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

SC No. S061086

61086

BRIEF ON THE MERITS AND APPENDIX OF *AMICUS CURIAE* INTERESTED OREGON LAW FIRMS

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Pursuant to ORAP 8.15, the Interested Oregon Law Firms represented herein respectfully submit this *amicus curiae* brief on the merits.

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief is filed on behalf of the following law firms: (1) Ater Wynne LLP, with offices in Portland, Oregon; (2) Bullivant Houser Bailey PC, with offices in Portland, Oregon; (3) Lane Powell PC, with offices in Portland, Oregon; (4) Miller Nash LLP, with offices in Portland and Bend, Oregon; (5) Perkins Coie LLP, with offices in Portland, Oregon; (6) Stoel Rives LLP, with offices in Portland, Oregon; and (7) Tonkon Torp LLP, with offices in Portland, Oregon (collectively the "Amicus Law Firms").

The seven Amicus Law Firms, along with defendant Davis Wright Tremaine LLP ("DWT"), include 615 Oregon lawyers and six of the seven largest law firms in Oregon (by number of Oregon lawyers).[1] The lawyers who practice at the Amicus Law Firms have a strong interest in meeting their professional and ethical obligations. They also have a strong interest in being able to rely on attorney-client privilege when seeking advice from their firms' in-house counsel. Each of the Amicus Law Firms has designated in-house

[1] Portland Business Journal, *Book of Lists*, at 128-130 (2013) (App-1-2).

counsel to advise firm lawyers on professional and ethical matters.[2] The Amicus Law Firms therefore have a significant interest in this case.

Although the Amicus Law Firms take no position on the specific facts of this case, which they do not know beyond what is in the public court filings, the Amicus Law Firms seek to ensure that communications between their lawyers and in-house counsel are protected by the attorney-client privilege and the work product doctrine. This issue directly impacts the ability of Oregon lawyers who practice in law firms (and law firms themselves) to seek confidential legal advice from designated in-house counsel regarding their professional and ethical obligations, as well as the ability of Oregon law firms to encourage their associates and partners to seek such advice promptly and without hesitation. In the Amicus Law Firms' view, ensuring that lawyers and firms have the same attorney-client privilege and work product protection as anyone who seeks legal advice not only is required by Oregon law but is good policy that promotes professional ethics.

II. ADOPTION OF PRELIMINARY SECTIONS OF DEFENDANTS-RELATORS' OPENING BRIEF

The Amicus Law Firms adopt the Statement of the Case contained in Defendants-Relators' Opening Brief.

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[2] The term "in-house counsel" is used herein to refer to lawyers designated by their firms to fulfill that role, regardless of their formal titles.

III. SUMMARY OF ARGUMENT

The Amicus Law Firms urge the court to recognize and enforce the attorney-client privilege in ORS 40.225 as it is written—applicable to everyone, including lawyers who seek legal advice from their firm's designated in-house counsel. Trial courts should not be permitted to disregard the attorney-client privilege and work product protection in civil litigation as an indirect means of enforcing the Oregon Rules of Professional Conduct (ORPC).

As set forth in Defendants' Opening Brief, no conflict of interest arises from consultation by a lawyer or law firm with counsel, whether in-house or outside counsel. But even if a lawyer serving as in-house counsel for a firm has a conflict of interest in advising a firm lawyer regarding a current client under ORPC 1.10 (the imputation rule), then that is a potential disciplinary matter that should be addressed through the ORPC, not through evidentiary rulings in civil litigation. As the body responsible for the ORPC, it would be useful for this court to clarify at some point the ethical rules regarding law firm in-house counsel. In particular, is in-house counsel automatically subject to imputation under ORPC 1.10, and, if so, to what extent and in what manner may actual or potential conflicts be addressed to avoid ethical violations? This is an important professional responsibility issue for Oregon lawyers because many law firms have designated in-house counsel.

