psychotherapist-patient and physician-patient privilege statutes in 1987—six years after the legislature enacted the evidence code—as part of a bill intended to address specific problems that had arisen in civil commitment proceedings. *See* HB 2324 (1987).

Prior to the passage of HB 2324, those privileges prohibited an investigator from "reading medical records or talking to the person's treating psychotherapist or physician" and prohibited a "treating physician's testimony or the medical record for the period of detention" from being received in evidence at civil commitment hearings. Testimony, House Committee on

Judiciary, Subcommittee 3, HB 2324, Jan. 30, 1987, Ex A at 17, 19 (Recommendations on Civil Commitment of Mentally Ill Persons, Task Force on Civil Commitment of Mentally Ill Persons). The legislature added the language to expressly provide that the listed exceptions were nonexclusive solely to ensure that in civil commitment proceedings investigators, physicians, and psychotherapists would not be prohibited from accessing and providing information pertinent to the issue of whether the alleged mentally ill person presented a danger to themselves or others. *See id.*; HB 2324.

Under those circumstances, that the legislature did not include the same or similar nonexclusivity language in OEC 503 provides little to no contextual support for DWT's position. At best, the Court can infer that the legislature did not see fit to amend OEC 503 to address problems that were not before it.[12]

Finally, DWT states that OEC 514 restricts the interpretation and application of OEC 503 to its enumerated terms, and that "a privilege should

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[12] DWT also misplaces reliance upon a previous interpretation of the very unique marital privilege in OEC 505. Opening Br 20–22. The Court noted in *Serrano*, 346 Or 311, that the interpretation and application of the marital privilege differed significantly from other privileges. "[R]elying on this court's interpretations of other privilege statutes is of limited value, because other privileges do not operate in the same manner as the marital confidential communications privilege." *Id.* at 323. Unlike OEC 505, OEC503—the attorney-client privilege—contains legislative history explicitly stating the legislature's intent to allow unenumerated exceptions and for the common law to continue to develop the privilege.

not be narrowed unless there is 'convincing evidence that the Legislature intended to exclude' a particular group of communications from its protection," quoting *John Deere Co. v. Epstein*, 307 Or 348, 353–54 (1989). Opening Br at 22–24. Section 514 and *John Deere* actually lend DWT no assistance. OEC 514 addresses the ongoing validity of privileges other than those codified in the evidence code, but has no application to determining the *scope* or proper interpretation of any particular privilege. The statute provides that all privileges that were not expressly repealed, continue to exist:

> "Unless expressly repealed by section 98, chapter 892, Oregon Laws 1981, 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."

At issue in *John Deere* was whether the term "privilege" as used in OEC 513, which prohibits a fact finder from drawing any inference based on the assertion of a privilege, included a privilege not explicitly stated in the Evidence Code—the U.S. Constitution's Fifth Amendment privilege against self-incrimination. The court considered OEC 514 as contextual support, because that statute recognizes the existence and validity of privileges other than those enumerated in the evidence code. *John Deere* cannot be read to narrowly construe exceptions to the attorney-client privilege. On the contrary, it is the scope of the attorney-client privilege that is "strictly confined within the narrowest

possible limits consistent with the logic of its principle," as recognized in Wigmore, Kirkpatrick, *Ogle*, and *North Pacific Lumber*.

2. *Other jurisdictions lend mixed aid to this Court's decision.*

Approximately ten cases, spanning jurisdictions across the country, both state and federal, have analyzed somewhat similar circumstances and refused to allow attorneys to shield their adverse, conflict, intra-firm communications from their then-current clients. Some four jurisdictions have allowed attorneys to assert the privilege, but on very unique facts or law not present in this case or in Oregon. Moreover, Crimson does not ask the Court to adopt a "fiduciary exception," applying law unique to lawyers to other fiduciaries, though the Court indeed could. In the final analysis, cases from other jurisdictions simply help the Court create an analytical framework for addressing the fiction created by DWT, namely that it represented itself against Crimson while representing Crimson, that DWT somehow gets to wear "two hats," one of lawyer and one of client, so that it can attempt to escape civil liability for its disloyalty.

