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.	Supreme Court No. S061086 61086 Multnomah County Circuit Court No. 1108-10810

BRIEF ON THE MERITS OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION

On Petition for Writ of Mandamus

Multnomah County Circuit Court
The Honorable Stephen K. Bushong

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I. Introduction

Davis Wright Tremaine's assertion of privilege in this case turns the purpose of the privilege on its head. For over three months after a conflict arose between Davis Wright and its client, the firm continued the representation with no disclosure. It now seeks to shield from the client its internal communications during those months, claiming its own lawyer-client privilege. Recognizing a privilege in that situation would undermine clients' trust that their confidential communications are secure from their adversaries, in contradiction to the aim of the lawyer-client privilege. The conflict rules clearly prohibited Davis Wright from representing itself while representing Crimson Trace. Nonetheless, that prohibited self-representation is the entire basis for Davis Wright's privilege claim. Conflict rules and privilege go hand-in-hand to protect clients from the possibility that their confidences may be used against them. They should not be applied to protect lawyers from their clients' legitimate inquiries.

Davis Wright and *amicus curiae* Interested Oregon Law Firms assert that law firms require their internal communications regarding current-client conflicts to be privileged—against disclosure to their clients—in order to provide high-quality professional services. Most Oregon lawyers, however, adhere to the highest ethical and professional standards without expecting a privilege to shield intra-firm communications from the relevant client. Davis Wright's argument

otherwise is troubling and does not reflect the experience of most lawyers across the state. OTLA appears in this case to advance an application of the lawyer-client privilege that retains as its focus the protection of the client, not law firms.

II. A review of conflict rules as they apply to this case.

As pertinent to this case, the rules prohibiting conflicted representation are clear. Rule of Professional Conduct 1.7(a) addresses conflicts with current clients:

> "(a) Except as provided in paragraph (b), 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
>
> "(3) the lawyer is related to another lawyer ... in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter."

Thus, under RPC 1.7(a)(1), plainly a lawyer cannot concurrently represent adverse clients. Further, under subsection (a)(2), even if clients' are not directly adverse, if the lawyer's responsibilities to one are likely to materially limit representation of another, concurrent representation is prohibited. Subsection (a)(3) addresses familial loyalties.

Paragraph (b) of RPC 1.7 sets out the limited conditions under which representation may be permitted despite a current conflict between clients or between a lawyer and her client:

> "(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> "(2) the representation is not prohibited by law;
>
> "(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
>
> "(4) each affected client gives informed consent, confirmed in writing."

Thus, a lawyer is prohibited from representing adverse clients without each client's written consent, among other requirements.

One more ethical rule bears on the issues in this case. Rule 1.10 provides that current conflicts under Rule 1.7, quoted above, and conflicts based on duties to former clients under Rule 1.9[1] impute to all lawyers at a firm:

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[1] Rule 1.9(a) provides:

> "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing."

> "(a) 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, unless the prohibition is based on a personal interest of a prohibited lawyer or on Rule 1.7(a)(3) and [representation by the firm is not compromised]."

The *only* conditions under which lawyers in a firm may represent a client despite a current conflict within the firm are under the waiver conditions provided in Rule 1.7(b), quoted above, including informed written consent by the clients. RPC 1.10(d) ("A disqualification prescribed by this rule may be waived by the affected clients under the conditions stated in Rule 1.7.").

Importantly for this case, there is no "screen" available to avoid the imputation of a current conflict to a lawyer's entire firm. Under Rule 1.10(c), "when a lawyer becomes associated with a firm," lawyers at the firm generally may not represent "a person in a matter in which that lawyer is disqualified under Rule 1.9," based on the lawyer's duties to her *former* clients. The exception is if "the personally disqualified lawyer is screened from any form of participation or representation in the matter." RPC 1.10(c). That exception to firm imputation does not apply to conflicts established by Rule 1.7—the prohibition on concurrent representation of adverse clients.

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Rule 1.9(b) governs a lawyer's duties to clients of the lawyer's former firm.

III. Conflict rules prohibited Davis Wright from representing itself while it represented Crimson Trace.

Although Davis Wright's interests were adverse to Crimson Trace's interests by December 2010, its representation of Crimson Trace continued until April 2011. Davis Wright makes much of the fact Crimson Trace stopped paying its bill in the fall of 2010 and was consulting with other counsel, characterizing its client's conduct as a "tactical ambush," clandestine, plotting, and secret. Defendant-Relators' Opening Brief, p. 2, 3, 6, 9, 30, 36, 50, 51, 53. It is unclear how a client failing to pay a bill could be a secret to the firm. Regardless, the Court should resolve any factual disagreements consistently with the trial court's decision and therefore should view the record in Crimson Trace's favor. *State ex rel OHSU v. Haas*, 325 Or 492, 498 (1997) ("Because the trial court ordered disclosure of the [allegedly privileged] report, we look at the record in the light most favorable to the order of disclosure.") (citing *State ex rel Ware v. Hieber*, 267 Or 124, 127-28 (1973)).[2] Furthermore, the material facts in this case are undisputed: Crimson

