IF YOU CAN'T TRUST YOUR LAWYER, WHO CAN YOU TRUST?: WHY CONFLICTS OF INTEREST AND CLIENT LOYALTY REQUIRE AN EXCEPTION TO THE INTRA-FIRM ATTORNEY-CLIENT PRIVILEGE FOR CURRENT CLIENTS

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> "[T]he greatest trust between people is the trust of giving counsel."[1]

> "There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, . . . few more anxiously guarded by the law, or governed by sterner principles of morality and justice . . . ."[2]

I. INTRODUCTION

Trust is the hallmark of the attorney-client relationship.[3] When faced with a troubling legal matter, clients place their trust in lawyers to "zealously" protect their property, liberty, and in some cases their life.[4] It is this unique foundation of trust that creates a fiduciary relationship between the client and the lawyer.[5] "[A]s representatives of clients, officers of the legal system, and public citizens having special responsibilities for the qualities of

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[1] Estate of Re v. Kornstein Veisz & Wexler, 958 F. Supp. 907, 925 (S.D.N.Y. 1997) (punctuation omitted).

[2] Stockton v. Ford, 52 U.S. 232, 247 (1850).

[3] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2013); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. b (2000) [hereinafter RESTATEMENT] ("A client is entitled to be represented by a lawyer whom the client can trust.").

[4] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2013) ("[C]lients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct."); *id.* at pmbl., cl. 9 (defining a lawyers's obligation to zealously protect and pursue a client's interests). This Note will use the Model Rules of Professional Conduct (Model Rules) to provide general understanding of the issues presented. The Model Rules are a compilation of suggested standards of professional conduct proposed by the American Bar Association to promote uniformity among jurisdictions. Most states have adopted their own version of rules or guidelines that are substantially similar to the Model Rules. RESTATEMENT, *supra* note 3, § 1, cmt. b, c. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2013) ("Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."), *with* GA. RULES OF PROF'L CONDUCT R. 1.7(a) (2011) ("A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b)."), *and* MASS. RULES OF PROF'L CONDUCT R. 1.7(a) (1999) ("A lawyer shall not represent a client if the representation of that client will be directly adverse to another client . . . .").

[5] *See* 2 RONALD E. MALLEN ET AL., LEGAL MALPRACTICE § 15:2 (2014); RESTATEMENT, *supra* note 3, § 16 cmt. b.

justice," lawyers are ethically obligated to carry out their responsibility competently and within the bounds of the law and rules of professional conduct.[6] Of lawyers' ethical duties, the foremost are the obligations owed to clients, which include the duty of loyalty, diligence, competence, and candor.[7]

Of these duties, loyalty is most central to the attorney-client relationship.[8] The loyalty that lawyers owe to their clients "is one of the strongest, possibly most absolute, commitments"[9] and is critical for effective representation.[10] The ethical rules attempt to secure the duty of loyalty owed to clients, which is predicated on the belief that "[a] client is entitled to be represented by a lawyer whom the client can trust."[11] This all-important trust is at great risk of being dramatically betrayed if a lawyer continues to represent a client after his interests become directly adverse to that client's. One particularly troubling situation presenting a direct conflict of interest arises when a client threatens his or her attorney with a malpractice claim.

Suppose that after researching a number of firms, a client retains a third-year associate in a prominent 100-lawyer firm to represent him in a commercial real estate transaction. The associate negligently drafted the sales contract, and as a result, the purchaser threatens to rescind. Recognizing that the client may have a malpractice claim against him and his firm, the associate consults and seeks legal advice from the firm's in-house counsel, who also happens to be a partner.[12] The in-house

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[6] RESTATEMENT, *supra* note 3, intro.

[7] ABA House of Delegates, Standards for Imposing Lawyer Sanctions 6 (1992), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf.

[8] MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2013).

[9] Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1263 (2009); s*ee also* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013) (prohibiting lawyers from representing a client where there is a conflict of interest).

[10] Gregory Zimmer, *Suing a Current Client: Responsibility and Respectibility in the Conduct of the Legal Profession*, 11 GEO. J. LEGAL ETHICS 371, 382 (1998).

[11] RESTATEMENT, *supra* note 3, § 121 cmt. b.

[12] As the number of malpractice lawsuits has increased over the years, many large law firms have appointed a partner to serve as the firm's in-house counsel "to provide day-to-day ethics advice, monitor internal policies and procedures, and respond to potential and actual malpractice claims against the firm." Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1721 (2005); *see also* ABA Standing Comm. on

attorney and its firm respond by initiating an investigation into the client's potential malpractice claim. Notwithstanding the duty of loyalty owed to the client, the firm begins building a defense against the client, while the associate continues with the representation. When the client discovers the associate's negligence, he ultimately terminates the attorney-client relationship and sues the lawyer and the firm for malpractice.

During discovery, the client requests that the law firm produce all internal communications regarding the malpractice claim. The law firm objects to production, claiming the communications are protected by the attorney-client privilege as between the firm and its in-house attorney. The important question that arises, however, is whether the attorney-client privilege protects communications between law firms and their in-house counsel concerning potential malpractice liability to a current client.

Until 2012, courts answered this question in the negative, holding that the privilege does not apply in the intra-firm context.[13] In that same year, however, the Georgia Court of Appeals departed from this approach and held that communications between a law firm and its in-house counsel were privileged in this context.[14] Shortly thereafter, the Supreme Judicial Court of Massachusetts and the Supreme Court of Georgia adopted similar positions, holding that the privilege could protect intra-firm communications from discovery by a current client.[15] On the heels of these decisions, the American Bar Association (ABA) encouraged states to adopt its proposed resolution that the attorney-client privilege shields a firm's consultations with a law firm's in-house counsel even if the communications create a conflict of interest between the attorney and the client whose representation is at issue.[16] The proposal further declared that a number of exceptions to the privilege do

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Lawyers' Prof'l Liab., Profile of Legal Malpractice Claims: 2008–2011, at 5 (2012) (showing that the number of malpractice claims filed between 2007 and 2011 increased from 40,486 to 52,982).

[13] *See infra* Part II.C.

[14] Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC, 730 S.E.2d 608 (Ga. Ct. App. 2012), *vacated on other grounds*, 746 S.E.2d 98 (Ga. 2013).

[15] *See infra* Part II.D.

[16] *See infra* Part II.D.

not apply when lawyers seek legal advice from a firm's counsel regarding their own responsibility to clients.[17]

This Note argues that the recent case law and the ABA's proposal to recognize an intra-firm attorney-client privilege fail to properly acknowledge and preserve the duty of loyalty and fiduciary responsibility owed to clients. Accordingly, an intra-firm privilege should protect communications between law firms and their in-house counsel except when such communications concern a firm's potential malpractice liability to a current client. Furthermore, the approach recently adopted by two state courts and proposed by the ABA is unfeasible for smaller firms. Ultimately, this new approach ignores the single most important aspect of the attorney-client relationship: the client. Though this Note advocates a narrower attorney-client privilege for law firms than that afforded to their clients, lawyers must be held to a higher standard than ordinary citizens.[18]

Part II reviews the attorney-client privilege in the intra-firm context and the history of the privilege as applied to law firms in state and federal courts. First, this section explains the attorney-client privilege and the conflicts of interest that arise when a law firm builds a case against an existing client.[19] Next, it examines the refusal of state and federal courts to apply the intra-firm privilege in such cases.[20] Finally, this section analyzes the recent shift towards recognition of the attorney-client privilege for communications between law firms and their in-house counsel in the context of a potential malpractice dispute with an existing client.[21]

Part III then proposes that courts should adopt the "current client" exception to the intra-firm attorney-client privilege, protecting intra-firm communications except in cases of potential malpractice suits concerning a current client. Under this approach, law firms would still be able to conduct internal investigations regarding ethical issues and potential malpractice

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[17] *See infra* Part II.D.

[18] *Cf.* 2 MALLEN ET AL., *supra* note 5, § 20:1 ("An attorney, as a professional, is recognized as having legal knowledge and skill superior to that of the ordinary person, and thus is held to a more demanding standard of care.").

[19] *See infra* Part II.A–B.

[20] *See infra* Part II.C.

[21] *See infra* Part II.D–E.

claims. However, if the firm wishes to protect such investigations from discovery by the current client, it will have to retain outside counsel to represent the firm, withdraw from representation, or obtain the client's informed consent confirmed in writing. Although this proposal is imperfect and denies lawyers a protection that is afforded to their clients, Part IV concludes that adopting the "current client" exception is the better approach.[22]

II. BACKGROUND

A. THE ATTORNEY-CLIENT PRIVILEGE

As the oldest common-law privilege for confidential communications recognized in the United States,[23] the attorney-client privilege protects attorneys and their clients from the compelled disclosure of their confidential communications.[24] By encouraging "full and frank communication" between attorneys and clients, the privilege promotes "the observance of law and administration of justice."[25] Effective counseling and representation of the client requires the full disclosure of the client's reasons for seeking legal representation.[26]

Though all U.S. jurisdictions have their own attorney-client privilege rule or statute, the elements in every state are largely the same:[27] The party asserting the privilege[28] must establish that

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[22] *See* Robert R. Summerhays, *The Problematic Expansion of the* Garner v. Wolfinbarger *Exception to the Corporate Attorney-Client Privilege*, 31 TULSA L.J. 275, 280 (1995) (discussing the current client exception) ("[E]videntiary privileges should only be recognized if the benefits produced by the privileges outweigh the associated costs from the loss of relevant evidence.").

