"To err is human; to forgive, divine." Alexander Pope, "Essay on Criticism" (1711).

The practice of law, being a human endeavor, is imperfect. All attorneys, no matter how careful, will make mistakes over the course of their careers. Most such mistakes will be trivial or immediately correctable. Some will not.

Our human nature can lead us to want to bury our heads in the sand and ignore the error, as if doing so would make it go away. It might also lead us to want to fix the problem ourselves without telling anyone – including our own partners – about it. Both instincts are problematic from an ethics perspective and potentially fatal from an attorney liability perspective.
This paper reviews three intertwined communication-related issues implicated by an attorney’s error. Two are ethics issues: (I) What communications do the rules of ethics require an attorney to have with her client when she makes a mistake in the course of the representation? and (II) Under what circumstances may the attorney ethically continue the representation after making a mistake? As shown below, the ethics rules governing communications and conflicts are not difficult to apprehend, but applying them in the real world, in real time, is not easy, particularly given our natural tendency to “turtle” if left to our own devices. For that reason, consulting with other attorneys – particularly those who are expert in matters of ethics – is helpful and wise and should in most cases result in a more “ethical” outcome. But that leads to the third issue, which exists at the crossroads of attorney ethics and the evidentiary attorney-client privilege: (III) May the attorney seek guidance on these matters from attorneys in her own law firm without opening up those communications to discovery in a subsequent suit by the client? While recent authority suggests that she may, the issue is very far from resolved.

I. Must an attorney inform her client that she made a mistake in the course of the representation?

An attorney’s duties to her client include the duty to communicate. In pertinent part, Model Rule of Professional Conduct 1.4 requires a lawyer to “promptly inform the client of any decision or circumstances with respect to which the client’s informed consent . . . is required by these Rules”, “reasonably consult with the client about the means by which the client’s objectives are to be accomplished”, and “keep the client reasonably informed about the status of
the matter”.¹ The duty to keep a client “reasonably informed” requires disclosure regarding “significant developments” in the matter.²

Not surprisingly, the duty to inform the client regarding “significant developments” includes the duty to disclose material adverse developments, including those caused by the attorney’s own error.³ Whether the attorney’s mistake is “significant” or “material” will depend on the circumstances. Where the mistake is easily correctable or otherwise of no moment (a typo in a pleading comes to mind), and will not prejudice the client’s rights or claims, it is usually not necessary to disclose the mistake to the client in order to keep the client “reasonably informed.”⁴ As the New York State Bar Association described the issue, “whether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer’s possible error or omission, whether it is possible to correct it in the present proceeding, the extent of the harm resulting from the possible error or omission, and the likelihood that the lawyer’s conduct would be deemed unreasonable and therefore give rise to a colorable malpractice claim.”⁵

Where the mistake is likely to give rise to a malpractice claim against the attorney, it is clear that the attorney must inform the client of the mistake as part of her duty to keep the client “reasonably informed.”⁶ Further, as discussed in Part II, the prospect of a claim against the

¹ Model Rule of Prof. Conduct 1.4(a)(1) & (3).
² Id. cmt. 3.
³ E.g., N.Y. State Bar Ass’n, Comm. Prof. Ethics, Op. 734 (2000) (obligation to keep client informed requires attorney to disclose to client the possibility of a significant error or omission). See generally Cooper, The Lawyer’s Duty to Inform His Client of His Own Malpractice, 61 Baylor L. Rev. 174 (Winter 2009).
⁶ See Minn. Lawyers Prof. Resp. Bd., Op. 21 (2009) (attorney must disclose error that may give rise to claim “to the extent necessary” to keep the client “reasonably informed”); Colo. Bar Ass’n Ethics Comm., Op. 113 (2005) (responsibility to keep client informed includes duty to inform client of “material” adverse developments, including those resulting from the lawyer’s own errors); N.Y. State Bar Ass’n, Comm. Prof. Ethics, Op. 734 (2000) (obligation to keep client informed requires attorney to disclose to client the
attorney gives rise to a conflict of interest, and the attorney may continue with the representation only if the client gives “informed consent” (assuming consent is permissible). Under Rule 1.4(a), the attorney must “promptly” inform the client of any circumstance with respect to which the client’s informed consent is required.

