IN THE SUPREME COURT OF THE STATE OF OREGON

CRIMSON TRACE CORPORATION, an Oregon corporation, Plaintiff-Adverse Party, v. DAVIS WRIGHT TREMAINE LLP, a Washington limited liability partnership, FREDERICK ROSS BOUNDY, an individual, and WILLIAM BIRDWELL, an individual, Defendants-Relators.	)	Multnomah County Circuit Court Case No. 1108-10810 Oregon Supreme Court Case No. S061086

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF PLAINTIFF-ADVERSE PARTY CRIMSON TRACE CORPORATION

On Petition for Writ of Mandamus

Multnomah County Circuit Court
The Honorable Stephen K. Bushong

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August 2013

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INTRODUCTION AND STATEMENT OF INTEREST

Clients pay law firms to serve them as advocates, not fight them as adversaries. In other words, more than anything else, clients need loyalty and transparency from outside law firms. That is why the legal profession values lawyers' duty of loyalty as a bedrock principle. Without it, firms can turn their knowledge and their experience and even their claims about ethical rules against clients whenever it suits them, as this case demonstrates. Creating a new privilege that applies only to law firms and allows them to hide information from existing clients would allow lawyers to put their own interests first, even when doing so harms their existing clients. Lawyers would be free to hide evidence of malpractice from their clients, undermining the fundamental bond of trust that inheres in the lawyer-client relationship. The duty of loyalty demands the opposite.

Indeed, if law firms retained privilege over this client-related information and the government or some third party wanted access to that confidential information, who would have authority to waive the privilege? The law firm? The client? Both? And the perplexity does not end there. Traditionally, if a law firm seeks payment on fees from a client or to otherwise defend the representation itself, it is free to introduce otherwise-confidential information into the case. *See* RPC 1.6(b)(4), *see also* ABA MODEL RULE 1.6(b)(5) (same language). If there is indeed an internal law firm privilege of the sort proffered

in this case, can a client seeking to prove malpractice by its law firm introduce otherwise-confidential information (from the law firm's perspective) into the case? If not, why not?

Naturally, given these sorts of questions, the issue that this case presents – whether law firms can rely on misguided claims of privilege to hold back information from existing clients about the clients' own matters – deeply affects the Association of Corporate Counsel and its members. ACC is a global bar association that promotes the common professional and business interests of in-house counsel. For 30 years, ACC has advocated across the country to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role of true in-house counsel and the legal departments where they work. ACC has over 30,000 members who are in-house lawyers employed in more than 75 countries by over 10,000 organizations. These include public and private corporations, partnerships, trusts, and non-profits. But ACC's long-standing policy bars membership to lawyers who work at law firms, even if they are characterized as "in-house counsel."

Since its creation, ACC has championed attorney-client privilege. In one filing after another – in the United States and around the world – ACC has pushed courts and agencies to adopt and expand the scope of the privilege.[1] And ACC has especially advocated to ensure that a robust privilege applies to a

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[1] *See* http://advocacy.acc.com/tags/privilege/ (listing recent briefs, letters, and meetings where ACC has advocated for stronger attorney-client privilege).

client's confidential communications with in-house lawyers, as the Supreme Court held in *Upjohn Co. v. United States*, 449 US 383, 390, 101 SCt 677, 66 L Ed 2d 584 (1981). No one holds the bona fide attorney-client privilege in higher esteem than ACC.

But the privilege must serve the broader relationship between law firms and the clients who hire them. That relationship rests on trust. Without it, in-house lawyers and their clients would have no good reason to securely rely on lawyers. ACC's members hire law firms for every imaginable legal assignment – to litigate bet-the-company cases, to write and enforce contracts that ensure necessary revenue and resources, to restructure their businesses to better serve consumers and shareholders, and even to investigate them internally for potential wrongdoing when something may be wrong. These issues are sensitive. Companies by necessity make themselves vulnerable to law firms they hire. Recognizing an internal privilege that law firms can assert against existing clients will corrode that trust. It will lead clients to fear that the law firms they hire will use it against them, as the law firm in this case has done. And that fear may well lead clients to hesitate to seek outside legal advice, a result that directly contradicts the goal of the attorney-client privilege.