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[2] For example, Davis Wright asserts that Crimson Trace must have known that their interests "could (and surely would) diverge," dismissing its disclosure obligation as a "formality." Defendant-Relators' Opening Brief, p. 50-51. The Court should not infer that Crimson Trace was informed of Davis Wright's conflict; it must infer the facts in Crimson Trace's favor. In any event, Davis Wright misses the point. Its lawyers' ethical obligations did not hinge on their estimation of what the client likely was aware of; the firm and its lawyers could not ethically represent Crimson Trace when its interests were opposed without obtaining Crimson Trace's informed consent. *See* RPC 1.7(a)(2) (personal interest

Trace was Davis Wright's client, and Davis Wright continued to represent Crimson Trace after a conflict arose between them, with no consent to do so by the client.

Davis Wright now claims that during those months of conflicted representation of Crimson Trace, it *also* was representing *itself* concerning the risks of its representation of Crimson Trace. That representation plainly was impermissible under the ethical rules quoted above. Because Crimson Trace was a client of Davis Wright and its lawyers, the firm and its lawyers were prohibited from engaging in any representation "directly adverse" to Crimson Trace or any representation that posed a "significant risk" of "materially limit[ing]" the firm's representation of Crimson Trace. RPC 1.7(a)(1)-(2); RPC 1.10(a). Representing itself while representing Crimson Trace after their interests had become opposed, without the informed, written consent of Crimson Trace, was prohibited by the ethical conflict rules. *E.g.*, *In re Jeffery*, 321 Or 360, 371-72 (1995) (lawyer impermissibly represented client when client's interests were adverse to lawyer's); *see also Reynolds v. Schrock*, 341 Or 338, 350 (2006) ("[L]awyers cannot serve their clients adequately when their own self-interest ... pulls in the opposite direction.") (citing cases).[3]

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conflict); *id.* at 1.10(a) (imputation to firm). There is no exception for unpleasant clients.

[3] The formal ethics opinion cited by Davis Wright is entirely inapposite to the facts and issues presented here. *See* Defendant-Relators' Opening Brief, p. 29

Davis Wright asserts its self-representation in this case without acknowledging the clear rules in Oregon that prohibit it. *See* Defendant-Relators' Opening Brief, p. 42-45 (arguing that there was no conflict because, *inter alia*, "there was no ... simultaneous representation"); *id.* at 47 ("[I]mputation of conflicts is not automatic, RPC 1.10(a), and there are sound reasons not to impute a conflict to DWT.") (citing Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1748 (2005); *Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC*, 730 SE 2d 608, 620 (Ga App 2012)). Davis Wright does not and cannot cite Oregon law supporting its position that there was no conflict of interest when it purported to represent itself in conflict with its then-current client.

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(relying on Ethics Opinion 2005-125). Formal Opinion No. 2005-125, entitled "Client Property: Photocopy Charges for Client Files, Production or Withholding of Client Files," considered a lawyer's duty to "deliver a former client's entire file to the former client." OSB Formal Ethics Op. No. 2005-125, p. 332 (citing *In re Arbuckle*, 308 Or 135 (1989); *In re Chandler*, 306 Or 422 (1988)). The Opinion states in passing that 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 ... need not be produced to the client." *Id.* at 333. The Opinion does not consider the issue here—whether such a note should be considered privileged, and, more importantly, whether the privilege would apply if the lawyer consulted with the co-counsel for the client rather than "the lawyer's *own* counsel," as the Opinion presumes. Even if it is applicable, it is not binding authority. *In re Lathen*, 294 Or 157, 164 (1982) (considering ethics opinion relied on by party, "although, of course, they are not binding authority").

IV. The text and purpose of the lawyer-client privilege do not support a lawyer's privilege to shield intra-firm communications concerning representation of a current client.

Oregon's lawyer-client privilege provides:

> "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 or the client's representative and the client's lawyer or a representative of the lawyer;
>
> "(b) Between the client's lawyer and the lawyer's representative;
>
> "(c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;
>
> "(d) Between representatives of the client or between the client and a representative of the client; or
>
> "(e) Between lawyers representing the client."

ORS 40.225(2). "[T]he burden is on the party asserting the privilege to establish that he or she is entitled to assert it and that the communications that he or she seeks to exclude fall within the scope of the privilege." *State v. Serrano*, 346 Or 311, 325 (2009). Davis Wright contends that because its lawyers sought professional legal services from lawyers on its Quality Assurance Committee, its confidential communications are privileged.

The privilege would arise, however, only because Davis Wright undertook an impermissible representation of itself in conflict with its then-current client.