II. Under what circumstances may the attorney continue the representation after making a mistake?

A mistake that may give rise to a malpractice claim against the attorney may present what is referred to as an “underlying work” or “prior work” conflict. The potential conflict is between the attorney’s duty to the client and the attorney’s personal interest in avoiding malpractice liability and protecting her own reputation. In the parlance of Model Rule 1.7, the prospect of a malpractice claim may give rise to a “significant risk” that the lawyer’s representation of the client “will be materially limited . . . by a personal interest of the lawyer.”7 Because the interest in avoiding liability would be shared by the other lawyers in the attorney’s firm, under traditional views of imputation, this personal interest conflict would be imputed to all firm lawyers.8

Whether a mistake causes such a conflict will depend on the circumstances, but it is a near certainty that if the matter resolves poorly for the client, the client as plaintiff in a subsequent malpractice lawsuit will claim that a conflict existed and was the root cause of its possibility of a significant error or omission); Phila. Bar Ass’n Prof. Guidance Comm., Op. 90-2 (1990) (plaintiffs’ attorney had duty to disclose to clients the factual and legal basis of the defendant’s statute of limitations defense, which my give rise to malpractice claim against plaintiffs’ attorney). See also Restatement (Third) of Law Governing Lawyers § 20 & cmt. c (“If the lawyer’s conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client.”).

7 Model Rule 1.7(a)(2).

8 Model Rule 1.10(a)(1). As discussed below, in recent decisions relating to the applicability of the attorney-client privilege to communications between firm lawyers and firm in-house counsel, some courts have suggested (if not held) that the traditional imputation rule should not apply to firm in-house counsel. See Part III.
misfortune. When in doubt, making disclosure to the client and seeking informed consent to the continued representation (if permissible) will usually be the prudent course.

Whether an attorney faced with an “underlying work” conflict can proceed with the representation, even with informed consent, depends in the first place on whether the attorney “reasonably believes” that she can provide “competent and diligent representation” notwithstanding her or her firm’s personal interest. This will often be a difficult decision – the client may well prefer that the lawyer continue rather than hire a new attorney to handle the matter, so the attorney faces the prospect of disappointing the client both by confessing the mistake and by withdrawing. But often withdrawing is the ethically correct thing to do – because the lawyer believing she could continue under the circumstances is not “reasonable” – and the smart thing to do to minimize the lawyer’s potential exposure.

Assuming that the lawyer “reasonably believes” she can represent the client notwithstanding the conflict, then the lawyer must obtain the client’s “informed consent, confirmed in writing.” “Informed consent” means “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” In the case of an underlying work conflict, the lawyer must, at a minimum, recite the relevant facts, which will usually require description of the attorney’s mistake in agonizing detail. (As one attorney ethics expert once described it, writing the letter should “hurt”.) The “material risks” of continuing to employ the attorney typically include the risk that, when faced with a strategy decision, the attorney will be inclined to choose the strategy that will further the attorney’s personal interest in avoiding responsibility for or scrutiny of her mistake. There may

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9 Model Rule 1.7(b)(1).

10 Model Rule 1.7(b)(4).

11 Model Rule 1.0(e).
be other risks depending on the circumstances. An alternative available to the client that should be discussed is to terminate the attorney and find other counsel.

Although the Model Rule does not require it,\textsuperscript{12} a best practice is to advise the client to obtain independent advice from another lawyer about whether to consent to the continued representation. The errant attorney should not herself provide that advice because of her conflict. The fact that the client had independent counsel advising it concerning whether to continue to employ the attorney is powerful evidence in favor of the effectiveness of the client’s consent.

The Model Rules require that the client’s consent be “confirmed in writing,” not that the consent itself be in writing or accompanied by the client’s signature. Nevertheless, because the validity of the consent may depend on the quality of the information upon which it was based, a best practice is to consult with the client, follow up that conversation with a writing that confirms the discussion, including the recitation of relevant facts, the risks of the continued representation, and the client’s consent, and obtain the client’s signature.

III. Upon making a mistake, may the attorney seek guidance from attorneys in her own law firm without opening up those communications to discovery in a subsequent suit by the client?