Finally, ACC emphasizes that it knows in-house counsel. Its members are in-house counsel. It works to promote and protect the interests of in-house counsel in a legal culture that can treat them as second-class citizens while often

going out of its way to accommodate law firms at the expense of their clients. Law-firm lawyers are not in-house counsel – especially not when they wear that hat to harm their actual clients. Law-firm lawyers are not at liberty to act as free agents. They must put their clients' interests before their own. In the relationship, they cannot use privilege to protect themselves at the expense of their own clients. Firm lawyers with clients must answer to a higher standard.

Therefore, ACC urges this Court to not grant the writ, and to refuse to recognize the existence of an internal law firm privilege that undermines the lawyer's primary duty of loyalty to the client.

ARGUMENT

A. *Lawyers owe clients profound loyalty.*

1. *The entire attorney-client relationship rests on loyalty and trust.*

US Supreme Court Justice Joseph Story held in a case almost 200 years ago that a lawyer must work with "exclusive devotion to the cause confided to him," and ensure "that he has no interest, which may betray his judgment, or endanger his fidelity." *Williams v. Reed*, 29 F Cas 1386, 1390 (CC Me 1824). That essential nature of the attorney-client relationship has not changed in two centuries, as ethics standards in Oregon and the United States clearly demonstrate.

This Court has stated that "the most important ethical duties are those obligations which a lawyer owes to clients." *In re Schaffner*, 325 Or 421, 426,

939 P2d 39 (1997), *quoting* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS at 6 (1992) [hereinafter "ABA STANDARDS"] (*available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf). It has repeatedly emphasized that "[t]he client's trust and confidence in the lawyer is, in many cases, an indispensable ingredient in the relationship." *In re Hassenstab*, 325 Or 166, 178, 934 P2d 1110 (1997), *quoting In re Drake*, 292 Or 704, 713, 642 P2d 296 (1982). This Court also stated in *Hassenstab* that a lawyer's conduct cannot violate "the principles of trust and confidence that should exist in every lawyer-client relationship." *Id*.

Other authorities and jurisdictions treat the duty of loyalty with equal reverence. According to the American Bar Association, "[m]embers of the public are entitled to be able to trust lawyers to protect their property, liberty, and their lives." ABA STANDARDS at 6. Similarly, the RESTATEMENT (THIRD) OF THE LAW OF GOVERNING LAWYERS makes clear that "the law seeks to assure clients that their lawyers will represent them with *undivided loyalty*" and that "[a] client is entitled to be represented by a lawyer whom *the client can trust*." RESTATEMENT at § 121 cmt. b (emphasis added).

Very much along the same lines, the California Bar's ethics committee has stated that "[t]he most fundamental quality of the attorney-client relationship is the absolute and complete fidelity owed by the attorney to his or

her client." Calif Bar Standing Comm on Prof Resp. and Conduct, Formal Op. 1984-83 (1984) (*available at* http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=iiHlBo5qfrE%3D&tabid=841#N_1_). Put another way, for lawyers, "[n]ot honesty alone, but the punctilio of an honor the most sensitive, is . . . the standard of behavior." *Bank Brussels v. Credit Lyonnais*, 220 F Supp 2d 283, 286 (SDNY 2002) *quoting Meinhard v. Salmon*, 249 NY 458, 464, 164 NE 545 (NY 1928) (Cardozo, J).

2. *The duty of loyalty prohibits lawyers from taking on clients with conflicting interests.*

This vital duty of loyalty, not surprisingly, prohibits lawyers from taking on clients whose interests conflict with existing clients. According to Oregon's Rule of Professional Conduct 1.7, a lawyer of course must avoid direct conflicts. RPC 1.7(a)(1). But more than that, lawyers must also avoid a conflict that might exist if "there is a significant risk that the representation of one or more clients will be materially limited by a lawyer's responsibilities to another client . . . or by a personal interest of the lawyer." RPC 1.7(a)(2). *See also Kidney Ass'n of Oregon, Inc. v. Ferguson*, 315 Or 135, 143, 843 P2d 442 (1992) ("[o]ne of the disciplinary rules prohibits a lawyer, in most instances, from representing two clients whose interests conflict.")

This same prohibition on conflicts between the client's interests and the lawyer's interests exists in the ABA's Model Rules of Professional Conduct (*see* ABA MODEL RULE 1.7(a)(2)). It also exists in the RESTATEMENT. *See*

RESTATEMENT at § 121 ("a lawyer may not represent a client if the representation would involve a conflict of interest."); § 125 ("a lawyer may not represent 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 financial or other personal interests.").