[23] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (John T. McNaughton ed., 1961).

[24] *See* RESTATEMENT, *supra* note 3, ch. 5, topic 2, tit. A, intro. note ("[N]either a client nor the client's lawyer may be required to testify or otherwise to provide evidence that reveals the content of confidential communications between client and lawyer . . . .").

[25] *Upjohn Co.*, 449 U.S. at 389; Fisher v. United States, 425 U.S. 391, 403 (1976).

[26] *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("[The attorney-client privilege] is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

[27] RESTATEMENT, *supra* note 3, ch. 5, topic 2, tit. A, intro. note.

[28] United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989) (citing *In re* Horowitz, 482 F.2d 72, 82 (2d Cir. 1973)).

there was: "(1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice."[29]

The privilege protects the information that the client conveys to an attorney as well as the professional advice that an attorney provides to a client.[30] Protected communications may be written or spoken words, nonverbal communicative acts, or communications made through the use of technology.[31] Common-law privileges are narrowly construed in order to limit the suppression of evidence and avoid hindering the search for the truth.[32] Thus, even if the attorney-client privilege has been asserted, there are exceptions to the privilege where the protection is lost.[33]

The best known exception is the crime-fraud exception, which eliminates the privilege when the client consults counsel for the purpose of obtaining legal assistance in connection with a contemplated or ongoing crime or fraud.[34] For the protection of lawyers, there is also the so-called "self-defense" exception.[35] Under this exception, lawyers may disclose otherwise protected communications with a client to defend himself or herself against a claim by a client or third party or for the purpose of establishing a claim against a client.[36] Another widely accepted exception is

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[29] United States v. Constr. Prods. Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996). The applicable standard for the privilege varies among jurisdictions, but all of the tests are substantially the same. *See, e.g.*, RESTATEMENT, *supra* note 3, § 68 ("[T]he attorney-client privilege may be invoked as provided in § 86 with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.").

[30] RESTATEMENT, *supra* note 3, § 69.

[31] *Id.* § 69 cmt. b.

[32] John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 446 (1982) (quoting 8 WIGMORE, *supra* note 23, § 2291) ("[T]he privilege should be strictly confined within the narrowest possible limits . . . ." (internal quotation marks omitted)).

[33] *See generally* RESTATEMENT, *supra* note 3, ch.5, topic 2, tit. c (addressing the exceptions to and waivers of the attorney-client privilege).

[34] *Id.* § 82; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2), (3) (2013) (enumerating crime-fraud as an exception to client confidentially).

[35] RESTATEMENT, *supra* note 3, § 83; s*ee also* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2013) (allowing lawyers to disclose communications where necessary to defend himself in litigation involving or against the client).

[36] RESTATEMENT, *supra* note 3, § 83 cmt. b; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2013) (allowing lawyers to reveal client confidences in certain situations).

the "Garner Exception," under which shareholders can overcome corporate management's assertion of the attorney-client privilege by showing "good cause."[37] Some jurisdictions also recognize a "fiduciary duty exception," preventing a trustee from claiming the attorney-client privilege when sued by a beneficiary to avoid disclosing communications with a lawyer retained to advise the trustee on carrying out the trustee's fiduciary duties.[38]

Even if no exception applies, the attorney-client privilege may be waived, lost, or unavailable under the circumstances. Communications will not be protected by the privilege if the client, the client's attorney, or the client's authorized agent voluntarily waive or disclaim the privilege.[39] Additionally, the protection will be lost if one of those parties "voluntarily discloses the communication in a non-privileged communication."[40] Other situations do not enjoy the privilege at all, such as when a lawyer jointly represents two or more clients in a matter.[41] Under those circumstances, any client may invoke the privilege against a third person, but a communication will not be privileged as between the jointly represented clients if their interests become adverse in a subsequent proceeding. These limitations on the attorney-client privilege have been particularly important in organizational settings.[42]

B. EXPANDING THE PRIVILEGE: THE CORPORATE AND THE INTRA-FIRM ATTORNEY-CLIENT PRIVILEGE

It has long been established that the attorney-client privilege applies not only to individuals but also to corporations, partnerships, and other organizations.[43] The Supreme Court

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[37] *See* Summerhays, *supra* note 22, at 286 (citing Garner v. Wolfinbarger, 430 F.2d 1093, 1103–04 (5th Cir. 1970)).

[38] RESTATEMENT, *supra* note 3, § 84 cmt. b. Additional exceptions to the privilege exist. *See generally id.* §§ 81, 85 (listing additional exceptions for probate disputes and communications involving a fiduciary within an organization).

[39] *Id.* § 78(l)(2).

[40] *Id.* § 79.

[41] *Id.* § 75.

[42] *See infra* Part II.B.

[43] *See* RESTATEMENT, *supra* note 3, § 73 (defining the privilege for an organizational client); *see also* United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 336 (1915) (applying the privilege to a corporation); Upjohn Co. v. United States, 449 U.S. 383, 397

endorsed a broad application of the privilege in the corporate context based on the need of counsel to ensure employee compliance with the complicated landscape of corporate regulation.[44] Rejecting a narrow application of the privilege that would only protect communications between the corporation's "control group,"[45] the Supreme Court recognized that middle- and lower-level employees are the ones that need legal protection.[46] Further, the Court refused to adopt a bright-line rule, stating that a privilege determination must be made on a case-by-case basis.[47] As a result, the Court in *Upjohn Co. v. United States* held that the corporation's communications with its counsel via its employees were protected because they "concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice."[48]

Like corporations and other organizations, law firms can use the attorney-client privilege to protect communications between its lawyers and the firm's in-house counsel.[49] With the recent increase in legal malpractice,[50] many law firms have designated an experienced attorney within the firm as in-house counsel to advise firm lawyers on ethical and malpractice-related issues.[51] The extension of the privilege to intra-firm communications has not been without limitations. Many courts have held that the attorney-client privilege cannot protect intra-firm communications when a law firm investigates a current client's potential

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(1981) (holding the privilege could apply to communications between a corporation and its in-house counsel).

[44] *Upjohn Co.*, 449 U.S. at 392.

[45] *See id.* at 391 (defining "control group" as officers and agents).

[46] *Id.* at 392.

[47] *Id.* at 396–97.

[48] *Id.* at 394.

[49] *See, e.g.*, United States v. Rowe, 96 F.3d 1294, 1295, 1297 (9th Cir. 1996) (holding the privilege applied to the firm's investigation of its lawyer's potential criminal conduct).

[50] ABA Standing Comm. on Lawyers' Prof'l Liab., *supra* note 12, at 5.

[51] *See* Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 297–98 (1996) (noting the desire to protect intra-firm communications has led to an increase in the number of firm in-house counsel positions). *See generally* Chambliss, *supra* note 12, at 1721–22 (discussing the increase in firms designating in-house counsel to address legal malpractice).

malpractice claim.[52] Courts refusing to apply the privilege in this context reason that the firm's internal communications and investigations create a conflict of interest in violation of ethical rules because the firm is simultaneously representing itself and the current client.[53]

Chief among a lawyer's ethical duties are the obligations owed to clients, specifically, the lawyer's duty of loyalty and duty to avoid conflicts of interest.[54] Both a client and members of the public are entitled to a minimum standard of confidence that lawyers can be trusted to "protect their property, liberty, and their lives."[55] Thus, a lawyer generally may not represent a client if the representation would involve a concurrent conflict of interest because doing so could divide the attorney's loyalties between clients with adverse interests.[56]

A concurrent conflict of interest exists if "the representation of one client will be directly adverse to another client or 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."[57] A concurrent conflict can also arise where representation of one client is adverse to the lawyer's personal or financial interests.[58] Conflicts of interest not only preclude the individual attorney from representing another client with adverse interests but also any conflict is imputed to the lawyer's firm.[59] Accordingly, no other attorney in the firm can represent the adverse client.[60] Nevertheless, if the client gives his or her informed consent, confirmed in writing to the concurrent

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[52] *See infra* Part II.C.

[53] *See infra* Part II.C.

[54] ABA House of Delegates, *supra* note 7, at 6.

[55] *Id.*; RESTATEMENT, *supra* note 3, § 121 cmt. b.

[56] MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013). A lawyer may continue to represent the client if he obtains the client's informed consent confirmed in writing. *Id.*; RESTATEMENT, *supra* note 3, § 121.

[57] MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013); RESTATEMENT, *supra* note 3, § 121.

[58] RESTATEMENT, *supra* note 3, § 125.