As discussed in Parts I and II: (I) An attorney’s duty to communicate includes the duty to inform the client of “significant” or “material” mistakes, but the rule leaves a lot of room for interpretation. And (II), the attorney’s mistake may give rise to a conflict of interest that will require the attorney to withdraw or, if permissible, obtain the client’s informed consent to the continued representation. These rules are difficult even for experts to apply, as they offer no

\textsuperscript{12} At least one state’s version of Rule 1.7 requires, in order for consent to be valid, that the consenting client have had the opportunity to consult with independent counsel. \emph{See} Ga. R. Prof. Conduct 1.7 (client must give informed consent after “having been given the opportunity to consult with independent counsel”).
bright-line rules and require the exercise of considered judgment. Trying to exercise that judgment in the “heat of the action”, under stress, would seldom seem to produce the optimal “ethical” outcome. Seeking out advice from another lawyer in one’s law firm is a very good idea.

But is that advice privileged? The answer for many years was, “probably not.” As discussed below, in 1989, a Pennsylvania federal district court held that the attorney-client privilege did not protect communications between attorneys in the same firm about a current client where the simultaneous representation by a firm lawyer of both the current client and the firm itself would be prohibited by Rule 1.7. In decisions handed down over the following two decades, a series of mainly federal courts largely followed this reasoning applying a “conflicting duties” exception to the attorney-client privilege.

Then in a single week in July 2013, two state high courts rendered decisions upholding for the first time an “in-house” privilege that may be invoked against a party that was the firm’s client at the time of the communication. Following those decisions from Georgia and Massachusetts, the ABA’s House of Delegates approved a resolution urging all relevant constituencies to support the principles that the attorney-client privilege applies to communications between in-house counsel and law firm personnel and that there is no exception when the advice concerns a current client. As of this writing, the Supreme Court of Oregon has the issue before it as well. Notwithstanding this momentum, the evidentiary issue of whether and when an in-house privilege may be asserted against a current client, and the underlying ethics issue of whether it is ethical for the in-house lawyer to consult under circumstances of an arguable conflict of interest between the firm and the client, remain open and developing.

The Conflicting Duties Exception to the Intra-Firm Privilege
In re Sunrise Securities Litigation\textsuperscript{13} involved consolidated litigation arising from the failure of Sunrise, a savings and loan association, against, among many others, a law firm that had represented Sunrise. The law firm resisted discovery of certain internal communications on the ground of intra-firm privilege. In its initial decision, the district court rejected the “novel assertion” that a law firm may claim the protection of the attorney-client privilege “on the basis that it is its own client.”\textsuperscript{14} On the law firm’s motion for reconsideration, the court reconsidered its broad holding, concluding that like any other business organization, a law firm can receive the benefit of the attorney-client privilege when seeking legal advice from in-house counsel.\textsuperscript{15} However, the court proceeded to consider “special problems” that arise when the law firm is seeking advice from in-house counsel regarding its representation of a current client. Under that circumstance, “the law firm’s representation of itself (through in house counsel) might be directly adverse to, or materially limit, the law firm’s representation of another client, thus creating a prohibited conflict of interest.”\textsuperscript{16} Analogizing to cases involving conflicting fiduciary duties in the corporate context, the court held the law firm could not withhold communications with firm house counsel, even if otherwise privileged, where house counsel labored under a conflict of interest.\textsuperscript{17} The court referred the matter to a special master to determine whether the withheld documents were privileged and, if so, whether they nevertheless should be produced because counsel had a conflict of interest between his duties to the firm’s client Sunrise and his duties to his client the law firm.

\textsuperscript{13} 130 F.R.D. 560 (E.D. Pa. 1989).
\textsuperscript{14} Id. at 572.
\textsuperscript{15} Id. at 595.
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 596-97 (citing Valente v. PepsiCo, 68 F.R.D. 361 (D. Del. 1975) and Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970)).
Over the next 20-plus years, while the applicability of the privilege generally to communications between in-house counsel and firm lawyers became firmly established, so too did the exception first established in *Sunrise* for communications concerning the representation of a current client. For example, in *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, S.A., the law firm represented Credit Lyonnais in connection with financing contracts for the purchase and sale of oil and in litigation arising from the financing transactions. Before litigation ensued, Credit Lyonnais informed the law firm that if it were found to be liable in the litigation, it would have a claim against the law firm. The firm represented Credit Lyonnais in the litigation for fourteen months, and during that period, firm lawyers consulted with firm in-house counsel regarding Credit Lyonnais’ conflicts issues related to the representation. Credit Lyonnais fired the law firm and filed a third-party claim against it in the same action in which it had served as counsel. The law firm resisted discovery of the internal communications with in-house counsel on the grounds that the communications were protected by the attorney-client privilege.