a. **The vast majority of courts have prohibited lawyers from hiding behind the privilege to avoid civil liability for disloyal conduct.**

While Oregon courts have not yet considered this issue, a majority of courts from other jurisdictions have firmly held that a law firm's duty to a current client overrides and trumps any assertion of attorney-client privilege by

the firm to intra-firm communications. *In re Sunrise Secs. Litig.*, 130 FRD 560, 597 (ED Pa 1989), *recons den*, 130 FRD 560 (ED Pa 1990) (holding that "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 [in violation of Rule 1.7 of the Rules of Professional Conduct] seeking to discover the communication") (emphasis added); *Koen Books Distribs. v. Powell, Trachman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 FRD 283, 286 (ED Pa 2002) (holding that firm's fiduciary duty to current clients "is paramount to its own interests"); *Bank Brussels*, 220 F Supp 2d at 287 (holding that law firm could not claim privilege over its internal conflict check from a current client: "[w]hile the privilege will be applicable as against all the world, it cannot be maintained against [the client]"); *VersusLaw*, 127 Wn App at 334 (holding that "communications between lawyers in a firm that conflict with the interest of the firm's client may not be protected from disclosure to the client by the attorney-client privilege") (citations omitted); *Thelen*, 2007 US Dist LEXIS at *19–20 (holding that firm's fiduciary relationship to client did not allow it to protect internal communications); *Burns v. Hale & Dorr LLP*, 242 FRD 170, 173 (D Mass 2007) (holding that firm's fiduciary duty to the client overrode any claim of privilege by the law firm); *SonicBlue Claims LLC v. Portside Growth and Opportunity Fund*, 2008 Bankr LEXIS 181, at *26–27 (Bankr ND Cal 2008)

(holding that "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"); *Asset Funding Group*, 2008 US Dist LEXIS 96505, at *10 (holding that "communication[s] with in-house counsel [are] not protected by the attorney-client relationship because [they] create[d] a conflict between the law firm's fiduciary duties to itself and its duties to [its client]"); *Cold Spring Harbor Lab. v. Ropes & Gray LLP*, 2011 US Dist LEXIS 77824, at *4–5 (D Mass 2011) (holding that "absent an affirmative act on the part of [the firm] that would have caused [the client] to know that [the firm] had unequivocally ended its representation, [the firm's] fiduciary duty to [the client] over[ode] any claim of privilege"); *E-Pass Technologies, Inc. v. Moses & Singer, LLP*, 2011 US Dist LEXIS 96231 (ND Cal 2011) (adopting the reasoning in *Koen*, *Thelen*, *Sunrise*, and *SonicBlue*).

The reasoning behind these cases is probably best articulated in *SonicBlue*. In *SonicBlue*, the court discussed *Sunrise*, *Koen Books*, *Bank Brussels*, *Thelen*, and *Burns*, stating:

> "[A] law firm's consultation with in-house counsel [] raises an additional layer of concern that is unique to the legal profession. [A] law firm's representation of a client, and its ability to meet its ethical and fiduciary obligations to that client, may be affected by its representation of another client, even if the second client is the law firm itself. In other words, when a law firm chooses to represent itself, it runs the risk that the

> representation may create an impermissible conflict of interest with one or more of its current clients. In light of these ethical concerns, the courts that have considered the issue have resoundingly found that, where conflicting duties exist, the law firm's right to claim privilege must give way to the interest in protecting current clients who may be harmed by the conflict. As a result, 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."

SonicBlue, 2008 Bankr LEXIS 181, at *26–27 (citations and quotations omitted). The vast majority of cases hold that the policies underlying the attorney-client privilege are best served by placing the advising attorney's duty to the current client above the advising attorney's duty to herself.