The interpretation and application of the ORPC is not the issue in this case, however. Regardless of the correct interpretation and application of the ORPC in disciplinary proceedings, the attorney-client privilege and work product doctrine should be respected and the Evidence Code applied as written. This court has exclusive jurisdiction to enforce the ORPC. The trial court's adoption of an unwritten exception to the Evidence Code as an indirect means of sanctioning lawyers and their firms for an alleged conflict of interest invades that exclusive jurisdiction. Moreover, nothing in Oregon law permits denial of attorney-client privilege or work product protection to a party in civil litigation based on an alleged ORPC violation by the litigant. The "fiduciary duty" exception extended to legal malpractice cases in some jurisdictions is poorly reasoned, bad policy, and inconsistent with Oregon law. Oregon should join other state courts that have rejected such exception under their own state law.

The Amicus Law Firms ask the court to reaffirm the importance of the attorney-client privilege and work product protection in Oregon; recognize that it applies to all civil litigants, including lawyers who have consulted in-house counsel for legal advice; and reverse the trial court's decision creating a "fiduciary exception" as a basis to deny attorney-client privilege and work product protection to Oregon lawyers.

IV. ARGUMENT

A. Designation of In-House Counsel Is Common at Law Firms and Serves Important Individual, Firm, and Societal Purposes

Over the last two decades, it has become increasingly common for law firms to have in-house counsel. Many Oregon firms designate a single lawyer as in-house counsel, while others like defendant DWT designate several lawyers to fill the role. These lawyers' exact titles may vary, but typically the position is a formal one and is akin to the position of in-house general counsel at any organization. *See* Andy Giegerich, *Law Firms Often Take It "In-House,"* Portland Business Journal, at 13 (July 8, 2011) (App-3-4) (discussing role of in-house counsel at Portland law firms).

Like any business, law firms "need legal oversight and expertise," especially law firms with a significant number of lawyers and employees. *Id.* at 16. In-house counsel may review contracts for the firm, address human resources issues, manage the firm's relationship with its professional liability insurer, and handle complaints about individual lawyers or firm practices. In-house counsel also is available to advise partners and associates on professional issues on which they require legal advice, including ethics issues and potential malpractice claims. This includes situations where a lawyer has identified a potential issue on his or her own, as well as situations in which a client has asserted or suggested a possible claim. Indeed, professional liability insurers

often recommend or even require that law firms have general counsel for this purpose. *See id.* at 13.

Individual law firms have different policies and practices regarding in-house counsel, but typical policies and practices suggested or required by insurers oblige the firm or firm management to designate in-house counsel; provide that in-house counsel may not bill clients for work for the firm or firm lawyers related to potential claims by a client; and prohibit retribution against anyone who reports any concern in good faith. In-house counsel may be a full-time position, but in Oregon it is more common for it to be a part-time position with the lawyer continuing to represent other clients. In the latter situation, in-house counsel will not be formally "screened" from matters on which he or she is consulted in the role of in-house counsel (as a true screen would make it impossible for in-house counsel to provide informed advice), but in-house counsel *will* be prohibited by a formal firm policy from participating in the representation of a client with respect to any matter on which in-house counsel is advising the firm or firm lawyers.

The availability of in-house counsel to address ethical issues and potential malpractice claims is intended to improve the quality of legal service, promote professional responsibility, and manage business risk. *See* Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 Notre Dame L Rev 1721, 1758, 1771-72 (2005) (discussing same and noting also that individuals who serve as

firm counsel "tend to be professionally committed to promoting compliance with ethical and legal rules"). Typically, lawyers are affirmatively encouraged to seek advice from in-house counsel rather than trying to resolve a professional dilemma on their own. Lawyers' ethical and professional duties to clients may be easy to describe in the abstract but can be difficult to apply in practice, making it extremely helpful to obtain the confidential advice of firm counsel. Moreover, a lawyer's conduct will inevitably be judged with the benefit of hindsight. The availability of in-house counsel tends to bring potential problems into focus sooner rather than later, creating an opportunity to avoid problems that might otherwise develop in the future. *See id.* at 1757. It also provides ready means for lawyers to seek advice about any potential issue, no matter how minor, and even if it turns out to be baseless or easily resolved, thus encouraging lawyers to take a proactive approach to professional responsibility. *See id.* at 1757-58. Once consulted, the advice of in-house counsel may comfort a lawyer who erroneously believes that a mistake was made, may wake up a lawyer who is not taking a situation seriously enough, or may provide informed guidance on any issue of concern.

