SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

----------x

KEITH STOCK,

Plaintiff-Respondent,

-against-

SCHNADER HARRISON SEGAL & LEWIS and M. CHRISTINE CARTY,

Defendants-Appellants.

----------x

New York County

No. 651250/13

AFFIRMATION OF RALPH M. STONE

RECEIVED
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SUP COURT APP. DIV.
FIRST DEPT.

Ralph M. Stone, an attorney duly admitted to practice law in the State of New York, hereby affirms under penalty of perjury as follows:

1. I am a member of the firm Stone Bonner & Rocco LLP, counsel to the Association of Corporate Counsel ("ACC"), the association making this motion. I make this Affirmation in support of the ACC's Motion for Leave to File Brief as *Amicus Curiae* in Support of Plaintiff-Respondent.
2. A copy of the proposed brief that the ACC seeks leave to file as *Amicus Curiae* is attached hereto as Exhibit 1.
3. The ACC has a strong interest in this case. ACC and its chapters represent the perspective of in-house lawyers who advise corporate clients on the full range of legal issues that arise in the course of day-to-day business. ACC has over 35,000 members who are in-house lawyers employed by more than 10,000 organizations throughout the United States and in other countries. The entities that ACC's members represent vary greatly in size, sector, and geographic region, and include public and private corporations, public entities, partnerships, trusts, non-profits, and other types of

organizations. In-house counsel at these entities frequently engage outside counsel to assist with their organization's legal affairs and in-house counsel serve as the principal liaison from the client side in matters involving attorney-client relations and privilege.

4. For more than 30 years, ACC has advocated to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role of in-house counsel. In particular, ACC has worked hard to ensure that a robust privilege applies to a client's confidential communications with in-house lawyers, as the Supreme Court recognized in *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). ACC has appeared as *amicus curiae* to provide clarity on the attorney-client privilege in many cases in the federal and state courts. No one holds the bona fide attorney-client privilege in higher esteem than ACC.

5. But the doctrine of attorney-client privilege exists to serve the interests of clients not attorneys; neither law nor policy supports the use of use the privilege to protect themselves at the expense of their own clients. Contrary to Appellants' arguments, under well-settled privilege law, the client – not his or her lawyer – has the right to assert the privilege for communications relating to the client's ongoing representation.

6. Granting lawyers a license to withhold communications from their clients would harm ACC's members and their organizations by weakening the trust between organizational clients and their lawyers. Clients pay law firms to serve them as advocates, not fight them as adversaries. Law firms cannot and should not be permitted to place their own interests above those of their clients. Allowing attorneys

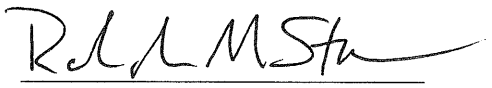
to assert the privilege against their clients would give law firms and their attorney the ability to sweep under the rug a large swath of communications that evidence self-dealing or malpractice. That result would severely interfere with the relationship between in-house counsel and their outside law firms, thereby impairing the ability of in-house lawyers to serve their organizations.

7. To borrow from the New York Court of Appeals' rules regarding *amicus curiae* participation, the ACC's proposed brief will "identify law or arguments that might otherwise escape the Court's consideration," and "otherwise would be of assistance to the Court." *See* 22 NYCRR 500.23(a)(4)(ii),(iii). In addition, ACC's brief is necessary and proper to respond to the 38-page amici curiae brief filed in support of Appellants' position by 74 law firms in this case.

8. Granting the ACC status as *Amicus Curiae* in this case will not prejudice the parties or substantially delay the progress of the action. Jordan M. Kam, counsel for Plaintiff-Respondent, has indicated his consent to the ACC's request to file an *Amicus Curiae* brief. Frederick B. Warder III, counsel for Defendants-Appellants, has stated that his client does not consent to ACC's filing of an *Amicus Curiae* brief because such a filing would be "untimely." However, Mr. Warder did consent to the filing of an amici curiae brief by 74 law firms even though that brief was filed without giving the Respondent an opportunity to respond.