The courts in these ten different cases approach the issue from different analytical perspectives, but all reach the same conclusion—a law firm cannot assert the privilege against a current client. These cases all focus upon how incompatible with all notions of attorney loyalty and duty it is for a law firm to claim to have entered, on the one hand, into an attorney-client relationship with itself (and enjoy the privilege arising from such relationship) while, on the other hand, simultaneously represent the client. Other jurisdictions have rightly realized the impossibility of synthesizing the firm's duty to itself with its duty to its client, with any real analytical honesty. The disconnect between the firm's duties that many courts have grappled with highlights just how objectively *unreasonable* this recently created fiction really is, that a law firm

can form an attorney-client relationship with itself adverse to a current client, which is prohibited by the lawyer's professional code and inherently contrary to the lawyer's most fundamental client duty of loyalty. Crimson's analytical framework outlined in Section 1 above best coalesces the attorney's duty of loyalty that forms the bedrock of our legal system with the purpose underlying the privilege.

Just as in *SonicBlue*, DWT cannot be allowed to protect communications that arose out of the self-representation that created an impermissible conflicting relationship with Crimson. The communications that DWT seeks to hide are not just evidence of other wrongdoing; they *are* the breach of duty. DWT, in effect, is attempting to use the evidence code to shield it from civil liability for its disloyalty. As a matter of law, lawyers in Oregon cannot represent themselves against their current clients, and then claim the privilege to shield them from civil liability to their clients for their disloyalty, whether analyzed from a relationship formation perspective, an exception to the privilege angle, or on simple public policy grounds.

b. A minority of courts have allowed lawyers to keep communications amongst themselves secret.

A minority of courts that have looked at somewhat similar issues have decided for various reasons to allow the attorneys to invoke the privilege when they represent themselves. All of these cases are quite different from the facts

presented here. Most of the cases turn on legal issues unique to the jurisdiction; legal issues not present in Oregon. The Court will find little guidance from these cases, but they do, in many ways, highlight why the Court's decision here should be different.

(1) **Illinois—*Garvy v. Seyfarth Shaw LLP*, 966 NE 2d 523 (Ill App 2012).**

In *Garvy*, the court ruled that a law firm's communications with its in-house counsel *after it obtained informed consent* to continue its representation were protected by the attorney-client privilege. The court noted that the rule from *Koen Book* and *Thelen* did not even apply to the requested communications because they occurred *after* the law firm disclosed its conflict of interest to the client and the client consented to the law firm's continued representation. *Id.* at 536–37; *see also MDA City Apts. LLC v. DLA Piper LLP*, 967 NE 2d 424 (Ill App 2012) (adopting reasoning from *Garvy*). The court did not analyze the application of imputed conflicts or even mention Rule 1.10.

(2) **Ohio—*TattleTale Alarm Sys. Calfee, Halter & Griswold, LLP*, 2011 US Dist LEXIS 10412, *22 (SD Ohio 2011).**

In *TattleTale*, the court ruled that the law firm's in-house communications were protected under the attorney-client privilege. However, the court recognized that "from a case law perspective, there is not much on

[its] side of the ledger."[13] Furthermore, *TattleTale* involved a dispute regarding a law firm's failure to pay patent maintenance fees, and the client requesting all loss prevention communications in discovery. The court in *TattleTale* noted that "given the nature of TattleTale's claim—a simple failure to pay patent maintenance fees in a timely fashion—it cannot be said that TattleTale will be unable to collect and put on substantial probative evidence unless it is given access to [the law firm's] loss prevention communications." *Id.* at 16. *Tattletale* did not involve, as here, the law firm's conflict representation without informed consent of its client. The communications Crimson seeks are at the heart of its claims against DWT.

(3) Georgia—*St. Simons Waterfront v. Hunter Maclean*, 2013 Ga LEXIS 614 (July 11, 2013).