The fact that in-house counsel is in-house makes it easy to obtain advice, as compared to needing to hire an outside lawyer. Although qualified outside counsel could serve the same function, in-house counsel is much more convenient and cost-effective. *See* Giegerich, at 13. Indeed, if in-house

counsel were not available, in most cases lawyers would likely try to handle potential issues themselves, alone or possibly calling the Bar to pose a general ethical hypothetical,[3] rather than hiring or asking the firm to hire an outside attorney to advise them based on a detailed disclosure of the situation.

Encouraging lawyers to seek legal advice whenever they have professional or ethical concerns promotes professional responsibility and benefits clients rather than harming them. If communications and work product between lawyers and in-house counsel are not protected, then lawyers are likely to be very wary of seeking advice. As an Ohio court recently explained:

> [I]ndividual lawyers who come to the realization that they have made some error in pursuing their client's legal matters should be encouraged to seek advice promptly about how to correct the error, and to make full disclosure to the attorney from whom that advice is sought about what was done or not done, so that the advice may stand some chance of allowing the mistake to be rectified before the client is irreparably damaged. If such lawyers believe that these communications will eventually be revealed to the client in the context of a legal malpractice case, they will be much less likely to seek prompt advice from members of the same firm.

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[3] The Oregon State Bar offers lawyers "the assistance of its General Counsel's Office to discuss your legal ethics questions," but it expressly cautions lawyers who call that no attorney-client relationship exists, that ethics questions should be posed as hypotheticals to protect client information, and that the Bar may only point to relevant resources and provide "a reaction" to the ethics question posed. "Legal Ethics Assistance for OSB Members," Ethics Home, Oregon State Bar website, www.osbar.org/ethics (as of May 14, 2013). As such, calling the Bar is no substitute for consulting counsel. To the contrary, the Bar itself suggests: "Lawyers seeking legal ethics advice subject to the lawyer-client privilege should consult a lawyer of their choice in private practice." *Id.*

> While consultation with outside counsel might be a fair substitute in some cases, by the time a matter has progressed to the point where outside counsel are called in, it may be too late to protect the client from damage. All of this suggests that, as a practical matter, there are societal values to be served by allowing members of a law firm to converse openly and freely about potential missteps in their representation of a client without worrying about whether the client will eventually be able to use those communications to the lawyer's disadvantage.

TattleTale Alarm Sys., Inc. v. Calfee, Halter & Griswold, LLP, 2011 WL 382627 at *5 (SD Ohio Feb 3, 2011) (paragraph break added).

A number of state courts have recently declined to adopt the "fiduciary exception" to attorney-client privilege and work product protection, in part precisely because it is bad policy. As a Massachusetts trial court recently explained, "Ultimately, it is usually in the interests of both the first attorney and of the client that the ethical issues be examined by a competent advisor who has been fully informed of all relevant facts, with none withheld out of fear that the consultation may not remain private." Order, *RFF Family P'ship, LP v. Burns & Levinson, LLP*, Civ No 12-2234-BLSI (Mass Superior Ct Nov 20, 2012), *on appeal*, No. SJC-11371 (Mass App) (DWT-App-47-48).

Similarly, the Georgia Court of Appeals has declined to automatically impute conflicts of interest to law firm in-house counsel, stating:

> [A]utomatic imputation, *inter alia*, increases the cost of privileged advice by requiring firms to either retain outside counsel or hastily withdraw from the representation. Additionally, this approach discourages firms from seeking

> early advice when problems with clients arise, thereby precluding a robust and frank assessment of potential conflicts and undermining conformity with ethical obligations. And 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.