And in the narrow circumstances in which the lawyer may still want to represent a client despite the conflict, the lawyer may do so only if "each affected client gives informed consent, confirmed in writing." RPC 1.7(b)(4). *See also* ABA MODEL RULE 1.7(b)(4) (using same language); RESTATEMENT at §§ 121, 125 (requiring consent to waive conflicts).

B. *Loyalty to existing clients bars law firms from using privilege against them.*

1. *The court below correctly denied privilege here.*

None of the arguments above is particularly controversial. No one would for a minute think that a law firm can ethically start to represent a new client whose interests conflict with those of an existing client, at least without giving notice and receiving a waiver. But the law firm here wants a special rule, when the new "client" is itself. That is precisely the wrong conclusion to draw. If the duty of loyalty means anything, it means that law firms *especially* cannot take themselves on as clients. Instead, they must put their clients' needs before their own, as the duty of loyalty demands.

That is the conclusion that the court below correctly drew. As it stated, the firm's "fiduciary duties of candor, disclosure, and loyalty to its outside client – Crimson Trace – were paramount." *Crimson Trace Corp. v. Davis Wright Tremaine*, LLP, No. 1108-10810, Op. Re: Alt. Writ of Mandamus (Apr 2, 2013) at 3.

The firm here is not the first to ask for special treatment and an exemption from its duty of loyalty. But a long line of cases have rejected those pleas. *See, e.g.*, *Bank Brussels*, 220 F Supp 2d at 286 ("[t]herefore, while [the firm] was still in the employ of [the existing client], [the firm] was still obligated to maintain a fiduciary duty to [the existing client], even in performing its internal conflict review."); *In re: SonicBlue, Inc.*, Adv. No. 07-5082, 2008 Bankr LEXIS 181, at *28-*29 (Bankr ND Cal Jan. 18, 2008) ("[a]ttorneys are governed by an ethical code that requires the utmost loyalty on the part of the attorney, including the duty not to represent another client if it would create a conflict of interest with the first client."); *Koen Books Distribs. v. Powell, Trachman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 FRD 283, 286 (ED Pa 2002) ("the firm still owed a fiduciary duty to plaintiffs while they remained clients. This duty is paramount to its own interests."); *Cold Spring Harbor Lab v. Ropes & Gray LLP,* No. 11-10128-RGS, 2011 US Dist. LEXIS 77824, at *5 (D Mass 2011), (in patent case, "[the firm's] fiduciary duty to [the existing client] overrides any claim of privilege."); *Thelen Reid & Priest*

LLP v. Marland, No. C 06-2071 VRW, 2007 US Dist. LEXIS 17482 at *19-*20 (ND Cal 2007), ("[the law firm's] fiduciary relationship with . . . a client lifts the lid on these communications."); *In re: Sunrise Sec. Lit.*, 130 FRD 560, 597 (ED Penn 1989) ("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.").[2]

These opinions use reasoning essentially identical to the analysis of the lower court here. Those courts were correct, and so is the court below.

2. *The law firm had no right to try to hire itself.*

This Court has held that "[r]epresenting clients in actual conflict is barred." *Ferguson*, 315 Or at 145. Put another way, the law firm here simply never had the authority to treat itself as a client. Its loyalty duty demanded that the firm place its client's interest above its own. Given that ironclad duty, and given the brewing conflict between itself and its client, the firm simply could not hire itself.

The California Supreme Court came to a similar conclusion in another case involving conflicting clients, though one that involved a law firm trying to serve two external clients in conflict. The Court held that the law firm simply

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[2] For a discussion of other cases considering whether law firms can assert privilege against existing clients, *see* Plaintiff-Adverse Party's Answering Br at 39-43.

had no obligation whatsoever to the second client that hired it. According to the Court, "the requirement of *undivided* loyalty to the first client negates any duty on the part of the attorney to inform the second client" of even harmful legal issues. *Flatt v. Superior Court*, 9 Cal 4th 275, 279, 885 P2d 950 (Cal. 1994) (emphasis added). *See also Valente v. Pepsico, Inc.*, 68 FRD 361, 368 (D Del 1975) ("in situations which involve other obligations of attorneys . . . , the applicability of the privilege must be determined in light of the obligations.").