The Supreme Court of Georgia found the existence of the attorney-client privilege between firm attorneys in *St. Simons Waterfront,* but specifically acknowledged that such a finding appeared inconsistent with the Georgia Rules of Professional Conduct ("Georgia Rules"). To reconcile that issue, the court relied upon the Georgia Rules' preamble, which specifically states that the Georgia Rules "are not intended to govern or affect judicial application of either

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13 The thrust of TattleTale's analysis is a federal district court struggling to predict what an Ohio state court would do, given that the Ohio Supreme Court "has not recognized a large number of exceptions to the attorney-client privilege." *Id.* at *12.

the attorney-client or work product privilege." Ga Rules of Prof'l Conduct, Preamble, ¶ 19. The preamble also provides that nothing in the Georgia Rules should lead to extra-disciplinary consequences of violating a duty under the rules. *St. Simons Waterfront*, 2013 Ga LEXIS 614, at *15 (citing Ga Rules of Prof'l Conduct, Preamble, ¶ 19). Because of "this clear pronouncement" in the Georgia Rules, the court concluded that the Georgia Rules could not be used to determine whether the attorney-client privilege existed within the law firm. *St. Simons Waterfront*, 2013 Ga LEXIS 614, at *14–15.

The recent Georgia decision sheds little to no light upon the Court's decision in this case. The preamble to Oregon's RPCs does not prohibit the Court from using ethics rules to understand the attorney-client privilege. Unlike Georgia, the Oregon legislature has codified the ORPCs, making them binding upon all Oregon attorneys by statute: "Such rules shall be binding upon all members of the bar." ORS 9.490(1). Furthermore, this Court has ruled that the rules of professional conduct "have the status of law in Oregon." *Kidney Ass'n*, 315 Or at 142; *State ex rel Bryant v. Ellis*, 301 Or 633, 636, 724 P2d 811 (1986). Consequently, this Court has repeatedly used them in non-disciplinary contexts. *See, e.g.*, *Chalmers v. Oregon Auto. Ins. Co.*, 263 Or 449, 455, 502 P2d 1378 (1972) (considering factors set forth in professional conduct rule prohibiting the charging of an excessive fee to determine a reasonable attorney fee in an appeal); *State v. York*, 291 Or 535, 632 P2d 1261 (1981) (considering

a prosecutor's duties under professional conduct rules with respect to issue of the propriety of instructing prosecution witnesses not to talk with defense counsel); *Bryant*, 301 Or at 636 (concluding that circuit courts have authority to disqualify lawyers for representation that is impermissible under the disciplinary rules, notwithstanding that circuit courts are not charged with enforcing those rules).

In many ways, Oregon's ethics code simply aids this Court in determining whether it was objectively reasonable for DWT to think it could represent itself against Crimson while still representing Crimson. DWT had ample knowledge, or should at least be charged with that knowledge, that its representation had resulted in so many ethical problems that its loyalty had shifted from protecting its client, Crimson, to protecting itself.

(4) **Massachusetts—*RFF Family Partnership, LP v. Burns & Levison, LLP*, 465 Mass 702 (Mass 2013).**

The facts and circumstances surrounding the law firm's dilemma in *RFF Family Partnership* ("*RFF*"), differ significantly from the facts in the present case. In *RFF*, the client notified its law firm that it had legal malpractice and breach of contract claims against the law firm and even sent the law firm a draft malpractice complaint. 465 Mass at 704. Within five days of the client's pronouncement that the law firm committed malpractice, the law firm discussed the client's threatened legal malpractice with the law firm's in-house counsel

for ethical and risk management issues and then tried to withdraw from representing the client. *Id.* Nevertheless, the client told the law firm it wanted the firm to continue representing the client. *Id.* at 705. Three months later, the client filed a legal malpractice action and sought discovery of the communications between the law firm's attorneys and designated in-house counsel who had not worked on any matters for the client and who had not billed for the communications. *Id.* The *RFF* court ruled that, under the circumstances in that case, the law firm was entitled to claim the attorney-client privilege in order to defend itself from the threatened claim. *Id.* at 723–24.