WHEREFORE, I respectfully request that this Court issue an order granting the Association for Corporate Counsel's Motion for Leave to File an *Amicus Curiae* Brief in Support of Plaintiff-Respondent.

Dated: May 12, 2015
New York, New York



Ralph M. Stone

EXHIBIT 1

New York County Clerk's Index No. 651250/13

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-against-

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and M. CHRISTINE CARTY,

Defendants-Appellants.

BRIEF OF AMICUS CURIAE ASSOCIATION OF CORPORATE COUNSEL

Ralph M. Stone
STONE BONNER & ROCCO LLP
145 West 45th Street, Suite 701
New York, NY 10036
Tel. (212) 239-4340
Fax (212) 239-4310
rstone@lawssb.com

Attorneys for Amicus Curiae Association of Corporate Counsel

Of Counsel:

Amar D. Sarwal
Wendy E. Ackerman
Association of Corporate Counsel
1025 Connecticut Ave., N.W., Suite 200
Washington, DC 20036

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INTRODUCTION AND STATEMENT OF INTEREST

As "representative[s] of clients and officer[s] of the legal system," attorneys have "special responsibility for the quality of justice" in our society. N.Y. Rules Prof. Conduct, Preamble, cl. 1 (effective April 1, 2009); *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 43 (1990) (stressing the important role attorneys play in "the vindication of individual rights in our society"). To protect the sanctity of the attorney-client relationship and ensure public confidence in the legal system, clients must be able to have unequivocal trust in their lawyers. Indeed, "[t]here 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." *Stockton v. Ford*, 52 U.S. 232, 247 (1850); *see also Estate of Re v. Kornstein Veisz & Wexler*, 958 F. Supp. 907, 925 (S.D.N.Y. 1997) ("[T]he greatest trust between people is the trust of giving counsel.") (punctuation omitted).

The time-honored doctrine of the attorney-client privilege serves to reinforce the bond between clients and their lawyers by ensuring that communications relating to the client's representation remain private. Notwithstanding that the fundamental purpose of the attorney-client privilege is to protect *clients*, the Appellant law firm – and the 74 other law

firms that submitted an amici curiae brief in this case (the "Amici Law Firms") – seek to turn that protection on its head by asserting the privilege against their own clients. The court below properly rejected that attempt and this Court should do the same.

The issue that this case presents – whether law firms can rely on misguided claims of privilege to conceal information from existing clients about those 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 over 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 35,000 members who are in-house lawyers employed by over 10,000 organizations throughout the United States and other countries.

The in-house lawyers ACC represents work for a wide variety of organizations, including public and private corporations, partnerships, trusts, and non-profit organizations. In-house counsel at these entities frequently engage outside counsel to assist with their organization's legal affairs and serve as the principal liaison from the client side in matters involving

attorney-client relations and privilege. ACC's long-standing policy bars membership to lawyers who work at law firms, even if they claim to act as "in-house counsel." Put another way, ACC's members work for actual clients – organizations that frequently turn to law firms for assistance. 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. These issues are sensitive. Corporate clients by necessity make themselves vulnerable to law firms they hire. For clients to take that leap of faith, they need to trust law firms to place their interests first. Without trust and transparency, in-house lawyers and their clients would have no good reason to rely on lawyers.

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. ACC has especially advocated to ensure that a robust privilege applies to a client's confidential communications with in-house lawyers, as the Supreme Court held in *Upjohn Co. v. United States*, 449 U.S. 383, 390

(1981). No one holds the bona fide attorney-client privilege in higher esteem than ACC.