Hunter, Maclean, Exley & Dunn v. St. Simons Waterfront, LLC, 730 SE 2d 608, 620 (Ga App 2012), *cert granted,* No. S12G1924 (Ga Nov 27, 2012) (internal alterations and footnotes omitted); *see also* Chambliss, 80 Notre Dame L Rev at 1748 (concluding that imputation of conflicts to firm in-house counsel does not further protection of outside clients' interests in loyalty or confidentiality).

These decisions are consistent with the fundamental purpose of the attorney-client privilege, which 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." *Upjohn Co. v. United States*, 449 US 383, 389, 101 S Ct 677 (1981). "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Id.*

Those principles apply equally to lawyers who seek legal advice on professional issues, including potential or threatened malpractice claims, as any other individuals who seek legal advice on business issues. The fact that lawyers are subject to professional discipline if they fail to comply with ethical rules regarding conflicts and other issues, in addition to being subject to civil

liability if they are negligent in their representation of a client, makes it all the more important that lawyers can and do seek legal advice without fear that what they tell their lawyer will later be used against them in a civil lawsuit. If communications with counsel are not privileged, few lawyers would engage in the "full and frank communication" and total disclosure necessary to obtain sound legal advice. To the contrary, a rule defeating privilege would create a negative incentive for lawyers to conceal possible issues and avoid seeking legal advice even though it might prevent a small problem from developing into a much larger one. That does not benefit lawyers or clients.

B. The Evidence Code Governs Application of the Attorney-Client Privilege and Work Product Doctrine, and It Provides No Exception for Lawyers

The issue of attorney-client privilege is and should be governed by the rules of evidence and discovery, not the ORPC. This case is not a Bar disciplinary proceeding. It is a civil lawsuit in which the trial court compelled discovery of communications and work product that would be privileged but for the trial court creating a special exception for lawyers that does not appear in the privilege statute or anywhere else in Oregon law. (ER-49.)

Allowing trial courts to interpret the ORPC and punish attorneys who do not conform to the trial court's interpretation of the ORPC by stripping them of attorney-client privilege and work production protection in civil litigation impinges on this court's exclusive jurisdiction over the disciplinary

rules. "The disciplinary rules are standards adopted by this court to govern the supervision and discipline of attorneys. The professional discipline of attorneys is within the exclusive jurisdiction of this court." *Brown v. Oregon State Bar*, 293 Or 446, 451, 648 P2d 1289 (1982). "Were an interpretation of the rules by the circuit court considered to be binding, the decision would infringe on this court's exclusive jurisdiction to discipline attorneys and establish standards of ethical conduct because the circuit court would be establishing patterns of conduct to which attorneys should adhere."[4] *Id.* at 451-52.

The attorney-client privilege is governed by ORS 40.225 (OEC 503), which is subject to the same standards of statutory interpretation as any Oregon statute. ORCP 36 B(1) limits civil discovery to non-privileged material, and ORCP 36 B(3) limits discovery of work product to narrow situations involving "substantial need" and "undue hardship." This court has made clear that the attorney-client privilege and the work product doctrine apply to in-house counsel as well as outside lawyers, so applying them to law firm in-house counsel is consistent with existing Oregon law. *E.g.*, *State ex rel*

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[4] It should be noted that the ORPC govern the conduct of an individual *lawyer*, regardless of whether he or she practices alone or with other lawyers. *See, e.g.*, ORPC 1.1. A lawyer may be responsible for someone else's conduct in some circumstances, *see* ORPC 5.1 to 5.3, or have someone else's conflicts imputed in some circumstances, *see* ORPC 1.10, but the ORPC ultimately apply on an individual-lawyer basis. By contrast, both individuals and organizations (including law firms) may hold the attorney-client privilege.