In the present case, Crimson is seeking internal DWT communications *before* Crimson's malpractice counsel contacted DWT, and DWT never sought informed consent from Crimson. DWT has presented no evidence that Crimson threatened or even contemplated an action against DWT during the time of these communications.

The *RFF* court's analysis of the Rules of Professional Conduct 1.10 is also fundamentally flawed. To circumvent the application of Rule 1.10(a), the *RFF* court tried to draw a distinction between "outside" clients and "inside" clients, finding that Rule 1.10 does not apply to a law firm who represents an "inside" client. 465 Mass at 719. ORPC 1.10(a) contains no such distinction and states unequivocally that a law firm cannot represent two current clients with conflicting interests. The *RFF* court assumed that all advice with in-house

counsel cannot be disloyal to the outside client because the law firm will always try to determine "how best to address the potential conflict." 465 Mass at 720. This ignores the entire purpose behind conflict imputation, as described above. Moreover, the exact opposite happened here and demonstrates the flaw in *RFF*'s reasoning. DWT failed to provide sound advice to Crimson, never disclosed the problems to Crimson, and instead essentially plotted against Crimson to find a way out of liability and cover up the law firm's mistakes, all while still representing Crimson. That is precisely what Rule 1.10 seeks to prevent—disloyalty with the law firm's ultimate client, Crimson.

The *RFF* court even acknowledged that their holding was not without its limits. The consulting "in-house counsel must not have performed work on the particular client matter at issue or a substantially related matter." 465 Mass at 710. DWT's supposed "in-house" counsel, Johnson, did perform work for Crimson and even billed Crimson for it. Another important factor for the *RFF* court in determining whether the privilege would apply was whether the attorneys billed the outside client for their communications with in-house counsel. *See id.* at 704, 715, 723. It is undisputed that Boundy and Birdwell billed Crimson for their time communicating with the supposed in-house counsel, Johnson.

c. The fiduciary exception does not apply to this case.

DWT incorrectly attempts to pigeonhole Crimson by characterizing Crimson's argument as one necessarily advocating a "fiduciary exception." Opening Br at 25–26, 32–36. Crimson does not rely upon the so called "fiduciary exception," and neither has any other court that has prohibited a law firm from invoking the privilege when representing itself to the detriment of a current client. DWT does not recognize the inherent and significant differences between the facts underlying application of the "fiduciary exception" and the lawyer disloyalty giving rise to the question before this Court.

DWT's attack on the "fiduciary exception" is inapposite and largely irrelevant to the question before the Court. The fiduciary exception arose as a part of trust law in 19th century English courts. *U.S. v. Jicarilla Apache Nation*, 131 S Ct 2313, 2321, 180 L Ed 2d 187 (2011). Under the fiduciary exception, "[t]here is no attorney-client privilege between a [] trustee and an attorney who advises the trustee *regarding the administration of the [trust]*." *U.S. v. Evans*, 796 F 2d 264, 265–66 (9th Cir 1986) (emphasis added). As the U.S. Supreme Court has explained, the fiduciary exception has two distinct rationales: (1) the "real client" of the attorney is the beneficiaries when the trustee seeks legal advice regarding the trust administration and (2) "the trustees' fiduciary duty to furnish trust-related information to the beneficiaries outweighed their interest in the attorney-client privilege." *Jicarilla Apache*

Nation, 131 S Ct at 2321–22 (citing *Riggs Nat. Bank of Washington, D.C. v. Zimmer*, 355 A 2d 709 (Del Ch 1976)); *see also U.S. v. Mett*, 178 F 3d 1058, 1063 (9th Cir 1999) (stating same two rationales). By its terms, the fiduciary exception[14] does not apply to communications regarding claims by the beneficiary against the trustee, and such communications would be protected by the attorney-client privilege. *Jicarilla Apache Nation*, 131 S Ct at 2321; *Mett*, 178 F 3d at 1063–64 (stating "where a [] fiduciary retains counsel in order to defend herself against the [] beneficiaries (or the government acting in their stead), the attorney-client privilege remains intact").