But the doctrine of attorney-client privilege exists to serve the interests of clients not attorneys; neither law nor policy enables attorneys to use it to protect themselves at the expense of their own clients. Under well-settled privilege law, the client – not his or her lawyer – is entitled to assert the privilege for communications relating to the client's ongoing representation. While Appellants and the 74 law firms that have submitted an amici curiae brief (the "Amici Law Firms") spend most of their briefs arguing that none of the various exceptions to the attorney-client privilege apply in this case, they ignore the fact that the client, not the client's lawyer, is "the client" for purposes of a lawyer's communications about an ongoing representation. Accordingly, the question is not whether the client may "abrogate" the lawyer's privilege, but whether the client may "assert" its own privilege. And the answer to that question is an emphatic yes.

Granting lawyers a license to withhold communications from their clients would also be contrary to public policy by weakening the trust between clients and their lawyers. Clients pay law firms to serve them as advocates, not fight them as adversaries. Law firms cannot and should not be permitted to place their own interests above those of their clients. Allowing

attorneys to assert the privilege against their clients would give law firms and their attorney the ability to sweep under the rug a large swath of communications that evidence self-dealing or malpractice. That result is not and should not be the law, particularly in a state that is the hub of many of the world's largest law firms. Accordingly, ACC urges this Court to affirm the decision below and make clear that law firms and their attorneys may not invoke the privilege against the very client they are hired to serve by concealing communications relating to the client's ongoing representation.

ARGUMENT

I. THE ATTORNEY-CLIENT PRIVILEGE DOCTRINE GIVES CLIENTS – NOT THEIR LAWYERS – THE RIGHT TO ASSERT PRIVILEGE OVER COMMUNICATIONS THAT RELATE TO THE CLIENT'S ONGOING REPRESENTATION

The attorney-client privilege, codified in CPLR 4503(a), promotes the trust and confidence of clients in their lawyers by barring disclosure of any confidential communications between a client and his or her attorney. Thus, the privilege "is designed to ensure that a client can confide in an attorney without concern that the information so imparted could be used to harm him in a legal proceeding before a court." *In re Will of Soluri*, 40 Misc.3d 1207(A) (Sur. Ct. Nassau County 2013) (citing *Priest v. Hennessy*, 51 N.Y.2d 62 (1980)); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (the privilege is intended to encourage "full and frank

communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice"); *Swidler & Berlin v. U.S.*, 524 U.S. 399, 412 (1998) ("The attorney-client privilege promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice.") (O'Connor, J., dissenting) (citing *Upjohn Co.*, 449 U.S. at 389).

To fulfill its important purposes, the privilege extends broadly to "communications among clients, their attorneys, and the agents of both, for the purpose of seeking and rendering an opinion on law or legal services, or assistance in some legal proceeding, so long as the communications were intended to be, and were in fact, kept confidential." *Johnson v. Sea-Land Service, Inc.*, 2001 WL 897185, at *2, 2001 U.S. Dist. LEXIS 11447, at *4 (S.D.N.Y. Aug. 9, 2001) (citing cases); *CSC Recovery Corp. v. Daido Steel Co.*, 1997 WL 661122, at *3, 1997 U.S. Dist. LEXIS 16346, at *9 (S.D.N.Y. Oct. 22, 1997); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 441 (S.D.N.Y. 1995); *see also* Supreme Court Standard 503(b), *Lawyer-Client Privilege*, reprinted in 56 F.R.D. 183, 235 (1973) (the privilege extends to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client").

Importantly, privileged communications include not only communications between the client and his or her lawyer, but "between his [or her] lawyer and the lawyer's representative." Supreme Court Standard 503(b)(2) (emphasis added); *accord* Restatement (Third) of Law Governing Lawyers § 68 (2000) ("the attorney-client privilege may be invoked . . . 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.") (emphasis added); *id*. § 70 ("Privileged persons . . . are . . . the client's lawyer, agents of either who facilitate communications between them, and *agents of the lawyer who facilitate the representation*.") (emphasis added); Revised Uniform Rules of Evidence, Rule 502(b)(2) (2005) (communications are privileged if "between [the client's] lawyer and the lawyer's representative"); *id*. Rule 502(a)(4) (1974) ("A 'representative of the lawyer' is one employed by the lawyer to assist the lawyer in the rendition of professional legal services").