Oregon Health Sciences Univ. v. Haas, 325 Or 492, 942 P2d 261 (1997). It is *not* applying them to law firm in-house counsel that requires adopting an exception to Oregon law, based on an alleged ORPC violation by either the lawyer seeking advice or the in-house counsel giving it.[5]

There is no basis in Oregon law to create such an exception. The application of attorney-client privilege and work production protection is truly a matter of state law, and in Oregon the privilege is a matter of statute. As the Georgia Court of Appeals explained when it was recently faced with this issue:

> Georgia has yet to address the applicability of the attorney-client privilege to a law firm's in-house communications concerning a current client. To put it plainly, we are in uncharted jurisprudential waters. And while opinions from other jurisdictions can and often are useful in providing guidance on novel questions of law, our charge as a *Georgia* appellate court is to outline an analytical framework for the issue before us that is, to the greatest extent possible, firmly rooted in this state's statutes, case law, and rules of professional conduct. In our view, none of the decisions from other jurisdictions addressing this issue do so in a way that is entirely consistent with Georgia law.

Hunter, Maclean, Exley & Dunn, 730 SE2d at 619 (emphasis in original).

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[5] *Cf. TattleTale Alarm Sys.*, 2011 WL 382627 at *4 ("[A]ll of the elements of attorney-client privilege—a communication, between a client and an attorney, for the purpose of seeking legal advice, made during the existence of an attorney-client relationship—are present when the typical 'loss prevention' communication takes place. Consequently, TattleTale is asking the Court to recognize an exception to the privilege for these types of communications based on the fact that they took place at the same time that the attorney or law firm was representing the client about which a 'loss prevention' issue has arisen. This conclusion requires the Court to examine Ohio case law to determine under what circumstances Ohio courts are willing to create exceptions to the attorney-client privilege.").

The "fiduciary exception" to attorney-client privilege that some courts have adopted is rooted in the law of trust administration and has been inaptly applied to cases involving communications between law firm lawyers and their in-house counsel. *See In re Sunrise Sec. Litig.*, 130 FRD 560 (ED Pa 1989) (first case to apply the "fiduciary exception" to communications with law firm in-house counsel). In recent years, a number of courts have revisited the reasoning of cases applying the "fiduciary exception" to communications with law firm in-house counsel and rejected such exception. *See, e.g.*, *TattleTale Alarm Sys.*, 2011 WL 382627 at *7-10 (rejecting "fiduciary exception" based on Ohio law); *Hunter, Maclean, Exley & Dunn*, 730 SE2d at 620 (rejecting "fiduciary exception" under Georgia law); *Garvy v. Seyfarth Shaw LLP*, 966 NE 2d 523, 534, 535 (Ill App), *appeal denied*, 979 NE 2d 876 (Ill 2012) (rejecting "fiduciary exception" under Illinois law); Order, *RFF Family Partnership*, Civ No 12-2234-BLSI (rejecting "fiduciary exception" under Massachusetts law) (DWT-App-47-48). This court should do the same under Oregon law.

Oregon has never adopted the "fiduciary exception" related to trust administration, let alone as to law firm in-house counsel communications. There is some indication that Oregon is not inclined to adopt the "fiduciary exception" in trust cases. One of the primary rationales for the "fiduciary exception" is that the trust beneficiaries are the "real client" of the trust lawyer, rather than the trustee. *See United States v. Mett*, 178 F3d 1058, 1063 (9th Cir

1999). In *Roberts v. Fearey*, 162 Or App 546, 553, 986 P2d 690 (1999), however, the Court of Appeals concluded that the lawyer who represented a trustee in the management of a trust was not the lawyer for the beneficiaries and therefore could not be sued by the beneficiaries for legal malpractice. Similarly, the Oregon State Bar's Legal Ethics Committee has opined that "a lawyer for a personal representative represents the personal representative and not the estate or the beneficiaries as such." Oregon Formal Ethics Op 2005-62; *see also* Oregon Formal Ethics Op 2005-119.