The New York district court seemed to approve of the “novel idea” that a law firm could assert the attorney-client privilege to protect communications with firm in-house counsel, but, citing *Sunrise*, observed that “[a]sserting the privilege against a current client seems to create an inherent conflict against that client.” The court proceeded to quote New York’s conflict of interest rule (since superseded by a version of Model Rule 1.7) and the obligation to seek consent “after full disclosure” from the affected clients. Jumping apparently from the obligation to provide “full disclosure” in order to obtain consent to conflicting representations, the court

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18 See, e.g., *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996) (upholding privilege in communications between associates and partner where associates were directed to investigate on behalf of the firm the conduct of another firm attorney).


20 *Id.* at 287.

21 *Id.*
held that the firm “was under an ethical duty to disclose to [its client] the results of its internal conflict check, and in no position to claim a privilege against their [sic] client.”

Similarly, in *Koen Book Distributors v. Powell, Trachtman, Logan, Carrie, Bowman & Lombardo, P.C.*, the law firm represented book wholesalers and distributors in a financing transaction. The clients informed the firm that they were considering bringing a malpractice action against the firm, but the firm continued to represent the clients for another month before it was fired. During that month, the matter attorneys consulted with another lawyer in the firm about ethical issues that arose from the possibility of a malpractice action. After the clients sued the firm, they sought to discover the internal communications, and the firm objected on grounds of privilege. Following *Sunrise*, the district court held that the conflicting representations (firm client vs. firm as client) “vitiated” the attorney-client privilege to the extent that the representation of the firm as client “adversely implicat[ed] or affect[ed] the interests of the [clients].” The district court reviewed the withheld documents in camera and ordered the firm to produce all of them, observing that “[p]ermeating the documents in consideration of how best to position the firm in light of a possible malpractice action.”

In *Thelen Reid & Priest LLP v. Marland*, the law firm represented Marland as relator in a qui tam action and another plaintiff in another similar action against the same defendant. The litigation resulted in very large settlements and a dispute over the division of the resulting fees. The firm withheld internal communications between matter attorneys and the firm’s general counsel relating to an amended fee agreement entered into with the client and other communications regarding the firm’s then ongoing representation. Following *Sunrise* and a

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22 Id.

23 Id. at 285.

24 Id. at 286.

more recent decision from the Court of Appeals of Washington, the district court ordered the law firm to produce the withheld documents on the theory that the firm’s “fiduciary relationship with Marland as a client lifts the lid on these communications.”

Unlike prior decisions following Sunrise, however, the court recognize[d] that law firms should and do seek advice about [] their legal and ethical obligations in connection with representing a client and that firms normally seek this advice from their own lawyers. . . . A rule requiring disclosure of all communications relating to a client would dissuade attorneys from referring ethical problems to other lawyers, thereby undermining conformity with ethical obligations . . ..

Adopting a more nuanced position, the court permitted the law firm to withhold documents reflecting consultations regarding ethical and legal obligations to Marland except for the conclusions of those consultations, i.e., documents reflecting a conclusion (if any) about what obligations the firm owed to Marland or discussing claims Marland might have against the firm or known conflicts that would trigger the firm’s duties under Rule 1.7 pursuant to the rules discussed above.

A similarly nuanced view of a law firm’s in-house consultations regarding a current client is reflected in the ABA’s Formal Opinion 08-453, In-House Consulting on Ethical Issues. Although not addressing privilege issues, the ethics opinion implicitly rejects the view in Sunrise and its progeny that there is necessarily a conflict of interest between the client and law firm

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26 See VersusLaw Inc. v. Stoel Rives, 111 P.3d 866 (Wash. Ct. App. 2005) (following Sunrise rule and directing trial court to review withheld intra-firm communications in camera to determine whether there was a conflict between the law firm’s interests and duty to then-current client).

27 Id. at *7.

28 Id.


when attorneys consult with in-house counsel regarding an ongoing representation. Rather, “[a] lawyer’s effort to conform her conduct to applicable ethical standards is not an interest that will materially limit the lawyer’s ability to represent the client.” The opinion suggests that seeking advice about what the rules of ethics may require the attorney to do prospectively (for example, advice about whether to take on a matter) will rarely pose a risk of material limitation. On the other hand, where the attorney is consulting about how to protect the firm from actions already taken, “the risk that the consulting lawyer’s representation of the firm’s client will be materially limited may be significant.”