Accordingly, courts have held that the attorney-client privilege protects communications between lawyers and agents of a lawyer where such communications are for the purpose of assisting the attorney in the provision of legal assistance to his or her client. *See, e.g., Forward v. Foschi*, 27 Misc.3d 1224(A) (Sup. Ct. Westchester County 2010) (the

privilege extends to all persons who act as the attorney's agents); *Gorman v. Polar Electro, Inc.*, 137 F.Supp.2d 223, 227 (E.D.N.Y. 2001) (the privilege applies to "communications with . . . specialists who assist attorneys"); *Occidental Chemical Corp. v. OHM Remediation Services Corp.*, 175 F.R.D. 431, 436 (W.D.N.Y. 1997) (noting that the attorney-client privilege has been extended to representatives of the attorney); *Golden Trade v. Lee Apparel Co.*, 143 F.R.D. 514, 518–19 (S.D.N.Y. 1992) (concluding that if a patent agent is acting to assist an attorney in providing legal services, the client's communications with him should come within the privilege); *Pasadena Refining System Inc. v. U.S.*, 2011 WL 1938133, at *1, 2011 U.S. Dist. LEXIS 54743, at *2 (N.D. Tex. Apr. 26, 2011) (the privilege covers communications not only with lawyers but also with representatives of lawyers or persons who assist lawyers in providing legal services).

Confidential communications between a client's lawyer and another lawyer regarding the ongoing representation of the client plainly fall within the ambit of the attorney-client privilege. To begin with, when a client's lawyer consults another lawyer – whether employed by the lawyer's law firm or an outside law firm – regarding an ongoing representation, the communications are clearly between a client's "lawyer and the lawyer's representative." Supreme Court Standard 503(b)(2). What is more, a

consultation about the ongoing representation of a client is, by definition, for "the purpose of facilitating the rendition of professional legal services to the client." *Id*. at 503(b). That is true regardless of whether the consultation relates to an ethical, malpractice or any other issue relating to the representation of an existing client. Indeed, the New York State Bar Association has recognized as much. *See* N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 789 at 12 ("A lawyer's interest in carrying out the ethical obligations imposed by the Code is *not an interest extraneous to the representation of the client*. It is inherent in that representation and a required part of the work in carrying out the representation.") (emphasis added.)

Although Appellants and the Amici Law Firms agree that communications between a client's lawyer and other lawyers regarding the client's representation are privileged, they argue that the client's lawyer has a right to assert that privilege against his or her client. As the authorities cited above illustrate, however, when an attorney engages in confidential communications regarding a current client's representation with another attorney, the "client" for purposes of privilege law is the current client – not his or her lawyer. Thus, the privilege is the right of the client, not his or her lawyer, to assert. *See* Supreme Court Standard 503(b) ("*[a] client* has a

privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client") (emphasis added); *id*. at 503(c) ("The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of *the client*.") (emphasis added); *Reese v. Klair*, 1985 WL 21127, 1985 Del. Ch. LEXIS 403, at *11-12 (Del. Ch., Feb. 20, 1985) ("The Attorney-Client Privilege belongs to the client; it is his to invoke and not the attorney's."). Accordingly, while communications between a lawyer and another lawyer regarding a current client's representation are privileged against the outside world, they are not privileged as against the client.