Of all the cases that have found that a law firm's in-house communications are not privileged from discovery by a then-current client, not a single case relied upon the fiduciary exception as the basis for its decision.[15]

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[14] No Oregon court has actually rejected the fiduciary exception to the attorney-client privilege. The case DWT cites for that proposition, *Roberts v. Fearey*, involved a beneficiary of a trust suing the attorney of the trustee for malpractice. 162 Or App 546, 986 P2d 690 (1999). The Court of Appeals only ruled that there was not privity sufficient to enable such a claim, and did not discuss the privilege. At some future date, the Court may decide to adopt the fiduciary exception, though it need not here.

[15] *E-Pass Technologies*, 2011 US Dist LEXIS 96231 (no mention of the fiduciary exception); *Cold Spring Harbor Lab.*, 2011 US Dist LEXIS 77824 (no mention); *Asset Funding Group*, 2008 US Dist LEXIS 96505 (no mention); *SonicBlue*, 2008 Bankr LEXIS 181 (mentions fiduciary exception doctrine but dismisses it as discussed below); *Burns*, 242 FRD at 170 (no mention but does allude to it because case involved the law firm managing a trust and then being sued by the trust beneficiary); *Thelen*, 2007 US Dist LEXIS 17482 (no mention); *Versuslaw*, 111 P3d 866 (no mention); *Koen Book*, 212 FRD 283 (no

In fact, only one of those ten even mentions the fiduciary exception—*SonicBlue*. The law firm in *SonicBlue* argued that its consultations with in-house counsel fell under the exception to the fiduciary exception: "Where a fiduciary seeks legal advice, on its own behalf, not that of the trust, in an effort to defend against beneficiaries' claims of improper trust administration, the attorney-client privilege could be asserted." 2008 Bankr LEXIS 181, at *27–28 (citing *Mett*, 178 F 3d 1058). The Court in *SonicBlue* rejected the analogy to the fiduciary exception, stating that such an analogy "fails to account for the unique attributes of the fiduciary relationship between the firm as the attorney and its client:"

> "First, the very nature of the attorney-client relationship exceeds other fiduciary relationships where the fiduciary must execute its duties faithfully on behalf of its beneficiaries. Attorneys are governed by an ethical code that requires the utmost loyalty on the part of the attorney, including the duty not to represent another client if it would create a conflict of interest with the first client. Second, the scope of [the law firm]'s fiduciary relationship with [the client] included much more than simply administering an ERISA plan as in *Mett*. In *Mett*, the Ninth Circuit recognized that the fiduciary could not assert the attorney-client privilege against its beneficiaries for all matters within the scope of its fiduciary duties—there, the administration of the ERISA plan. Here, however, the scope of [the law firm]'s fiduciary duties were broad-ranging and prohibited [the law firm] from engaging in any activity that was adverse to [the client]'s interests. Applying *Mett*'s reasoning, [the law firm] cannot invoke the privilege as to any matter

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mention); *Bank Brussels*, 220 F Supp 2d 283 (no mention); *In re Sunrise*, 130 F.R.D. at 595 (no mention).

> within that broad scope of fiduciary activities. This would include its failure to comply with its duty of loyalty by entering into a second representation that created a conflict with its representation of [the client].

Id. at *28-29. In other words, what DWT misses by attempting to pigeon-hole this situation into the fiduciary exception is the differences between the relationships of beneficiary, trustee, and the trustee's attorney versus the relationships of a client and the law firm she hired to protect her interests. As *SonicBlue* points out and as discussed above, the unique duties owed by the law firm and its lawyers makes this situation completely different from the situation that the fiduciary exception was fashioned to address.