**A Turning Tide?**

While the “conflicting duties” exception to the firm in-house privilege seemed relatively firmly established for 20-plus years following the *Sunrise* decision, two lower court decisions earlier this decade upholding the attorney-client privilege against a current client, and separating the ethical conflict issue from the evidentiary privilege issue, suggested a possible shift in momentum. This perspective was confirmed when two state high courts weighed in with decisions issued within a span of a week in July 2013.

In *RFF Family Partnership, LP v. Burns & Levinson*, a decision handed down on July 10, 2013, the law firm represented its client RFF in connection with a commercial loan to be secured by a first mortgage on real property and the subsequent foreclosure on that property after the borrower defaulted. The law firm allegedly missed a prior lien in its title search, and the

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31 Id. at 3.

32 Id.

33 Id.


lienholder asserted that the foreclosure was therefore invalid. While the law firm did not represent RFF in connection with the dispute with the lienholder, it continued to represent RFF in connection with a possible sale of the property. Nearly a year after the foreclosure sale, RFF’s counsel in the dispute with the lienholder gave notice to the law firm of a claim for legal malpractice. The matter attorneys consulted with the law firm’s in-house ethics and risk management counsel and, five days later, withdrew from representing RFF. After RFF disclaimed its counsel’s notice of claim and requested that the law firm continue to represent RFF in its efforts to sell the property, the law firm resumed its representation and saw it through to conclusion.

More than a year later, RFF sued Burns & Levinson in Massachusetts state court for legal malpractice, among other related claims. RFF sought in discovery the communications between the matter attorneys and the firm’s in-house risk management lawyer; the firm resisted claiming privilege. The trial court granted the firm’s motion for protective order to prevent the matter lawyers from having to testify about their communications with the in-house lawyer. RFF appealed to the Massachusetts Appeals Court, and the appeal was transferred to the Supreme Judicial Court.

The Massachusetts high court observed that no state court of last resort had addressed the applicability of the attorney-client privilege to a firm’s in-house communications regarding a current client. However, the court observed that the attorney-client privilege and its applicability to communications with in-house counsel of business organizations, including law firms, were well established both within Massachusetts and without. While the court recognized Massachusetts’ Rule 1.7 and its prohibition on continuing to represent a client where the interests between the firm and client conflict, it observed that the application of Rule 1.7 “may not always be clear” and consulting an expert “is not in and of itself adverse to the client and . . .
may ultimately benefit the client.”\textsuperscript{36} As a matter of policy, the court favored a rule that encouraged firm lawyers to consult confidentially with an expert before acting precipitously, either by withdrawing from the representation or disclosing a conflict where neither action may be warranted.\textsuperscript{37}

The court specifically addressed whether to adopt a “fiduciary” or “current client” exception to the attorney-client privilege, observing that the majority of courts to confront the issue (\textit{Sunrise} and its progeny) had fashioned some sort of limitation on the privilege that results from a perceived conflict of interest on the part of the in-house lawyer where the communications concern a current client.\textsuperscript{38} The court found two “fundamental flaws” with the reasoning of the \textit{Sunrise} line of cases. First, the court observed that the rule of imputation, the ethics principle that “imputes” the conflicts of one firm lawyer to all other firm lawyers, makes no sense as applied to in-house counsel.\textsuperscript{39} Second, the court rejected the notion that an attorney’s conflict of interest should deprive the client (in this case, the law firm) of the attorney-client privilege, finding it inconsistent with “black-letter law”.\textsuperscript{40}

Finally, the court imposed four conditions that must be met for the privilege to apply to communications with firm in-house counsel:

- The in-house counsel must be so designated by the firm, forming the attorney-client relationship between attorney and firm.
- The house counsel must not have worked on the matter at issue or a substantially related issue.

\textsuperscript{36}\textit{Id.} at 1073.

\textsuperscript{37}\textit{Id.} at 1073-74.

\textsuperscript{38}\textit{Id.} at 1077 n.7.

\textsuperscript{39}\textit{Id.} at 1978-79. The imputation rule provides that no lawyer in a firm may represent a client where any one lawyer in the firm would be prohibited from doing so by the conflict of interest rules. See Model Rule 1.10.