That conclusion is not altered by the self-serving claim of Appellants and the Amici Law Firms that the lawyer is the "client" for purposes of communications relating to an existing client when such communications are for the "benefit" of the lawyer. While the parties spend much time debating whether the particular communications at issue were for the benefit of the lawyer or the client, that question is irrelevant. There is nothing in the law that states that if the communications were for the benefit of the attorney, he or she has the right to assert or waive the privilege, as opposed to the client. So long as the communications are made to facilitate the representation – a

fact that is clearly true when a lawyer consults another lawyer about an ongoing representation – the client has the right to assert privilege over them. That is the case regardless of whether the issue is one of ethics, potential malpractice, or any other matter affecting a current representation.[1]

Nor is there any merit to the reliance by the Amici Law Firms on the express language of the New York privilege statute, which "creates the privilege between 'attorney' and 'client.'" Brief of Amici Curiae Interested Law Firms ("Amici Law Firm Brief") at 11 (citing CPLR 4503). The Amici Law Firms insist that there is no reason "why a law firm consulting with its in-house counsel cannot be 'a client' just like any other person or entity whose employees or partners consult with in-house counsel." Amici Law Firm Brief at 11-12. But that argument begs the question of who is the client for purposes of communications relating to an existing client's representation. Because the current client – not his or her lawyer – is the client for purposes of such communications, there is no conflict with the New York privilege statute.

[1] The argument that the attorney is "the client" when the communications are for his or her benefit also fails in light of the duty of lawyers to place the interests of clients above their own. *See infra*, pp. 15-17. Given that duty, it makes no sense to allow an attorney to conceal communications relating to an ongoing representation on the ground that they were for his or her benefit rather than for the benefit of the client

In sum, where a client's lawyer engages in confidential communications with another lawyer regarding the ongoing representation of a client, the client – not the lawyer – is entitled to assert the privilege as a matter of law with respect to such communications. That is and should be true regardless of whether the client's lawyer consults other counsel employed by his or her law firm or outside his or her firm. In either case, it is the existing client – not the lawyer – that is the client for purposes of the communications. Indeed, the Appellant law firm itself has recognized the lack of a principled basis for distinguishing between in-house and outside lawyers. *See* Appellants' Reply Brief at 10 ("Requiring a lawyer to consult with outside counsel rather than in-house General Counsel does not remove or remedy any potential conflict of interest between the lawyer and her client that might have led to, or might arguably result from, such consultation"). Of course, when the representation is terminated, a lawyer is free to assert the privilege over communications he or she engages in *thereafter*. But unless and until the representation is terminated, the client has the right to assert the attorney-client privilege with respect to communications about a client's ongoing matter.

II. Permitting Attorneys To Hide Communications Relating To A Current Client's Representation Would Impair the Trust Between Clients And Their Attorneys, Thereby Undermining Public Confidence In The Legal System

A. The Attorney-Client Relationship Imposes A Unique And Strict Fiduciary Duty On Attorneys To Represent Their Clients With Undivided Loyalty

Allowing attorneys to assert a privilege against their current clients would not only be contrary to privilege law, but would impair the public interest by eroding the trust and confidence that clients need to have in their lawyers. As U.S. Supreme Court Justice Joseph Story observed almost 200 years ago, 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 (C.C.D. Me. 1824). Thus, "[a] client is entitled to be represented by a lawyer whom the client can trust." Restatement (Third) of the Law Governing Lawyers at § 121 cmt. b (emphasis added). 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 (S.D.N.Y. 2002) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, J.)); *see also In re Cooperman*, 83 N.Y.2d 465, 472 (1994) (attorney-client relationship depends on "ultimate trust and confidence"); Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.6

cmt 1 ("trust" is "the hallmark of the client-lawyer relationship");[2] *see also Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 43 (1990) ("without this relationship of trust and confidence an attorney is unable to fulfill this obligation to effectively represent clients") (citation omitted).