[59] MODEL RULES OF PROF'L CONDUCT R. 1.10 (2013) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so . . . .").

[60] *Id.*

adverse representation, the client's attorney or another attorney at the firm may represent the adverse client.[61]

C. THE HISTORICAL APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE TO COMMUNICATIONS BETWEEN LAW FIRMS AND THEIR IN-HOUSE COUNSEL

For decades, courts have addressed whether the attorney-client privilege should apply to communications between law firms and their in-house counsel regarding a current client's potential malpractice claim.[62] In a long line of cases, many courts have rejected the proposal to extend the attorney-client privilege to this context, reasoning that it would be inconsistent with the ethical duties a lawyer owes to his or her clients.[63] In *In re Sunrise*

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[61] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2013) ("Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: . . . each affected client gives informed consent, confirmed in writing."); RESTATEMENT, *supra* note 3, §§ 121, 125 (stating that a lawyer cannot represent a client when there is a conflict of interest unless the affected client consents).

[62] *E.g.*, *In re* Sunrise Sec. Litig., 130 F.R.D. 560, 595–96 (E.D. Pa. 1989).

[63] *See* Cold Spring Harbor Lab. v. Ropes & Gray LLP, No. 11-10128-RGS, 2011 WL 2884893, at *2 (D. Mass. 2011) (holding that the firm's fiduciary duty to the current client overrides the attorney-client privilege regarding the firm's internal communications absent immediate and unequivocal termination of the representation); Asset Funding Grp., L.L.C. v. Adams & Reese, L.L.P., No. 07-2965, 2009 WL 1605190, at *3 (E.D. La. 2009) (same where firm failed to seek conflicts waiver from client); SonicBlue Claims LLC v. Portside Growth & Opportunity Fund (*In re* SonicBlue Inc.), Adv. No. 07-5082, 2008 WL 170562, at *9 (Bankr. N.D. Ca. 2008) ("[A] law firm cannot assert the attorney-client privilege against a current outside client when the communications that it seeks to protect arise out of self-representation that creates an impermissible conflicting relationship with that outside client."); Thelen Reid & Priest LLP v. Marland, No. C 06-2071 VRW, 2007 WL 578989, at *7 (N.D. Cal. 2007) (holding the firm's fiduciary duty to its current client lifted the attorney-client privilege with regard to the firm's internal communications dealing with that client's interests); Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C., 212 F.R.D. 283, 286 (E.D. Pa. 2002) (stating the law firm still owed a duty to the clients while they remained clients and this interest was paramount to the firm's own interest); Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A., 220 F. Supp. 2d 283, 288 (S.D.N.Y. 2002) ("[T]his Court finds that a law firm cannot invoke the attorney-client privilege against a current client when performing a conflict check in furtherance of representing that client."); Nesse v. Pittman, 202 F.R.D. 344, 358 (D.D.C. 2001) (holding the privilege cannot apply against a client); *In re Sunrise Sec. Litig.*, 130 F.R.D. at 595–97 ("[A] law firm's communication with in house counsel is not protected by the attorney client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication.") ("[W]hen a law firm seeks legal advice from its in house counsel, the law firm's representation of itself (through in house counsel) might be directly adverse to, or

Securities Litigation, the court held that the communications between an attorney and the firm's in-house counsel were not privileged from discovery by a current client "if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication."[64]

A few years later, in *Nesse v. Pittman*, the court held that the communications between a law firm and its in-house counsel were not privileged because a conflict of interest was created when the lawyer sought advice regarding ethical obligations owed to a client.[65] Supporting its rule, the court explained that the in-house lawyer, like all partners at the firm, had his own financial interest in the outcome of the case that could be adversely affected should the current client sue the firm for malpractice.[66] Likewise, the court in *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.* held that the privilege did not protect communications between a law firm and its in-house counsel from discovery by a client, explaining that "[a]sserting the privilege against a current client seems to create an inherent conflict against that client." Although the privilege could protect those communications "against all the world," the court reasoned that it could not be invoked against the client.[67] In response to the argument that firms need the protection in order to conduct internal investigations to ensure that they are complying with ethical duties, the court stated that a firm "can still perform its responsibilities under the Code of Professional Responsibility—it just is not protected by the attorney-client privilege."[68]

Following the majority view, the court in *Koen Book Distributors v. Powell, Trachtman, Logan, Carrle Bowman & Lombardo, P.C.* stated that a firm "still owed a fiduciary duty to plaintiffs while they remained clients" and the clients' interests were "paramount to [the firm's] own interests."[69] There, the court

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materially limit, the law firm's representation of another client, thus creating a prohibited conflict of interest.").

[64] *In re Sunrise Secs. Litig.*, 130 F.R.D. at 595–97.

[65] *Nesse*, 202 F.R.D. at 353–56.

[66] *Id.* at 353.

[67] *Bank Brussels Lambert*, 220 F. Supp. 2d at 287.

[68] *Id.* at 288.

[69] 212 F.R.D. 283, 286 (E.D. Pa. 2002).

noted that the firm could have avoided the conflict by promptly withdrawing from the representation or obtaining the client's informed consent to continue representation.[70] Because the firm did neither, the court found that the communications were not privileged.[71]

Though the court in *Thelen Reid & Priest LLP v. Marland* also concluded that the communications between a law firm and its in-house counsel were not privileged from discovery by a current client, it recognized that law firms should seek advice regarding their legal and ethical obligations to current clients, often from the firm's own attorneys.[72] As a result, the court rejected the strict rule adopted in other jurisdictions requiring disclosure of all communications relating to a client and held that such an approach would dissuade attorneys from seeking advice and attempting to comply with ethical obligations.[73] Thus, the court carved out its own application of the privilege, which privileges all communications between a firm and its in-house ethics adviser regarding client matters, except those communications involving conflicts of interest between a client and the firm or attorney.[74] The approach endorsed by these courts was the longstanding majority view, but it has recently been rejected in favor of a more law-firm-friendly approach.

D. AN EMERGING TREND IN THE APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE IN THE INTRA-FIRM CONTEXT

Until 2013, no state court of last resort had addressed whether the attorney-client privilege applies to communications between law firms and their in-house counsel concerning the firm's potential liability to a current client.[75] Recently, however, the Supreme Court of Georgia and Massachusetts held that the

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[70] *Id.*

[71] *See id.* (holding the privilege did not apply where the firm had a conflict of interest with a client and did not withdraw from representation or failed to seek the clients' consent).

[72] No. C 06-2071 VRW, 2007 WL 578989, at *7 (N.D. Cal. 2007).

[73] *Id.*

[74] *Id.* at *8 (citing MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013)).

[75] RFF Family P'ship v. Burns & Levinson, LLP, 991 N.E.2d 1066, 1070 (Mass. 2013); Henry R. Chalmers, *Protecting Communications with Law Firms' In-House Counsel*, *in* 39 ABA LITIGATION NEWS 1, 11 (2013).

attorney-client privilege protected intra-firm communications from discovery by a current client, marking a shift away from the majority view.[76]

1. Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC. In *Hunter, Maclean, Exley & Dunn, P.C.*, the Georgia Court of Appeals addressed as a matter of first impression whether the attorney-client privilege applied to communications between law firms and their in-house counsel when the communications concern a current client.[77] The appeal arose from the law firm's representation of St. Simons Waterfront (SSW) in connection with its development and sale of condominiums.[78] Eventually, several buyers rescinded purchase agreements with SSW. On a conference call with three of the firm's attorneys, SSW expressed anger at the firm for failing to seek enforcement of the contracts through specific performance.[79] The law firm interpreted this finger pointing as a threat that SSW clearly intended to sue the firm for malpractice and "hold the firm responsible for the buyers' rescissions."[80]

Immediately after the call, while still serving as counsel for SSW, the attorneys approached the firm's in-house counsel to report that SSW threatened to sue the firm for malpractice.[81] The next day, the law firm began an internal investigation into the potential malpractice claim and sought new counsel to represent SSW.[82] Yet, the firm struggled to secure replacement counsel and did not formally withdraw from representing SSW until two months later.[83] A week after the conference call, Hunter Maclean contacted outside counsel to represent the firm in the anticipated

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[76] Each court cited Professor Elizabeth Chambliss's rationale for applying the intra-firm privilege in the current client context as support for its holding. *See generally* Chambliss, *supra* note 12 (discussing the benefits of applying the intra-firm privilege).

[77] Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC, 730 S.E.2d 608, 619 (Ga. Ct. App. 2012), *vacated on other grounds*, 746 S.E.2d 98 (Ga. 2013).

[78] *Id.* at 611–12.

[79] *Id.* at 612.

[80] *See id.* The parties disagree about the implication of the conference call. Hunter Maclean interpreted the call to mean SSW intended to hold the firm responsible for the rescissions. SSW could not recall any threat and maintained that it was not looking to bring a malpractice suit against the firm at that time.

[81] *Id.* at 613.