C. DWT cannot escape the ethical implications of their argument.

To obtain the benefit of the privilege, DWT on the one hand argues that it represented itself against Crimson, and then on the other hand argues that DWT did not offend even the most rudimentary understanding of the ethics rules and attorneys' duty of loyalty. Ignoring that QAC co-chair Johnson directly represented Crimson *and* apparently the firm at the same time, on the same matter, directly adverse to Crimson, DWT tries to shift the Court's focus to whether conflict imputation is discretionary under Rule 1.10. It is not. Likewise, the Court need not incentivize lawyers to comply with their ethical obligations of full and frank disclosure and utmost loyalty—the profession requires it, and the legal system demands it. Failing that, DWT essentially

argues that even with its disloyalty, the circuit court lacked the ability to do anything about it, in direct contradiction to this Court's prior jurisprudence.

1. *Lawyers do not need the protections of the ethics rules, clients do.*

As noted above, ORPC 1.7(a)(1) prohibits a lawyer from representing a client if the representation involves a current conflict of interest. No lawyer in a law firm may represent a client when that representation would be adverse to the client of any other lawyer in the firm; each lawyer associated in a law firm is *presumed* to represent all of the firm's current clients, regardless of whether they are directly involved in the representation of the particular client.

DWT correctly points out that no provision of Oregon law requires a "prophylactic 'screen' of in-house counsel." Opening Br at 44. Not only does Oregon law not *require* such a screen, the Rules of Professional Conduct—which "have the status of law"—do not even *allow* for any such screening for current client conflicts. The Rules of Professional conduct only allow representation with appropriate screening when a lawyer is disqualified from representing a *former* client. *See* RPC 1.10(c).

Without explanation, and apparently ignoring the circuit court's findings and rulings, DWT asserts that the circuit court's conclusion that DWT represented itself in conflict with Crimson "suggested that a conflict was created *simply because DWT sought legal advice.*" Opening Br at 42 (emphasis

added). On the contrary, the circuit court premised its conclusion that DWT's self-representation constituted a conflict of interest on its finding that DWT's internal communications were "adverse" to Crimson. *See* ER 35–36. The circuit court explicitly found that DWT's internal communications concerned DWT's "separate interest" and concluded that the communications evidenced a conflict of interest. At least implicit in the circuit court's ruling is its finding that the communications were adverse to Crimson—conduct which is explicitly prohibited by RPC 1.7(a)(1) and 1.10(a).[16]

Building on its misunderstanding or misrepresentation of the circuit court's rulings and Crimson's arguments, DWT advances the perverse policy argument that unless lawyers are incentivized to seek advice regarding their duties to their clients through protection of the privilege, many lawyers will simply seek to withdraw, thereby harming the client. The possibility that some lawyers might respond to an appropriate interpretation of the attorney-client

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[16] Notably, DWT complains about the circuit court's findings and conclusions but has not provided a copy of the documents listed in DWT's privilege log, which the circuit court reviewed *in camera* and on which the circuit court's findings and conclusions were based. DWT essentially asks this Court to review the circuit court's findings and rulings without providing this Court a record adequate to conduct that review. *Cf. King City Realty, Inc. v. Sunpace Corp.*, 291 Or 573, 582, 633 P2d 784 (1981) ("It is well established that it is the duty of the appellant to designate and bring to the appellate court such portions of the record of the proceedings before the trial court as are necessary to support and establish his content that the trial court committed the error of which the appellant complains on appeal.").

privilege by breaching their duties to their clients in a different way is simply not an appropriate consideration in interpreting OEC 503.

Finally, a fundamental factual premise on which DWT relies no longer holds true, based on the record that has continued to develop in the circuit court since this Court granted the alternative writ of mandamus. DWT argues that, based on case law from other jurisdictions, no conflict should be imputed to a lawyer associated in a law firm when that lawyer has not been directly involved in the representation of the outside client. Even were that an accurate legal premise, the co-chair of the QAC who was consulted regarding possible breaches of duties to Crimson—Bruce Johnson—was *also* directly involved in the representation of Crimson. Johnson reviewed subpoenas that LaserMax served on DWT in the underlying patent litigation and provided advice to Crimson through Boundy and of course billed Crimson for his work.