Moreover, even courts that have adopted the "fiduciary exception" in trust law typically recognize that it does not apply to communications between the trustee and lawyer regarding non-administrative matters, including actual or potential disputes between the trustee and beneficiaries. *E.g., United States v. Jicarilla Apache Nation*, 131 S Ct 2313, 2321 (2011) (stating that the exception relates to "legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation"); *Mett*, 178 F3d at 1063; *Wilbur v. ARCO Chem.*, 974 F2d 631 (5th Cir 1992); *Spinner v. Nutt,* 417 Mass 549 (1994). Thus, even if Oregon were to adopt a "fiduciary exception" in the legal malpractice context, it should not apply to communications between lawyers and in-house counsel for the purpose of seeking legal advice for the benefit of the lawyers or firm. *See, e.g., Garvy*, 966 NE2d at 535 (stating that fiduciary exception does not apply to "legal advice rendered concerning the personal

liability of the fiduciary or in anticipation of adversarial legal proceedings against the fiduciary"); *MDA City Apts. LLC v. DLA Piper LLP*, 967 NE 2d 424, 430 (Ill App), *appeal denied*, 979 NE 2d 879 (Ill 2012) (holding same).

The Oregon State Bar has publicly taken the position that lawyers may consult their own attorney to obtain privileged advice on ethical issues. *See* "Legal Ethics Assistance for OSB Members," www.osbar.org/ethics ("Lawyers seeking legal ethics advice subject to the lawyer-client privilege should consult a lawyer of their choice in private practice."). It also has formally taken the position that work product relating to the attorney-client relationship or consultation with counsel about a potential disciplinary matter or malpractice claim is protected and need not be produced to the client. A "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" and "[d]ocuments reflecting matters of this type need not be produced to the client." Oregon Formal Ethics Op 2005-125; *see also* Restatement (Third) of the Law Governing Lawyers, § 46, comment c ("[a] lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client"). While the Bar's position is not binding on the court, *see Brown*, 293 Or at 451, it is relevant, and it also

underscores why Oregon lawyers would expect their communications with counsel to be privileged.

Oregon should not create a new "fiduciary exception" to its attorney-client privilege statute. Enforcing the conflicts rules in the ORPC through evidentiary rulings in civil lawsuits conflates two issues that are and should remain separate. It also is inconsistent with the principle that it is the client who holds the privilege. *See In re Teleglobe Comm. Corp.* 493 F3d 345, 368 (3d Cir 2007) ("[T]he black-letter law is that when an attorney (improperly) represents two clients whose interests are adverse, the communications are privileged against each other notwithstanding the lawyer's misconduct.") (citing 8 J. Wigmore, Evidence § 2312)); *Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.*, 743 F2d 932, 937-38 (DC Cir 1984) ("[C]ounsel's failure to avoid a conflict of interest should not deprive the client of the privilege. The privilege, being the client's, should not be defeated solely because the attorney's conduct was ethically questionable.").

For example, if a lawyer representing Client A undertakes the representation of Client B, the interests of Clients A and B subsequently become adverse, and Client A provides information detrimental to Client B's legal interests, the lawyer may violate the ethical rules if he or she continues to represent both clients, but the clients do not lose their privileges as a result. Client B cannot discover communications between the lawyer and Client A just

because the lawyer did not fulfill his or her obligations under the ORPC, whether the conflicted representation was intentional, negligent, or otherwise. Similarly, if in-house counsel represents a firm lawyer (Client A) and then potentially represents an outside client by imputation (Client B), in-house counsel may have an ethical issue if a conflict exists or develops between the firm lawyer and the outside client, but that should not deprive either client of the privilege.

Denying the attorney-client privilege and work product protection also would be unduly punitive. While in-house counsel must be "sensitive to the conflict between his own interests and the interest of [the outside client]," the abrogation of discovery privileges would be unduly punitive." *Neese v. Pittman,* 202 FRD 344, 353 (DDC 2001); *see also TattleTale Alarm Sys.,* 2011 WL 382627 at *6 (finding "no evidence that an Ohio court would exclude certain communications from the ambit of the attorney-client privilege simply due to the lawyer's alleged misconduct or breach of an ethical duty"). For all of these reasons, the court should decline to adopt a "fiduciary exception" for communications with law firm in-house counsel and instead follow the more recent decisions that reject such exception as misguided or untenable under applicable state law.