[82] *Id.*

[83] *Id.*

malpractice suit.[84] Meanwhile, Kirby Mason, an attorney at Hunter Maclean, continued representing SSW in its negotiations, all the while participating in the internal investigation of SSW's potential malpractice suit in building the firm's defense.[85] In essence, Mason acted as in-house counsel for the firm against SSW while simultaneously acting as counsel to SSW.[86]

SSW alleged that it was never informed that Hunter Maclean began investigating the potential malpractice suit or that the attorneys representing SSW were simultaneously participating in building the firm's defense to the expected action.[87] Testimony at trial revealed that Hunter Maclean had suggested SSW obtain new counsel because it sensed SSW might bring a malpractice claim.[88] After obtaining new counsel, SSW filed suit against Hunter Maclean for legal malpractice, breach of fiduciary duty, and fraud concerning the firm's representation of the company from 2006 to 2008.[89] The malpractice claim was based on Hunter Maclean's alleged failure to properly advise SSW on the Georgia Condominium Act, draft a form purchase contract, and represent SSW after buyers began rescinding the contracts drafted by the firm.[90] The breach of fiduciary duty claim arose from the manner in which Hunter Maclean handled SSW's buyers' contracts and responded to the initial allegations of wrongdoing by continuing the representation despite the conflict of interest.[91] The fraud claim was based on the firm allegedly concealing its own negligence and other facts related to the breach of fiduciary duty claim.[92]

SSW sought depositions of Hunter Maclean's in-house and outside counsel as well as documents from outside counsel.[93] Hunter Maclean and its outside counsel objected to SSW's discovery requests and asserted the attorney-client privilege. In

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[84] *Id.* at 613–14.
[85] *Id.* at 613.
[86] *Id.*
[87] *Id.* at 615.
[88] *See id.* (stating that the firm felt like SSW might turn on them).
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*

response, SSW filed a motion to compel discovery of the following documents: (1) a letter drafted by one of Hunter Maclean's attorneys analyzing the buyers' rescission claims that was intended for SSW but withheld at the direction of the firm's in-house counsel; (2) a memo drafted by the firm's outside counsel; (3) all written communications between outside counsel and Hunter Maclean; (4) a memo drafted by Kirby Mason for the firm's in-house counsel following the conference call with SSW; (5) all intra-firm e-mails sent within three days after the conference call discussing the need to find another firm to represent SSW; (6) and draft statements and handwritten timesheets showing work by Hunter Maclean's attorneys on SSW's purchase contract, regardless of whether the firm billed SSW for the work.[94] In addition, SSW sought to compel the depositions of the firm's in-house counsel and other attorneys at the firm regarding their understanding and consideration of the state bar rules and the professional rules of conduct in dealing with SSW.[95] The trial court ruled that the attorney-client privilege only applied to the firm's communications with outside counsel and granted SSW's motion to compel the remaining communications.[96]

On appeal, the Georgia Court of Appeals rejected the rule adopted in other jurisdictions that automatically imputes an attorney's conflict of interest to the law firm's in-house counsel, finding that the Georgia Rules of Professional Conduct do not explicitly require such an approach.[97] The court characterized the rule as "draconian" because of its negative effect on law firms.[98] Specifically, the automatic imputation rule would increase the costs to law firms by requiring them to withdraw from representation or retain outside counsel anytime it wants to investigate or get advice about its *potential* malpractice liability to a current client.[99] Accordingly, the majority rule could discourage firms from investigating potential lawsuits against them and seeking early legal advice. The court observed that the firm's

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[94] *Id.* at 616.
[95] *Id.*
[96] *Id.* at 617.
[97] *Id.* at 620.
[98] *Id.*
[99] *Id.*

loyalty to the client would be the same whether it uses in-house or outside counsel, since the firm is adverse to the client in both situations.[100]

Because the communications between the law firm and its in-house counsel raised a conflict-of-interest issue, the court looked to the state's rules of professional conduct.[101] It concluded that "when firm [in-house] counsel individually has no conflict of interest under Rule 1.7 or Rule 1.9, and the in-firm communication meets the ordinary requirements for privilege, . . . courts should not automatically impute a conflict" to the firm's in-house counsel under rule 1.10.[102] The court held that the determination to impute the conflict depends on the nature of the firm's in-house counsel. For example, the conflict should not be imputed when the "firm counsel holds a full-time position and does not represent outside clients."[103] Thus, in order for the attorney-client privilege to apply, the in-house counsel must be employed by the firm and wholly disconnected from representing the client except to the extent necessary to gather information from an attorney previously or currently involved in the client's representation.[104]

The court recognized that situations might arise where a conflict of interest may require a firm to withdraw from representation, which would harm the client, resulting in the violation or implication of other ethical obligations under the rules of professional conduct.[105] When those situations arise, the court advised law firms to provide the client with a written explanation of "the firm's perception and (1) seek the client's informed consent for an immediate withdrawal, . . . and/or (2) seek the client's informed consent to continued representation until such time as the firm can withdraw, with disclosure that the firm will

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[100] *Id.*

[101] *See id.* at 621 (examining Georgia Rules of Professional Conduct Rules 1.7, 1.9, and 1.10).

[102] *Id.* (internal quotation marks omitted) (citing Chambliss, *supra* note 12, at 1748); *see also* GEORGIA RULES OF PROF'L CONDUCT R. 1.10 ("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 Rule 1.7 . . . .").

[103] *Hunter, Maclean, Exley & Dunn*, 730 S.E.2d at 621 (citing Chambliss, *supra* note 12, at 1748).

[104] *Id.* at 622.

[105] *Id.* at 624.

simultaneously take steps to protect its own interests."[106] Further, the court advised that in using the latter option, the firm should segregate its attorneys to insulate those investigating the firm's liability from those continuing to represent the client.[107] The court remanded the case to the trial court to determine "whether the communications at issue otherwise [met] the standard for attorney-client privilege."[108] In *Hunter, Maclean, Exley & Dunn*, the Georgia Court of Appeals became the forerunner of a broader intra-firm privilege rule, extending its protection to communications regarding a current client. Its approach was adopted by the Massachusetts Supreme Court one year later.

2. RFF Family Partnership, LP v. Burns & Levinson, LLP. Following *Hunter, Maclean, Exley & Dunn,* the Supreme Judicial Court of Massachusetts was the first state court of last resort to address the application of the attorney-client privilege to protect intra-firm communications concerning liability to a current client.[109] In *RFF Family Partnership*, RFF retained Burns & Levinson, LLP to represent it in connection with a loan made to a third party and to seek foreclosure when the party defaulted.[110] While Burns & Levinson lawyers Michael MacClary and Francis Perkins were representing RFF in negotiations with a third party, another attorney at the firm, Shephard Davidson, received a "notice of claim" from another law firm, Prince Lobel Tye LLP, informing the firm that RFF intended to file a legal malpractice and breach of contract suit against it.[111] As a result, MacClary, Perkins, and Davidson consulted firm partner David Rosenblatt for advice on responding to the notice of claim.[112] RFF was not billed for the time spent on the internal communications.[113]

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[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *See* RFF Family P'ship, LP v. Burns & Levinson, LLP, 991 N.E.2d 1066, 1070 (Mass. 2013) ("Neither this court nor any other court of last resort in the United States appears to have addressed the applicability of the attorney-client privilege to a law firm's in-house communications concerning a current client.").

[110] *Id.* at 1068.

[111] *Id.*

[112] *Id.* at 1068–69. Rosenblatt was the partner responsible for addressing ethical and risk management issues on behalf of the firm. He had not dealt with any matters for RFF. *Id.*

[113] *Id.* at 1069.

When Burns & Levinson sent a letter to RFF's principal acknowledging the notice of claim and withdrawing from the representation effective immediately, RFF contacted Prince Lobel stating that it was not authorized to file or threaten Burns & Levinson with litigation and that RFF still wanted Burns & Levinson to represent the company in the sale of the foreclosed property.[114] Before it would recommence its representation, Burns & Levinson requested written confirmation from RFF that the company "had not engaged Prince Lobel to bring a claim against [Burns & Levinson] or its attorneys."[115] RFF responded with the requested confirmation, and Burns & Levinson resumed its representation of RFF for the sale of the property.[116]

Nevertheless, once Burns & Levinson concluded its representation, RFF brought suit against the firm for legal malpractice, negligent misrepresentation, and intentional misrepresentation, among other claims.[117] During discovery, RFF sought to depose the Burns & Levinson attorneys that handled its affairs, as well as Rosenblatt.[118] In response, the firm filed for a protective order, asserting that the attorney-client privilege protected from discovery communications with Rosenblatt regarding Burns & Levinson, LLP's reply to the notice of claim.[119] The trial court granted the motion for a protective order and RFF appealed.[120]

Relying on *Hunter, Maclean, Exley & Dunn* and trial court cases from other jurisdictions, the Massachusetts Supreme Court rejected RFF's argument that the communications between Rosenblatt and Burns & Levinson were not privileged.[121] The court concluded that nothing in the language of the ABA Model Rules or the Massachusetts Rules of Professional Conduct suggested that the rule of imputation was intended to preclude a law firm from seeking legal advice from in-house counsel without fear that the communications would be discoverable by an adverse

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[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 1069–70.
[121] *Id.* at 1070–80.

client.[122] Even if the law firm violated Rule 1.7 by simultaneously representing two clients notwithstanding a conflict between them, the presence of a conflict should not prevent the application of the attorney-client privilege.[123] The court stated: "[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."[124] Relying on the "black-letter law," the court asserted that a client should not be penalized for its lawyer's ethical violation of Rule 1.7 by lifting the attorney-client privilege, even where the " 'client' is a law firm and the 'attorney' is an in-house counsel within that same law firm."[125]

In support of its conclusion, the court opined that applying the privilege in this context benefits clients and would encourage firm compliance with ethical obligations.[126] The court recognized that the privilege must have limits and stated that in order for the attorney-client privilege to apply, four conditions must be met:

> (1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel, (2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter, (3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client, and (4) the communications are made in confidence and kept confidential.[127]

Finding that all four of the conditions were satisfied, the court held that the attorney-client privilege protected the communications between Burns & Levinson and Rosenblatt

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[122] *Id.* at 1078.