Just like in *Flatt*, here, the law firm's loyalty duty ran to the client it already had, and nowhere else.

3. *The duty of loyalty reaches beyond even a regular fiduciary's responsibilities*

In reaching its conclusion that the attorney-client privilege does not apply here, the court below used the language of "fiduciary" duty. *Crimson Trace,* at 3. Many of the opinions quoted above that have rejected an internal law firm privilege use similar phrasing as well.

Viewing the duty of loyalty as a fiduciary duty captures only by analogy some of the scope of lawyers' obligations to their clients. Using that analogy is fine as far as it goes, and will indeed lead this Court to the correct conclusion, just as it worked for the court below. But in fact, a lawyer's obligation of loyalty stems from the lawyer's professional obligations, rather than from trust

law. Any changes to or new interpretations of the law of trusts or fiduciaries should not affect how courts view lawyers' duty of loyalty.[3]

Viewed in its entirety, the duty of loyalty demands even more of lawyers than of fiduciaries. As the court in *Sonic Blue* noted, the "very nature of the attorney-client relationship *exceeds* other fiduciary relationships where the fiduciary must execute its duties faithfully on behalf of its beneficiaries." *SonicBlue*, 2008 Bankr LEXIS 181 at *28 (emphasis added). Or, in the words of the ABA's Model Rules, "[a] lawyer, as a member of the legal profession, is a representative of clients . . . having *special responsibility* for the quality of justice." ABA MODEL RULES, Preamble, cl. 1 (emphasis added). That "special responsibility" is the source of the lawyer's loyalty, even more than a standard fiduciary duty. *See also id*. at cl. 2, cl. 9 (requiring lawyer to "zealously" protect the client's interests). However high a standard the law imposes on a fiduciary, it requires even more from a lawyer serving its existing clients.

C. *The parade of horribles that the firm holds up will not occur.*

The firm makes a series of arguments about terrible things that will happen if this Court grants the writ. There is no merit to these claims.

1. *Law firms surrender rights when clients hire them.*

Much of the firm's brief boils down to "What about us?" By repeatedly referring to themselves as "clients," the law firm and its lawyers beg the

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[3] For a fuller discussion of the differences between fiduciary duties and the duty of loyalty, *see* Plaintiff-Adverse Party's Answering Br at 50-53.

question – shouldn't they, just like every other client, have the right to privileged communications?

In this context, no. As explained above in Section B-2, the firm had no ability to take on a client – including itself – whose interests conflicted with the one it already had. That is, to be sure, a limit – however small – on the firm's options. But part of a lawyer's duty of loyalty involves accepting limits, in exchange for the financial and other rewards of working as a licensed attorney to help clients.

Requiring law firms to respect their duty of loyalty will not even prevent them from obtaining legal advice internally. They are free to use the full body of knowledge and experience from the lawyers that they employ. They simply cannot keep those communications from their existing clients. As the court said in *Bank Brussels*, 220 F Supp 2d at 288, "[c]ontrary to [the firm's] arguments, [the firm] can still perform its responsibilities under the Code of Professional Responsibility—it just is not protected by the attorney-client privilege." While this does place law firms with loyalty duties in a different posture than other actors, those other actors have not assumed the duty of loyalty.

The RESTATEMENT offers a helpful example of another restriction that the duty of loyalty places on lawyers. Normally, lawyers have the ability to speak their minds on matters of public policy. RESTATEMENT at § 125 cmt. e. But that right has limits: "a lawyer's right to freedom of expression is modified by the

lawyer's duties to clients." *Id.* Therefore, "a lawyer may not publicly take a policy position that is adverse" to a current client "if doing so would materially and adversely affect the lawyer's representation of the client in the matter." *Id.* That shushes lawyers from fully exercising their First Amendment rights. But it's part of the deal that lawyers strike when they decide to let clients hire them. The same deal and the same limits apply here, and prevent the firm from claiming privilege against Crimson Trace.

2. *Oregon's privilege statute does not mix up lawyers with clients, and does include the loyalty duty.*

The firm also asserts that this Court can consider "only one source of law" – the privilege statute, OEC 503 – when deciding this case. Defendants-Relators' Br at 5. According to the firm, because that statute does not contain an explicit "fiduciary" exception to privilege, this Court should treat the firm like every other client. This reasoning is flawed.