C. The Trial Court's Ambiguous Description of the Exception It Adopted Makes Matters Even Worse

The trial court's April 2, 2013 opinion in response to the alternative writ of mandamus is particularly problematic. The court adopts a "fiduciary duty" exception that it broadly defines as meaning that "a conflict [with a client] precludes a law firm from relying on the attorney-client privilege to shield its internal communications from disclosure to its former client in a legal malpractice action." (ER-49.) At the same time, the court states that it is attempting to "decide an issue of first impression in Oregon on narrow grounds based on the particular circumstances presented in this case" and that "[i]n other circumstances, a law firm's claim of privilege for certain confidential internal communications might well defeat a former client's request to discover those communications in a legal malpractice case." (ER-50.) The court then suggests that obtaining informed consent from the client, withdrawing from the representation, formally screening in-house counsel from the lawyers representing the external client, *or* hiring outside counsel might be sufficient to enforce the privilege in another case. (*Id.* n.5.)

The trial court has introduced remarkable ambiguity as to when Oregon courts will enforce the attorney-client privilege in civil litigation with respect to communications with law firm in-house counsel and when they will not. Such ambiguity is almost worse than a wholesale exception to the

attorney-client privilege, because it puts lawyers in the position of having no idea whether a communication will be privileged until it is far too late to assess that risk in deciding how to proceed.

The Washington Court of Appeals similarly created unnecessary confusion in Washington law in *VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P3d 866 (Wa App 2005), *review denied*, 132 P3d 147 (Wa 2006). In that case, the court seemingly adopted a "fiduciary duty" exception for communications with law firm in-house counsel based solely on the fact that the defendant had not identified any cases protecting such communications, whereas the plaintiff had cited several "fiduciary duty" cases. *VersusLaw*, 111 P3d at 878-79. The court engaged in almost no analysis, simply indicating that it would be "important" on remand to determine "whether there is a conflict between the law firm's own interests and its fiduciary duty to VersusLaw," including resolving when the outside client terminated the attorney-client relationship and when the law firm knew there was a potential malpractice claim. *Id.* at 879. The court never explained what the trial court should *do* with that information though. *See id.*

"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." *Upjohn*, 449 US at 393; *see also, e.g.*, ORS 40.225(1)(d), comment ("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."). Of course, no exception should be adopted at all under Oregon law.

D. Protecting the Attorney-Client Privilege and Work Product Does Not Encourage Unprofessional Conduct

To the extent that the trial court was concerned that protecting communications between lawyers and in-house counsel would encourage professional misconduct, that concern is unfounded. Rather, failing to protect such communications just punishes lawyers for seeking legal advice, which is bad policy that is both unfair to lawyers and more likely to harm clients than promote professional ethics.

If a lawyer realizes that he or she may have made a mistake in the representation of a client, the lawyer's ethical obligations to the client are the same regardless of whether the lawyer seeks personal legal advice. The consequences of failing to properly address the situation with the client also should be the same regardless of whether the lawyer seeks legal advice. A lawyer who seeks legal advice should not be *worse off* than one who does not, subject not only to disciplinary action but forced to reveal information conveyed in confidence to his or her own attorney.

Such a rule would effectively deprive lawyers of the ability to obtain legal advice on any matter involving a current client, forcing them to either withdraw immediately in order to seek legal advice (if immediate

withdrawal is even feasible) or forge ahead without the benefit of legal advice. In the vast majority of cases, this is more likely to hurt clients than help them. The only time clients will actually benefit from such a rule is if they someday sue the lawyer and, even then, only if the lawyer unsuspectingly relied on the attorney-client privilege to obtain legal advice from in-house counsel.[6] Lawyers would quickly learn not to risk seeking legal advice.

Protection of the attorney-client privilege and work product does not encourage lawyers to violate their professional obligations or conceal wrongdoing. To the contrary, it encourages lawyers to seek advice and counsel and increases the likelihood that they will do the right thing because it increases the likelihood that they will understand what the right thing is. In some cases, consultation with counsel may resolve an issue without any conflict ever arising, for example if in-house counsel concludes that no error occurred. In other instances, the interests of the firm and its lawyers and the client will be well-aligned, with everyone seeking to avoid or minimize any negative impact from an alleged error. The catch is that there is no way to know what the situation will be until legal advice is sought, and legal advice will not be sought in the first place if doing so creates additional risk to the lawyer or firm.