[123] *Id.* at 1079.

[124] *Id.* (alteration in original) (quoting *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 368 (3d Cir. 2007)).

[125] *Id.*; *see also* MASS. R. PROF. CONDUCT R. 1.7(a) (1999) ("A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.").

[126] *RFF Family P'ship*, 991 N.E.2d at 1080.

[127] *Id.* at 1068.

regarding how the firm should respond to RFF's notice of claim.[128] The day after the court issued this decision, another state supreme court reached a similar conclusion.

3. St. Simons Waterfront, LLC v. Hunter, MacLean, Exley & Dunn, P.C. Most recently, the Georgia Supreme Court has endorsed the trend towards recognizing an intra-firm attorney-client privilege.[129] The court held that the analysis for applying the attorney-client privilege should be applied to the intra-firm context in the same manner as that assessed in every other attorney-client relationship.[130] Furthermore, the court held that the Georgia Rules of Professional Conduct neither govern nor affect the application of the attorney-client privilege, even if a conflict of interest exists between the firm and its client.[131]

The court acknowledged that ethical issues may stem from the principle of imputed conflicts, but found that the ethical rules violated are not relevant to the application of the attorney-client privilege.[132] It supported its finding with the Georgia Rules of Professional Conduct, which expressly note that the rules "are not intended to govern or affect judicial application of [the attorney-client privilege]."[133] Addressing a number of possible exceptions to the privilege, the court rejected the fiduciary exception and its rational that "fiduciary duty trumps privilege."[134] Instead, the court stated that the privilege may be waived if the firm employed in-house counsel "to defraud rather than merely defend" itself against a client.[135] The court summarized its holding as follows:

> [T]he attorney-client privilege applies to communications between a law firm's attorneys and its in-house counsel regarding a client's potential claims against the firm where (1) there is a genuine attorney-client relationship between the firm's lawyers and in-

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[128] *Id.* at 1081.

[129] St. Simons Waterfront, LLC v. Hunter, MacLean, Exley & Dunn, P.C., 746 S.E.2d 98 (Ga. 2013).

[130] *Id.*

[131] *Id.*

[132] *Id.* at 105.

[133] *Id.* at 106 (internal quotation marks omitted).

[134] *Id.* at 107.

[135] *Id.*

> house counsel; (2) the communications in question were intended to advance the firm's interests in limiting exposure to liability rather than the client's interests in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence, and (4) no exception to the privilege applies.[136]

Shortly after this decision, the approaches adopted by the Georgia and Massachusetts courts gained favor with the ABA,[137] which then proposed that all courts and legislatures adopt its proposed resolution, applying the attorney-client privilege to intra-firm communications.[138]

E. THE ABA'S PROPOSED RESOLUTION

On August 12, 2013, following the Georgia Supreme Court and Massachusetts Supreme Court decisions,[139] the ABA adopted a resolution formally backing the application of the attorney-client privilege in the context of communications between law firms and their in-house counsel.[140] The ABA also urged legislative, judicial,

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[136] *Id.* at 108.

[137] *See infra* Part II.E.

[138] *See infra* Part II.E.

[139] The ABA filed an amicus curiae brief in the Georgia case. *See generally* Brief of American Bar Association as Amicus Curiae, St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 746 S.E.2d 98 (Ga. 2013) (No. S12G1924), 2013 WL 3475328 (arguing that the attorney-client privilege should apply to communications between law firms and their in-house counsel).

[140] *See* ABA House of Delegates, ABA H.D. Res. 103 (Aug. 12–13, 2013), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2013_hod_annual_meeting_103.docx ("[T]he American Bar Association urges all federal, state, tribal, territorial, and local legislative, judicial and other governmental bodies to support the following principles that: (a) the attorney-client privilege applies to protect from disclosure confidential communications between law firm personnel and their firms' designated in-house counsel made for the purpose of facilitating the rendition of professional legal services to the law firm (including any legal advice provided by such counsel) to the same extent as such confidential communications between personnel of a corporation or other entity and that entity's in-house counsel would be protected; (b) any conflict of interest arising out of a law firm's consultation with its in-house counsel regarding the firm's representation of a then-current client and a potentially viable claim the client may have against the firm does not create an exception to the attorney-client privilege; (c) the 'fiduciary exception' to the attorney-client privilege (for a fiduciary's communications seeking legal advice regarding ordinary affairs of the fiduciary office), if recognized by the jurisdiction, does not apply to

and other governmental bodies to do the same.[141] The adopted resolution applies the attorney-client privilege to communications between law firms and their in-house counsel, even when those communications are about the potential malpractice liability to a current client.[142]

The ABA is an institution that strives to assure that attorneys act with a high standard of "professional competence and ethical conduct."[143] The ABA has adopted model rules for regulating the legal profession, leading the profession in ethics and professional responsibility for the last century.[144] The ABA adopted the Model Rules of Professional Conduct as a template for uniform nation-wide implementation of the standards of professional conduct.[145]

Notwithstanding its mission, the ABA now advocates for the application of the attorney-client privilege to intra-firm communications concerning a current client, surprisingly maintaining that a law firm's simultaneous representation of itself and a client with which it is adverse does not create an exception to the attorney-client privilege.[146] The ABA further defends the proposed resolution based on a contention that when an attorney represents two clients despite their conflict of interests, the clients are not penalized for the attorney's actions by losing their privilege.[147] Central to the ABA's proposal is the institution's

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confidential communications between law firm personnel, acting on behalf of the law firm in its individual capacity, and the firm's in-house or outside counsel, even if those communications regard the law firm's own duties, obligations, and potential liabilities to a current client; and (d) as a reaffirmation of existing Association policy, confidential communications between personnel of a corporation or other entity and that entity's in-house counsel should be protected by the attorney-client privilege to the same extent as confidential communications with outside counsel would be protected."); *see also ABA Formally Backs Attorney-Client Privilege for Consults with Law Firms' Inside Counsel*, ABA/BNA LAW. MANUAL ON PROF. CONDUCT (Aug. 28, 2013), *available at* http://www.bna.com/aba-formally-backs-n17179876446/ (discussing the ABA's adoption of Resolution 103, which extends the attorney-client privilege to protect from disclosure confidential communications between law firm personnel and their firms' designated in-house counsel for the purpose of providing legal services to the firm).

[141] ABA H.D. Res. 103, *supra* note 140.

[142] *ABA Formally Backs Attorney-Client for Consults with Law Firms' Inside Counsel*, *supra* note 140.

[143] MODEL RULES OF PROF'L CONDUCT, at xi (2013).

[144] *Id.*

[145] *Id.* at xvii.

[146] ABA H.D. Res. 103, *supra* note 140.

[147] *Id.* at 8 (quoting *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 381 (3d Cir. 2007)).

belief that it is necessary to protect intra-firm communications from discovery by a current client in a malpractice suit in order to ensure that lawyers comply with legal and ethical duties owed to clients.[148] Such an antithetical argument should be soundly rejected by courts.

III. ANALYSIS

The recent case law and the ABA's proposal should be rejected. It has long been recognized that lawyers are held to a higher standard of professional responsibility in the practice of law.[149] A lawyer's most important obligations are those owed to clients.[150] Of these duties, loyalty is the most central to the foundation of an attorney-client relationship.[151] Although each state has adopted its own rules of professional conduct, those rules uniformly agree that lawyers must represent their clients with undivided loyalty.[152]

This Note proposes that courts and legislatures adopt an exception to the intra-firm attorney-client privilege, namely, that the privilege does not apply to a firm's internal communications concerning potential liability to a current client. Such a "current client exception" accords with the ethical duties lawyers owe to clients. Furthermore, a current client exception holds lawyers to a higher standard of care than ordinary citizens, which promotes confidence in the legal system. Moreover, the exception softens the structural bias that would result if the privilege could protect large firms, but not small ones, as is the likely effect under the recent case law and ABA resolution. This Note does not advocate that an intra-firm attorney-client privilege should never exist. There is certainly strong justification for allowing the privilege to protect intra-firm communications; however, when the firm's

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[148] *See id.* at 15 ("Prudence in assuring that all appropriate legal and ethical duties arising in a representation are followed may require attorneys to consult in-house counsel about the obligations to the client.").