Recognizing the privilege in that instance is contrary to the text and purpose of the privilege rule. The text indicates that the drafters anticipated that a client's lawyers would confer with each other regarding their client's representation, and deemed those communications privileged. ORS 40.225(2)(e). But, as in all other communications, the *client* holds the privilege, not the lawyers. *Id.* at § 40.225(3) ("The privilege ... may be claimed by the client."); *see also* 1981 Conference Committee Commentary to Oregon Evidence Code Subsection (3) ("The lawyer-client privilege belongs, of course, to the client[.] ... The lawyer may not claim the privilege on the lawyer's own behalf."). Under the text of the statute, the privilege is not available to Davis Wright on its own behalf in these circumstances.

Davis Wright's argument otherwise—that *it* was the client to be protected, not its existing client, Crimson Trace—is not supported by the broader purpose of the privilege. The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" *State ex rel OHSU v. Haas*, 325 Or 492, 500 (1997) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). "Because '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.'" *State v. Ogle*, 297 Or 84, 90 (1984) (quoting *United States v. Osborn*, 561 F.2d 1334, 1339 (9th Cir 1977)). As such, this Court has noted that application of the privilege is largely dictated by its purpose of strengthening the lawyer-client relationship:

> "[T]he evidentiary privileges ... are distinguishable from most other evidentiary rules in that they are designed to limit the search for truth, rather than facilitate its discovery. The resulting loss of relevant evidence is tolerated to protect certain relationships that have been deemed sufficiently important, such as the relationship between ... attorney and client. Generally speaking, the purpose of the evidentiary privileges is to encourage open communications between the persons in the protected relationship, which theoretically, in turn, strengthens that relationship and encourages participation in such relationships."

Serrano, 346 Or at 325, n 6.

As described below, Davis Wright's claimed privilege would not serve those purposes. First, in instances in which a lawyer needs counsel regarding its current client, outside counsel is available to allow the lawyer privileged communications without violating ethical duties. Second, recognizing a privilege here would undermine, not encourage, open communications between clients and their lawyers, who would be entitled to shield from a client their internal conferences regarding that client's representation.

Lawyers facing potential or actual conflicts may have privileged communications with their *own* counsel. Ethical confidentiality rules permit lawyers to reveal client confidences to the extent reasonably necessary to secure

legal advice on the ethical rules or to defend against a claim regarding a client's representation. RPC 1.6(b). Because the lawyer's outside counsel does not represent the lawyer's client, no conflict should arise and, importantly, the extent of client confidences revealed to counsel is limited to those reasonably necessary for the advice sought. *See id.* (allowing a lawyer to reveal information "to the extent the lawyer reasonably believes necessary" to secure the advice sought). For that reason alone, much of Davis Wright's argument that an intra-firm privilege is required to encourage open communications by lawyers who seek counsel falls flat.

The privilege asserted by Davis Wright would undermine client trust in lawyers, weakening the lawyer-client relationship, because it is premised on a necessarily conflicted representation at the original client's expense. The conflict rules go directly to the heart of the privilege—the issue is not simply one of confidentiality, but of confidential information related to a client's legal representation, which could have particularly adverse effects if not guarded in court (via the privilege) or against one's opponents (via conflict rules). *See* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1106-07 (1978) ("[I]t has always been understood that if attorneys were free to divulge confidences out of court that were protected

by the privilege in court, the privilege would be of limited value, if not useless.").[4] In fact, rules against conflicted representation date back at least to the 13th Century, when a London Ordinance banned the practice of "[r]epresenting both sides simultaneously—ambidexterity, as it was known medievally," as well as "representing a client adverse to a former client in the same matter." Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 65, 65 (1998). Undermining conflict rules undermines the privilege as well, because the two work together to protect information about a client's legal representation.

Crimson Trace was Davis Wright's client for the time period relevant to this dispute, intended to be protected by the privilege and the conflict rules. Davis Wright's claim that *it* was a client is based entirely on its violation of Crimson Trace's entitlement to not be unknowingly represented by its opponent's lawyer. It therefore undermines a client's sense of security in confidentially confiding in lawyers, the same security meant to be encouraged by the privilege rules. Davis Wright casts itself as the "client" under the evidentiary privilege rules by asserting that conflict rules are not relevant. But without conflict rules, the lawyer-client

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[4] *See also* Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. at 1106 n 96 ("The only reference to confidentiality in the original *Canons* was in canon 6, which dealt primarily with conflicts of interests and forbad attorneys from accepting employment which might require the divulgence of the client's 'secrets or confidences.'") (quoting Canons of Professional Ethics, Canon 6 (1908)).

privilege becomes a tool for lawyers rather than clients, in plain opposition to its text and purpose.

V. CONCLUSION

For the reasons stated above, OTLA urges this court not to issue the peremptory writ.

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I certify that (1) the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f); (2) this brief complies with the word-count limitation in ORAP 5.05(2)(b); and (3) the word-count of this brief as described in ORAP 5.05(2)(a) is 2,997 words.

I further certify that on August 1, 2013, I filed the foregoing BRIEF ON THE MERITS OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION with the State Court Administrator through the court's electronic filing system and that, on the same date, I served the same document on the party or parties listed below in the following manner(s):

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