Even relying on the express terms of the Oregon provision, the rule nowhere grants a pass to ignore the traditional structure of the attorney-client relationship. Rather, it proceeds on the basis that, for purposes of the attorney-client relationship and the attorney-client privilege, the client is the client and the lawyer is the lawyer. There's no evidence that the rule intends to mix up the relationship. In other words, the duty of loyalty is implicitly embedded in the privilege statute.

Further, reading the rule in the unduly strict manner that the firm suggests would stack the deck in the firm's favor. As discussed above, the firm is most definitely *not* an ordinary client. It's not a client at all. Rather, it's a group of lawyers with a duty of loyalty to Crimson Trace. By asking this Court to read the evidence statute to ignore the duty of loyalty, the firm seeks to conveniently escape the main legal authority that imposes a higher standard on the firm than on real clients.[4]

Oregon's rules on privilege are essentially the same as the rules across the country. As one court has stated, "[t]he attorney-client privilege is not complex on its face. Whatever formulation is used . . . the elements of the privilege are substantially the same." *Valente*, 68 FRD at 366-367. Just as other courts discussed above have used the duty of loyalty to reject claims of internal law firm privilege, this Court should do the same.

3. *This Court routinely considers professional responsibility rules outside of the disciplinary setting.*

On a related note, the firm claims that even if the firm has potentially committed an ethics violation here, it would be "irrelevant," Defendants-Relators' Br at 38, and at worst should be taken up in a separate proceeding "reserved to this court and the Disciplinary Board appointed by the court." *Id.* at 52 (*quoting Ferguson*, 315 Or at 141).

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[4] Perhaps not surprisingly, the defendants-relators' opening brief to this Court mentions the duty of loyalty only twice, and both times minimizes the duty's importance and scope. *See* Defendants-Relators' Br at 30, 49.

But this Court is not so stingy with Oregon's ethics rules as the defendants make it out to be. *Ferguson* concerned whether this Court can use ethics rules to "illuminate a court's inquiry" into a separate legal matter, specifically, setting legal fees. 315 Or at 142. This Court answered with a clear yes, stating "[t]his court has noted the applicability of disciplinary rules to non-disciplinary contexts." *Id*. This Court should do the same here, and allow the ethics rules to inform its privilege analysis.

4. *Law firms can assert an internal law firm privilege when the loyalty duty allows it.*

To be clear, ACC is not asking this Court to always deny attorney-client privilege to law firms that represent themselves. Rather, this case – and therefore this brief – only addresses the question of how to proceed when law firms have duties of loyalty to existing clients. In other contexts, where the duty of loyalty does not apply or has not yet attached, law firms can treat lawyers within their firm as in-house counsel if they want to. They can do so when deciding whether to accept new clients; when they sue someone on their own behalf, or get sued, and there's no loyalty duty involved; when they write contracts for the firm; or need legal advice or counsel or assistance in any of the myriad contexts that do not involve a duty of loyalty to existing clients. In those situations, law firms are just like everyone else when it comes to legal advice, and the privilege that attaches to it. Because just like everyone else, they would not be operating under a duty of loyalty. But for the period of time at issue in

this case, with this client, and with this law firm, the duty of loyalty applied with full force.

CONCLUSION

Even considering the vital importance of the attorney-client privilege, it serves the broader duty of loyalty. The privilege ensures that "the professional mission is to be carried out." *Upjohn*, 449 US at 389 (*quoting Trammel v. United States*, 445 US 40, 51, 100 SCt 906, 63 LEd2d 18 (1980)). The professional mission, of course, is to serve the client. Lawyers cannot assert a privilege that exists solely to serve their clients in order to interfere with a client. In that context, the law firm is not a client, and cannot hire itself. Its duty of loyalty runs only to an existing client, which means it cannot assert privilege against one.

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Therefore, ACC requests that this Court deny the writ that the law firm has requested.

DATED: August 8, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,892 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 8, 2013, I filed the foregoing BRIEF OF *AMICUS CURIAE* ASSOCIATE OF CORPORATE COUNSEL IN SUPPORT OF PLAINTIFF-ADVERSE PARTY CRIMSON TRACE CORPORATION with the Appellate Court Administrator through the court's electronic filing system and that, on the same date, I served the same document on the party or parties listed below in the following manners:

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