2. *The circuit court did not "sanction" DWT's lawyers.*

DWT incorrectly argues that *Kidney Ass'n* prohibits a circuit court from considering the disciplinary rules when "depriv[ing] an attorney of a valuable legal right." Opening Br 52–53. It is true that only the Oregon Supreme Court and its designee, the Oregon State Bar, may sanction lawyers for violating disciplinary rules. *Kidney Ass'n*, 315 Or at 144–45. However, as discussed above, circuit courts routinely consider the disciplinary rules in determining

whether a lawyer breached a duty to a client. *See Chalmers*, 263 Or at 455; *Bryant*, 301 Or at 636. In fact, the particular standard of conduct prescribed by the disciplinary rules—a conflict of interest—can be so egregious as to justify a circuit court's decision to hold a lawyer's fees forfeit. *Kidney Association*, 315 Or at 143. Just as in *Chalmers*, *Bryant*, and *Kidney Association*, Crimson did not ask the circuit court to sanction DWT, but rather to consider DWT's conduct and claim of privilege in light DWT's professional duties to Crimson.

Using the ethics rules as a basis for evaluating the objective reasonableness of attorneys' subjective belief that they represent themselves against their own clients does not in any way ask the Court to mete out sanctions. Lawyers do know, or at least should know, that they cannot form an attorney-client relationship that is expressly prohibited by the profession.

D. DWT cannot invoke the work product doctrine.

DWT takes the inexplicable position that a portion of the internal communications made during DWT's representation of Crimson constitute DWT's privileged work product. The work product doctrine protects documents prepared in anticipation of litigation, but not those merely prepared in the regular course of business. ORCP 36 B(3); *Hickman v. Taylor*, 329 US 495, 508, 67 S Ct 385, 91 L Ed 451 (1947); *Brink v. Multnomah County*, 224 Or 507, 517, 356 P2d 536 (1960). The circuit court found that DWT continued to

represent Crimson until late April 2011, and that finding is supported by evidence. *See* SER 46. At the time DWT lawyers engaged in the communications at issue, litigation was neither threatened nor imminent. *See Markwest Hydrocarbon, Inc. et al v. Liberty Mut. Ins. Co.*, 2007 US Dist Lexis 3037, *4 (D Co 2007) (setting forth heightened standard for application of work product doctrine); *Marten v. Yellow Freight Sys.*, 1998 US Dist Lexis 268, *10 (D Kan 1998) (same).

Moreover, for all the same reasons that the attorney-client privilege does not shield a law firm's communications made in conflicting representation with its client, neither does the work product doctrine protect a law firm's internal communications evidencing an undisclosed conflict of interest between the firm and client. Oregon law simply does not shield from disclosure the internal communications that a law firm has in conflict with its client.

CONCLUSION

In a lot of ways, DWT caused its own problem by arguing that it represented itself. Had DWT lawyers just talked amongst themselves about how best to avoid conflicts in the LaserMax suit and how best to protect the interests of their client, Crimson, as ethical and dutiful lawyers do, DWT may have avoided the deeply troubling ethical and legal ramifications of lawyers secretly plotting against their clients. It is their attempt to invoke the privilege

that should give this profession pause and the public concern. The attorney-client privilege should not protect the attorney over the client. As it had for a century before the evidence code and has since, this Court should continue to interpret the privilege in light of its purpose and in furtherance of the administration of justice. Lawyers cannot be allowed to invent an attorney-client relationship to shield them from liability to their clients for their disloyalty.

DATED this 1st day of August, 2013.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count for this brief (as described in ORAP 5.05(2)(a)) is 13,961 words.

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CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that on August 1, 2013 I filed the foregoing PLAINTIFF-ADVERSE PARTY'S ANSWERING BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS AND SUPPLEMENTAL EXCERPTS OF RECORD by electronic filing to:

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I further certify that on August 1, 2013, I served a true and correct copy of the foregoing PLAINTIFF-ADVERSE PARTY'S ANSWERING BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS AND SUPPLEMENTAL EXCERPTS OF RECORD on the following individuals, by electronic mail at the email addresses set forth below:

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