\textsuperscript{40}991 N.E.2d at 1079 (quoting \textit{In re Teleglobe Communications Corp.}, 493 F.3d 345, 369 (3d Cir. 2007)).
• The time spent by house counsel must not be billed to any client.
• The communications must be made in confidence and remain confidential.\(^{41}\)

The day after the Massachusetts court’s decision in *RFF*, the Georgia Supreme Court issued a long awaited decision in *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*\(^{42}\) The Hunter Maclean firm represented St. Simons Waterfront in a real estate venture. Several purchasers of units in the project gave notice of their intent to rescind, and the client blamed Hunter Maclean. The matter attorneys consulted with the firm’s in-house general counsel, who investigated the situation and sought advice from outside counsel. The client retained another law firm to provide representation as to the rescinding purchasers and to pursue a claim against Hunter Maclean, but at the client’s request, Hunter Maclean continued to handle ongoing closings. The client later sued the law firm for legal malpractice, breach of fiduciary duty, and other claims and sought discovery from the firm’s general counsel and outside counsel. The trial court granted the plaintiff/client’s motion to compel except for the firm’s communications with outside counsel, finding that any privilege that would have applied to the in-house communications was abrogated by the conflict of interest that developed as a result of the client’s claim against the firm, which conflict was imputed to the general counsel.\(^{43}\)

On interlocutory appeal, the Georgia Court of Appeals vacated the trial court’s decision, holding that the matter attorney’s conflict should not automatically be imputed to in-house counsel, and remanding to the trial court for additional fact-finding.\(^{44}\) The Georgia Supreme Court granted certiorari.

The Georgia high court’s opinion vacating the Court of Appeals’ decision and remanding focuses mainly on whether the communications between firm lawyer and in-house counsel meet

\(^{41}\) *Id.* at 1080.
\(^{42}\) 746 S.E.2d 98 (Ga. 2013).
\(^{43}\) *Id.* at 103.
the traditional criteria for application of the attorney-client privilege, particularly whether an
attorney-client relationship had been formed between the in-house counsel and the firm. The
essence of the court’s holding is that law firms may enjoy an in-house privilege like any other
business organization. Regarding the in-house lawyer’s alleged conflict of interest, the court
acknowledged “that the principle of imputed conflicts may present ethical problems for firms
employing in-house counsel” but held that “potential ethics violations” are not “relevant to the
attorney-client privilege determination.” In a footnote, the court elaborated on the “ethical
quandary” posed for law firms that “perceive a current client is considering legal action against
them” but disclaimed any intent to address it and instead encouraged appeals for guidance to
the State Bar.

What Will The Future Hold?

On August 12, 2013, a little more than a month after the Massachusetts and Georgia
courts’ decisions, the ABA’s House of Delegates approved a resolution urging support for the
principle that the attorney-client privilege protects from disclosure communications between firm
personnel and firm in-house counsel made for the purpose of rendering legal services to the
firm, regardless of whether the communications concern a then-current client.

45 746 S.E.2d at 105-06.
46 Id. at 106 n.4.
47 RESOLVED, That the 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 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 the ordinary affairs of the fiduciary office), if recognized by the jurisdiction,
does not apply to confidential communications between law firm personnel, acting on behalf of the
Whether the Massachusetts and Georgia high courts’ decisions and the ABA’s statement of support for the in-house privilege portend a streak of decisions upholding the in-house privilege to match the streak of law going the other direction from earlier in the millennium, remains to be seen. The first test of whether a new era is upon us will be the Supreme Court of Oregon’s decision in *Crimson Trace Corporation v. Davis Wright Tremaine LLP*.

*Crimson Trace* is before the Oregon court on the defendant-law firm’s petition for writ of mandamus to challenge the trial court’s order compelling the production of communications between firm lawyers and the firm’s in-house counsel. The law firm represented its client Crimson Trace in a patent infringement suit. After the client stated it was not paying the firm’s fees, the matter attorneys consulted with in-house counsel about the firm’s rights and obligations while they continued to represent the client for several months before the client terminated the representation. In the subsequent malpractice suit, Crimson Trace sought to discover the firm’s internal communications with in-house counsel, and the firm claimed privilege. The trial court granted the client’s motion to compel, holding that although the communications were otherwise privileged, they were subject to the “conflicting duties” exception. In the mandamus proceeding, the law firm argues that the communications at issue are privileged under Oregon law, Oregon law recognizes no exception based upon the attorneys’ allegedly conflicting duties, and the “conflicting duties” theory is analytically flawed.

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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.

ABA Res. 103 (Aug. 12, 2013).
and inapplicable in any event. As of this writing, the mandamus proceeding is fully briefed and argued (including by a host of amici) and awaiting decision.