[149] *See generally* MODEL RULES OF PROF'L CONDUCT pmbl. (2013) (defining the special responsibilities of lawyers).

[150] ABA House of Delegates, *supra* note 7, at 6.

[151] *Id.*

[152] *See* RESTATEMENT, *supra* note 3, § 121 cmt. b ("[T]he law seeks to assure clients that their lawyers will represent them with undivided loyalty.").

representation of itself conflicts with the ethical duties owed to a client, the privilege should be lifted.

A. THE CURRENT CLIENT EXCEPTION COMPORTS WITH A LAWYER'S ETHICAL DUTIES TO CLIENTS

1. The Recent Case Law and the ABA's Resolution Violates the Duty of Loyalty Lawyers Owe to Clients. The attorney-client relationship is predicated upon the client's ability to confide in his attorney with confidence in the attorney's "undivided loyalty and devotion."[153] Accordingly, the relationship is one of society's "most sensitive and confidential relationships."[154] Courts have been uncompromising in their refusal to undermine the duty of loyalty that lawyers owe their clients,[155] recognizing that "an attorney's loyalty to his client is not just a casual obligation to be turned on or off as the dictates of the moment."[156] This loyalty is betrayed when a lawyer continues to represent a client despite a conflict of interest. In order to ensure the trust and loyalty that is essential to the attorney-client relationship, a lawyer is prohibited from taking on a new client whose interests are directly adverse to those of an existing client without informed consent, confirmed in writing.[157] When a lawyer and his firm initiate an internal investigation and begin to prepare a defense to a potential malpractice claim brought by a current client, while continuing to represent that client, the law firm is representing itself in a matter directly adverse to its own client. This scenario presents a clear conflict of interest in violation of the lawyer's and firm's ethical duties.[158]

Despite this conflict, the Georgia and Massachusetts courts and the ABA advocate that the attorney-client privilege should

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[153] Lawrence J. Fox, *Commentary: How We Have Lost our Way*—Galderma v. Actavis, *in* 22 THE PROF'L LAWYER 1, 2 (2013) (quoting Demov, Morris, Levin & Shein v. Glantz, 428 N.E.2d 387, 389 (N.Y. 1981)).

[154] *Id.*

[155] *Id.* at 2 (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)).

[156] *Id.* at 7 n.3 (internal quotation marks omitted) (citing *In re* Evans, 556 P.2d 792, 796 (Ariz. 1976)).

[157] MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1), (b)(4) (2013).

[158] *See, e.g.*, 2 MALLEN ET AL., *supra* note 5, § 16:3 ("A claim of legal malpractice can create a conflict of interests between lawyer and client, resulting in a loss of confidence for the client and impairing the lawyer's independent judgment.").

nevertheless protect the firm's internal communications because the breach of duty to avoid conflicts of interest does not vitiate the privilege.[159] To support this proposition, the ABA cites to the Restatement:

> [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. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved.[160]

In presenting this support for its position, the ABA fails to consider that a tribunal may nevertheless order the discovery of these privileged documents when discovery rules so provide.[161] Even if the lawyer refuses to comply with a discovery order, the duty to inform may require him to disclose matters discussed in the document.[162]

While two adverse clients should not be penalized for their lawyer's failure to avoid a conflict of interest by depriving them of the benefit of the attorney-client privilege,[163] the same justification for preserving the privilege should not apply when the adverse party is the law firm itself. The rationale for preserving the privilege when a law firm represents two adverse clients despite a conflict of interest is that the clients should not be punished for the lawyer's ethical breach under circumstances in which they

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[159] *See* St. Simons Waterfront, LLC v. Hunter, MacLean, Exley & Dunn, P.C., 746 S.E.2d 98, 105–06 (Ga. 2013) (stating that a conflict of interest does not require the attorney-client privilege to be vitiated); RFF Family P'ship, LP v. Burns & Levinson, LLP, 991 N.E.2d 1066, 1079 (Mass. 2013) ("With the exception of the final catch-all remedy of entering an 'other sanction,' none of these remedies includes disclosure of otherwise privileged communications."); ABA H.D. Res. 103, *supra* note 140, at 5 (same).

[160] ABA H.D. Res. 103, *supra* note 140, at 6 (alterations in original) (quoting RESTATEMENT, *supra* note 3, § 46 cmt. c).

[161] RESTATEMENT, *supra* note 3, § 46 cmt. c.

[162] *Id.*

[163] *RFF Family P'ship*, 991 N.E.2d at 1079.

reasonably expected that their communications with the lawyer would be kept confidential.[164] However, when the law firm is the adverse client, there is no justification for not penalizing the law firm for violating the duty to avoid conflicts. In contrast to the two adverse clients who are affected by the lawyer's conflicted representation, the lawyer and the firm in the situation at issue are aware of the conflict and have consciously chosen to represent themselves against their own client.

Additionally, a lawyer may not represent a client if there is a substantial risk that the lawyer's financial or other personal interests would materially or adversely affect the representation of the client.[165] An attorney-client privilege that protects intra-firm communications concerning potential liability to a current client enables lawyers to put their interests above those of their clients. Even if the firm's in-house attorney has no connection to the client and is paid by billing the firm and not the client,[166] as an employee of the firm, that lawyer nevertheless has a financial interest in the outcome of the malpractice suit that could materially affect the firm's representation of the client.[167] In-house attorneys depend on the success of the firm for their livelihoods because the firm is their sole client.[168] As such, in-house counsel do not share the same independence as an outside attorney for the firm. Unlike outside counsel, an in-house lawyer, as a member of the law firm,

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[164] *See supra* note 125 and accompanying text (stating that a client should not be deprived of the privilege because of their attorney's ethical violation).

[165] MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2), cmt. 10 (2013).

[166] *See RFF Family P'ship*, 991 N.E.2d at 1068 (requiring time spent by in-house counsel to not be billed to the client); Chambliss, *supra* note 12, at 1749 ("Compensation is the clearest way to demarcate the role of the firm counsel.").

[167] *See* 2 MALLEN ET AL., *supra* note 5, § 16:2 ("The independence of a lawyer's judgment can be affected if the lawyer has a business, financial, property or personal interest in the subject matter of the representation.").

[168] *See* Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A., 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002) ("[B]ecause [corporate in-house counsel] are employees of their client, and their livelihood depends on that single corporate client, in-house counsel are not as independent as outside counsel." (quoting Janet J. Higley et al., *Confidentiality of Communications by In-House Counsel for Financial Institutions*, 6 N.C. BANKING INSTS. 265, 280 (2002) (internal quotation marks omitted))).

owes a duty of loyalty to the existing client by imputation,[169] and to the law firm as his client.[170]

Furthermore, policy reasons justify vitiating the privilege in this context. If lawyers and firms know that the privilege can shield their actions, they do not face the same repercussions as they would in the absence of one because the privilege often can prevent the exposure of the truth.[171] In turn, the firm's ability to suppress the truth weakens the client's ability to prove the firm's malpractice liability. An attorney-client privilege that shields client-related information from discovery undermines the basic concept of the privilege and "would allow the perpetration of frauds" by hindering access to the truth.[172] Allowing for protection of intra-firm communications incorrectly places the law firm's interests over those of its clients.[173]

2. Protecting Intra-Firm Communications from Discovery by a Current Client is Self-Serving. Though the attorney-client privilege may protect the client's communications with his attorney from compelled disclosure, the law permits the attorney to reveal such communications in certain situations. For example, under the "self-defense" exception, a lawyer can disclose privileged information notwithstanding the duty of confidentiality where needed to defend himself in litigation against a client.[174] Without a self-defense exception, attorneys would have no shield against false charges nor sword to assert claims against clients who refuse

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[169] MODEL RULES OF PROF'L CONDUCT R. 1.10 (2013).

[170] *See* Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C., 212 F.D.R. 283, 286 (E.D. Pa. 2002) (stating the law firm still owed a duty to the clients while they remained clients and this interest was paramount to the firm's own interest).

[171] *See* Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 910 (2006) (noting the attorney-client privilege hinders the ability to discover the truth).

[172] Valente v. PepsiCo, 68 F.R.D. 361, 369 (D. Del. 1975); *see also* Chambliss, *supra* note 12, at 1727 (recognizing the concern that protecting communications with in-house counsel will result in the funneling of otherwise unprotected information through the in-house counsel in order to create a "zone of silence"); Amy L. Weiss, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 GEO J. LEGAL ETHICS 393, 398–407 (1998) (reviewing cases where courts were concerned with the "zone of silence").