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[6] In this case, the trial court found that the lawyers believed their conversations were confidential and privileged when they consulted counsel. (ER-48.)

Whether a lawyer has an obligation to disclose a potential error to a client or even attempt to withdraw from the representation is a separate matter than whether the lawyer may obtain confidential legal advice just like anyone confronted with a professional dilemma.[7] Lawyers' communications with their own counsel should be subject to the same attorney-client privilege and work product protections in civil lawsuits as anyone else, and it should not matter whether advice is sought from designated in-house counsel or an outside attorney hired by the lawyer or the firm. If the lawyer fails to handle the matter appropriately as to the client, with or without the advice of counsel, he or she is subject to professional discipline, but that should not alter the application of evidentiary privileges in any civil lawsuit that may be filed.

Finally, law firms cannot use attorney-client privilege to "cover up" wrongdoing. The attorney-client privilege does not allow otherwise discoverable *facts* to be withheld. *Port of Portland v. Oregon Ctr. for Environ. Health*, 238 Or App 404, 410-11, 243 P3d 102 (2010); *see also, e.g., Southern Guar. Ins. Co. of Ga. v. Ash*, 383 SE2d 579, 583 (Ga App 1998) ("The privilege

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[7] The possibility of a malpractice claim only necessitates withdrawal (or receipt of informed consent) if it can be shown "by clear and convincing evidence that the lawyer's error, and the pending or potential liability arising from that error, will or reasonably may affect the lawyer's professional judgment," which "conclusion will depend on the facts and circumstances of each case." *In re Knappenberger*, 337 Or 15, 29, 90 P3d 614 (2004); *see also* Oregon Formal Ethics Op 2009-182 (discussing Supreme Court's rejection of "per se" approach in *Knappenberger* and opining that same approach applies when a current client files a bar complaint).

would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure."). "The client still has access to every communication between the client and the firm and to every communication made by the lawyer, whether within the firm or outside of it, that reflects how the lawyer was carrying out the client's legal business. It is hard to conceive of a case where the only evidence of legal malpractice is found within the firm's loss prevention communications." *TattleTale Alarm Sys.*, 2011 WL 382627 at *6.

V. CONCLUSION

For all of these reasons, the trial court should not have created a "fiduciary duty" exception to the attorney-client privilege and work product doctrine under Oregon law. Such an exception is inconsistent with existing Oregon law, impinges on this court's exclusive jurisdiction over disciplinary matters, and is bad policy. The Interested Oregon Law Firms respectfully ask this court to reject the exception adopted by the trial court and reaffirm that everyone is entitled to seek confidential legal advice, including lawyers.

DATED this 30th day of May, 2013.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to ORAP 5.05, I certify that the **BRIEF ON THE MERITS AND APPENDIX OF *AMICUS CURIAE* INTERESTED OREGON LAW FIRMS** is proportionately spaced, has a typeface of 14 points or more, and contains 5,991 words.

Dated this 30th day of May, 2013.

s/ Robyn Ridler Aoyagi
Robyn Ridler Aoyagi

CERTIFICATE OF E-FILING AND SERVICE

I hereby certify that on May 30, 2013, I directed the original **BRIEF ON THE MERITS AND APPENDIX OF *AMICUS CURIAE* INTERESTED OREGON LAW FIRMS** be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system. Participants in the case who are registered appellate court users will be served by the appellate court's electronic filing service.

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I further certify that some participants in the case are not registered users of the court's electronic filing system. I mailed two copies of the foregoing **BRIEF ON THE MERITS AND APPENDIX OF *AMICUS CURIAE* INTERESTED OREGON LAW FIRMS** by First Class Mail, postage prepaid, to the following parties who are not registered users:

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Dated this 30th day of May, 2013.

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