[173] *See Koen Book Distribs*., 212 F.R.D. at 286 (stating the duties a law firm owes to its clients are paramount to the firm's own interests).

[174] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (permitting lawyers to reveal client confidences in certain situations).

payment.[175] While this exception has drawn criticism for being "scandalously self-serving and a slap in the face to clients,"[176] the ABA and the Georgia and Massachusetts courts assert that intra-firm communications should likewise be protected from discovery and disclosure by a client in a malpractice suit. This means lawyers and more generally, law firms can "have their cake and eat it too," because they can use privileged communications with their client in self-defense *and* keep their intra-firm communications secret from their client. Thus, the Georgia and Massachusetts courts and the ABA are granting lawyers an unprecedented level of self-protection to the detriment of the client.

This expansion of the attorney-client privilege guarantees that lawyers and their firms are protected by the privilege when sued for malpractice, yet their clients are not afforded an equal protection in such cases. Because layers are protected by the self-defense exception, a rule limiting the attorney-client privilege when firm communications with in-house counsel relate to the representation of the client would place attorneys and clients on more equal footing. The courtroom should be a neutral battleground meant to secure justice and prevent wrongdoing, and privileges are historically narrowly construed to avoid hindering the process.[177] Recognizing an additional protection for law firms distorts the purpose of litigation and the sanctity of the attorney-client relationship, elevating the lawyers' interests over the clients' they are sworn to represent.

B. LAWYERS MUST BE HELD TO A HIGHER STANDARD

Clients rely on lawyers "to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct."[178] The attorney-client relationship is a fiduciary relationship[179] more sacred and essential than others,[180] requiring

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[175] RESTATEMENT, *supra* note 3, § 83 cmt. b.

[176] Chambliss, *supra* note 12, at 1753 (internal quotation marks omitted).

[177] *See generally* 75 AM. JUR. 2D *Trial* § 130 (2014) (discussing the need for a trial to be impartial).

[178] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2013).

[179] *E.g.*, 2 MALLEN ET AL., *supra* note 5, § 15:2.

a high standard of faithfulness to clients.[181] As representatives of clients, officers of the court, and public citizens, lawyers play an integral role in the administration of justice.[182] The obligations lawyers owe to clients are evidence of the unique role attorneys play in society.[183]

Often lawyers must make sacrifices to serve their clients and promote confidence in the legal system.[184] Membership in the bar is an "ancient fellowship," conditioning the lawyer's privilege to practice on his commitment to serve the client, the court, and the community above himself.[185] Despite the high standard accompanying the progression, law firms seek the same protection given to ordinary individuals and corporations, arguing that the attorney-client privilege is necessary to ensure compliance with ethical rules.[186] Unlike ordinary people and businesses, however, lawyers possess special knowledge and skill in the area of law.[187] Thus, lawyers and firms are expected to know, understand, and follow the law, unlike lower-level employees of a corporation that

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[180] SonicBlue Claims LLC v. Portside Growth & Opportunity Fund (*In re* SonicBlue Inc.), Adv. No. 07-5082, 2008 WL 170562, at *10 (Bankr. N.D. Cal. 2008).

[181] Brief of Amicus Curiae Ass'n of Corporate Counsel (ACC) in Support of Plaintiff-Adverse Party Crimson Trace Corporation, at 11, Crimson Trace Corp. v. Davis Wright Tremaine LLP, 353 Or. 430 (2013) (No. S061086) ("However high a standard the law impose on a fiduciary, it requires even more from a lawyer serving its existing client."); *see also* 2 MALLEN ET AL., *supra* note 5, § 20:1 ("An attorney, as a professional, is recognized as having legal knowledge and skill superior to that of the ordinary person, and thus is held to a more demanding standard of care.").

[182] RESTATEMENT, *supra* note 3, intro.

[183] Balla v. Gambro, Inc., 584 N.E.2d 104, 108 (Ill. 1991); *see also* Fox, *supra* note 153, at 2 ("Because of the role attorneys play in the vindication of individual rights in our society, they are held to the highest standard of ethical behavior."); Lonnie T. Brown, Jr., *Civility and Collegiality—Unreasonable Judicial Expectations for Lawyers As Officers of the Court?*, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 324, 352–59 (2012) (discussing the unique status lawyers hold as officers of the court).

[184] *See, e.g.*, RESTATEMENT, *supra* note 3, § 125 cmt. e ("[A] lawyer's right to freedom of expression is modified by the lawyer's duties to clients.").

[185] Brown, *supra* note 183, at 352 (quoting People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928)).

[186] *See generally* Chambliss, *supra* note 12 (discussing the benefits of the intra-firm privilege and its effect on ethical compliance).

[187] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2, cmt. 2 (2013) ("Clients defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.").

"constantly go to lawyers to find out how to obey the law."[188] Additionally, given the unique nature of the attorney-client relationship, "a law firm's consultation with [in-house] counsel may cause problems of conflicting fiduciary duties which seldom arise in corporations or other professional associations."[189]

Yet, the ABA dismisses the heightened standard imposed on lawyers, asking why the attorney-client privilege should not "apply to law firms just like anyone else."[190] The ABA's position forgets the unique conditions placed upon attorneys by virtue of the special place they occupy within the judicial process as an officer of the court.[191] As members of this noble profession, attorneys may not abuse their power, erode confidence in the judicial system, and place themselves above those whom they are supposed to protect.[192] "What distinguishes [lawyers] from other business pursuits is how [they] treat, and remain accountable, to those who trust [them]."[193]

Not only are attorneys, as officers of the court, bound to uphold the integrity of the court, they are also required to maintain personal integrity in the eye of the public.[194] With the "widespread criticism of the quality of legal services,"[195] now greater than ever, courts must hold lawyers to the highest ethical standards already in place to promote confidence in the legal process. By allowing law firms to protect intra-firm communications from discovery by a current client, the ABA and the Georgia and Massachusetts courts place lawyer self-protection above the interests of the clients that

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[188] Upjohn Co. v. United States, 449 U.S. 383, 392 (1981) (internal quotation marks omitted) (quoting Bryson P. Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901, 913 (1969)).

[189] *In re* Sunrise Sec. Litig., 130 F.R.D. 560, 595 (E.D. Pa. 1989).

[190] Chalmers, *supra* note 75, at 12.

[191] *See* Brown, *supra* note 183, at 356 ("[T]here are some things that [lawyers] simply cannot do.").

[192] *See* Susan Saab Fortney, *Law As a Profession: Examining the Role of Accountability*, 40 FORDHAM URB. L.J. 177, 215 (2012) ("What distinguishes [lawyers] from other business pursuits is how [they] treat, and remain accountable, to those who trust [them].").

[193] *Id.*

[194] Brown, *supra* note 183, at 363 (quoting Smith v. Johnston, 711 N.E.2d 1259, 1263–64 (Ind. 1999)).

[195] Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329, 361 (1995); *accord* Fortney, *supra* note 192, at 210 n.176 (noting that a survey showed members of the public believe lawyers put their own self-interest ahead of their clients).

they represent.[196] Such an approach will undermine society's confidence in the legal system.

There are certainly recognized benefits of having in-house counsel for a law firm. Most importantly, it encourages lawyers within the firm to seek legal advice early and promotes the ethical infrastructure of the firm.[197] Law firms can, and should, provide their lawyers with ethical advice and promote compliance with the law by creating an in-house counsel position. Lawyers can still perform their responsibilities and comply with the rules of professional conduct; however, when communications within the firm relate to the investigation or preparation of a defense against an existing client's potential malpractice claim, the attorney-client privilege cannot be a shield.[198] Employing in-house counsel or addressing ethical issues "is in law firms' economic self-interest; thus, we need not hold out the privilege as a carrot."[199] Law firms, based on the very nature of their role in the legal profession, need no incentive to defend themselves in a malpractice suit nor to seek legal advice regarding ethical conflicts.

Although a lawyer's conflict of interest is imputed to the lawyer's firm,[200] the recent case law asserts that the firm's in-house counsel should be exempted from imputation.[201] Even if law firms insulate in-house counsel from the rest of the firm by implementing a full-time in-house counsel position that does not represent outside clients, this approach still fails to overcome the

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[196] The ABA has been criticized for taking a more "lawyer friendly" stance. *See* Fortney, *supra* note 192, at 195 (criticizing the ABA for requiring lawyers to disclose lack of insurance on registration statements but not directly to clients); Fox, *supra* note 153, at 6 (criticizing the ABA's Ethics 2000 Commission for recommending firms place an open-ended prospective waiver in their retainers over a more client-protective standard of informed consent). The former ABA president also cautioned the ABA to consider that the adoption of its 2008 mission conveys to the world that the ABA is guided by the interest of attorneys. *House of Delegates Passionately Debates ABA's Goals*, A.B.A. J., Aug. 12, 2008, *available at* http://www.abajournal.com/news/article/house_of_delegates_passionately_debates_abas_goals/.

[197] Chambliss, *supra* note 12, at 1758.

[198] *See* Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A., 220 F. Supp. 2d 283, 288 (S.D.N.Y. 2002) (noting that firms can still provide ethical advice and promote compliance with the rules of professional conduct without the privilege).

[199] Chambliss, *supra* note 12, at 1763.

[200] MODEL RULES OF PROF'L CONDUCT R. 1.10 (2013).

[201] *See supra* notes 97, 123, 132 and accompanying text (stating that even though the principle of imputed conflicts may present ethical problems, the ethical rules are not relevant to the privilege).

concept of imputation: when a client retains the services of a lawyer, it retains the entire firm, including the in-house counsel.

Opponents of a current client exception maintain that imputing the law firm's conflict of interest to the in-house counsel forces the firm to "retain outside counsel or withdraw from the representation," which increases the firm's operational costs.[202] Opponents argue that the chief consequence of this increased cost will discourage firms from seeking legal advice early, or at least assuming that the firm's internal communications are not memorialized in writing or an e-mail.[203] Central to the position taken by opponents of a current client exception, this argument fails to acknowledge that a client's interests are paramount to the firm's own.[204] Accordingly, the law should not protect a law firm's financial interests to the detriment of a client, especially when such a consequence may stem directly from the firm's malpractice in representing that client.

As discussed above, it is in a law firm's own interest to seek legal advice early and resolve malpractice disputes. Because a firm's success and livelihood depends largely on its reputation in the legal community, firms will act in a self-protective manner to save face, even in the absence of any privilege. Firms will not be deferred by the cost of retaining counsel from resolving disputes quickly and properly. Thus, this "chief consequence" is not as great as opponents claim. Additionally, if courts were to rule that the conflict of interest should not be imputed to the firm's in-house counsel, such an approach would allow large firms—but not small firms—to be protected by the intra-firm attorney-client privilege.

C. THE CURRENT CLIENT EXCEPTION ELIMINATES STRUCTURAL BIAS AMONG FIRMS

By protecting a law firm's communications with in-house counsel from discovery by a current client, large firms are granted a protection that cannot be equally afforded to small firms. In a proposed solution to preserving the intra-firm attorney-client

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[202] Chambliss, *supra* note 12, at 1747.

[203] *Id.*

[204] Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C., 212 F.R.D. 283, 286 (E.D. Pa. 2002).

privilege in a malpractice suit brought by a current client, Professor Elizabeth Chambliss suggested that the scope of the privilege, based on the imputation of conflict under Rule 1.10, should turn on the facts of the representation at issue. Her proposal has three levels: (1) "Where firm counsel holds a full-time position and does not represent outside clients, courts should not impute a conflict under Rule 1.10"; (2) "Courts also should not impute a conflict to part-time firm counsel where the lawyer who serves in that capacity does so on a formal, ongoing basis, such that the firm is clearly established as the client before the in-firm communication occur"; and (3) "Lawyers who act as firm counsel on a one-shot or ad hoc basis should be subject to imputation unless the firm can show that an attorney-client relationship was established before the in-firm communication occurred."[205]

Chambliss's proposal favors large firms over small firms in two ways. First, even if courts were to decide that imputation were inapplicable to in-house counsel, this would only grant protection to large firms, as smaller firms would have great difficulty establishing a special, insulated in-house counsel position. In a large firm of 100 lawyers or more, shielding an in-house counsel from outside client confidences may be more feasible, such that outside clients' representation will not be materially or adversely affected. Conversely, in a small firm of ten to thirty lawyers, shielding an in-house lawyer from outside client cases would be nearly impossible. Thus, while large firms will be able to handle malpractice claims in-house and protect internal communications from discovery by current clients, small firms will have to resort to outside counsel if they want communications to remain privileged.

Second, as a result of the structural bias, small firms will incur greater financial costs by hiring outside counsel than large firms, putting small firms at an even greater disadvantage. Generally, small firms have fewer financial resources than large firms for retaining outside counsel. Additionally, to the extent that the privilege potentially allows firms to hide unethical conduct, small firms would be more exposed to liability than large firms. Addressing this bias, Chambliss contends that "[s]mall firms may be unlikely to need permanent full- or even part-time firm counsel,

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[205] Chambliss, *supra* note 12, at 1748–49.

and may be less likely to compensate partners for ad hoc advising."[206] However, this point lacks evidentiary support.[207] Although a study by Chambliss showed that "firms' investment in the in-house position was not directly correlated with size, but rather appeared to depend significantly on firm culture and management philosophy,"[208] the limitations posed by firm size and the influence of firm size on firm culture are evident.

D. RECOGNITION OF A "MIDDLE GROUND"

Lawyers, even very good ones, make mistakes, and it is understandable that when such mistakes occur, lawyers should be able to seek the advice of a colleague. The need to make rational decisions in light of potential liability and to seek advice on how to resolve such issues justifies striking a balance between protecting the firm's internal communications from discovery by a current client and not protecting them at all. Some may assert that a complete current client exception goes too far and conversely argue that courts should adopt a more moderate approach.

For example, if courts and legislatures find that the intra-firm communications must be afforded some protection, the privilege should only apply to the initial conversation in which the firm's lawyer informs the in-house counsel of the potential malpractice claim. Under this proposal, any intra-firm communications after this point will not be protected from discovery by the current client, and it is within the discretion of the in-house counsel to hire outside counsel to represent the firm. While this proposal attempts to provide courts with a "middle ground," it would be difficult to draw a line between communications that are and are not protected because the facts defining the "initial" conversation would likely be different in every case. Such a case-by-case determination lacks predictability and could subject law firms to greater liability when damaging communications are exchanged with the expectation that such information would have been afforded protection. Additionally, lawyers could creatively craft around this blurred line, finding a loophole. Furthermore, this

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[206] *Id.* at 1761.
[207] *Id.*
[208] *Id.*

approach fails to overcome the justification for rejecting the application of the privilege in a case against a current client as previously discussed in this Note: lawyers must place clients' interest above their own.

Thus, while this "middle ground" approach appears to be a possible solution, courts should decline to adopt such a malleable standard.[209] It is better to adopt an approach that allows for predictability and puts law firms on notice of when communications will and will not be protected. Accordingly, courts should adopt the proposed "current client exception." Not only will such an exception create a clear standard for law firms and courts, but it will also serve the long established principle that a lawyer's most important ethical duties are those owed to clients.[210]

IV. CONCLUSION

Clients pay lawyers to advocate *for* them, not against them.[211] They trust deeply that their lawyers will zealously protect and pursue their interests.[212] Based on this profound trust, "the law seeks to assure clients that their lawyers will represent them with undivided loyalty."[213] This duty of loyalty requires lawyers to put their clients' interests above their own.[214] Thus, this duty of loyalty prohibits law firms from hiding behind the intra-firm attorney-client privilege when faced with a potential malpractice claim by a current client.

While communications between law firms and their in-house counsel can be protected by an intra-firm attorney-client privilege, courts should adopt an exception to the privilege when the communications concern the firm's potential liability to a current

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[209] Upjohn Co. v. United State, 449 U.S. 383, 393 (1981) ("An uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all.").

[210] ABA House of Delegates, *supra* note 7, at 6.

[211] Brief of Amicus Curiae ACC, *supra* note 181, at 1.

[212] MODEL RULES OF PROF'L CONDUCT, at pmbl. (2013).

[213] RESTATEMENT, *supra* note 3, § 121 cmt. b.

[214] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013) (stating a conflict of interest exists if there is a "significant" risk that the representation will be affected by the lawyer's own personal interests); Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C., 212 F.R.D. 283, 286 (E.D. Pa. 2002) (stating the duty a firm owes to a client is paramount to its own interests).

client. Lawyers and law firms[215] are ethically obligated to refuse or discontinue representation of a client if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own financial or personal interests, or if the representation of one client would be materially or adversely affected by the lawyer's duties to another client.[216] When a law firm represents itself in a malpractice suit brought by a current client, the firm is not only taking on itself as an adverse client, but is also putting its own interests above those of the client. The existence of such an ethical violation cannot allow law firms to shield their internal investigations and communications from discovery by the client.

Despite this ethical violation and betrayal of the loyalty that lawyers owe their clients, the ABA has adopted a proposed resolution to apply the attorney-client privilege to communications between law firms and firm in-house counsel concerning potential liability to a current client.[217] Courts must reject this proposed resolution because it ignores the important ethical duties that lawyers owe to their clients, and it unfairly affords a protection to large firms that cannot be given to small firms. Lawyers are and must continue to be held to a higher standard than the ordinary citizen. Therefore, courts should adopt an exception to the intra-firm attorney-client privilege, under which the protection is lost when the firm's internal communications with the firm's in-house counsel concern a current client's potential claim for malpractice.

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[215] *See* MODEL RULE OF PROF'L CONDUCT R. 1.10 (2013) (imputing a lawyer's conflict of interest to the lawyer's firm).

[216] MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013); RESTATEMENT, *supra* note 3, §§ 121, 125, 128.

[217] ABA H.D. Res. 103, *supra* note 140.