As a result of the critical need for clients to trust their attorneys, lawyers have a duty to represent their clients with "undivided loyalty." *See Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 865 N.Y.S.2d 14, 21 (1st Dep't 2008) ("[i]t is well settled that the relationship of the client and counsel is one of 'unique fiduciary reliance' and that the relationship imposes on the attorney the duty to deal fairly, honestly, and with *undivided loyalty*") (citing *Cooperman*, 83 N.Y.2d at 472) (emphasis added); *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 43 (1990) (emphasizing "[t]he unique relationship between an attorney and client, founded in principle upon the elements of trust and confidence on the part of the client and of *undivided loyalty* and devotion on the part of the attorney") (emphasis added).

"The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique

[2] The preamble and comments to the Rules of Professional Conduct are available at http://www.nycbar.org/pdf/FinalNYRPCsWithComments%28April12009%29.pdf.

duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's." *Cooperman*, 83 N.Y.2d at 472 (citations omitted). These duties reach beyond a regular fiduciary's responsibilities. As the Second Circuit has explained, "the attorney-client relationship entails one of the highest fiduciary duties imposed by law." *In re Hayes*, 183 F.3d 162, 168 (2nd Cir.1999). Thus, 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." *In re SonicBlue*, 2008 Bankr. LEXIS 181, at *28 (N. D. Cal. Jan. 18, 2008) *see also Cooperman*, 83 N.Y.2d at 471-72 (as a result of the "the unique fiduciary attorney-client relationship," the obligations of attorneys "transcend those prevailing in the commercial market place") (citations omitted).

B. Allowing Attorneys To Assert A Privilege Against Their Current Clients Would Be Inimical To Their Duty Of Loyalty

Permitting lawyers to shield communications relating to an ongoing representation from the very clients they are hired to serve would fly in the face of their duty to act with undivided loyalty. The law is quite clear that the duty of loyalty requires lawyers to put the interests of clients above all other interests, including their own. Thus, "with rare and conditional

exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship." *Kelly v. Greason*, 23 N.Y.2d 368, 376 (1968); *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).

The New York professional ethics rules specifically reflect the obligation of lawyers to put their clients' interests above their own. Thus, the rules state that

> [l]oyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, *solely for the benefit of the client* and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise professional judgment on behalf of each client.

Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 cmt 1 (emphasis added); *see also* Rule 1.7(a)(2) (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).

In order to ensure the trust that is essential to the attorney-client relationship, lawyers should not be able to hide communications from the clients that they are hired to represent. Such a rule would be at odds with the lawyer's fundamental duty to place the client's interests above their own and impair the trust and confidence that clients need and deserve in their counsel. To place lawyer self-protection above the interests of the clients they represent would not only harm individual clients, but also undermine society's confidence in the legal system as a whole. 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.

Giving lawyers the green light to shelter information from their clients under the guise of privilege would also contravene the obligation of attorneys to act with candor toward their clients. That obligation is reflected in the New York professional ethics rules, which require lawyers to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.4(b)), "keep the client reasonably

informed about the status of the matter" (Rule 1.4(a)(3)), and "promptly comply with a client's reasonable requests for information" (Rule 1.4(a)(4)). With special relevance to this case, the ethics rules specifically note that "*[a] lawyer may not withhold information to serve the lawyer's own interest or convenience* . . . ." Rule 1.4(b) cmt 7 (emphasis added). Thus, lawyers who fail to properly communicate with clients, *e.g.,* by failing to disclose a conflict of interest, are subject to disbarment. *See In re Jordan III*, 299 A.D.2d 34, 35 (2d Dept. 2002).

In New York, the lawyer's duty to disclose facts that do not "serve the lawyer's own interest or convenience" explicitly extends to informing clients about the lawyer's conduct that might constitute malpractice. Thus, an attorney "has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim." N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 734 (2000); *see also Tallon v. Comm. on Prof'l Standards*, 86 A.D.2d 897, 898 (3d Dep't 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him."). Granting attorneys the authority to keep communications about their existing clients secret would contravene this fundamental duty to inform

clients of issues affecting their representation, including potential malpractice.

Indeed, to allow lawyers to withhold communications from their client would result in an extremely odd and unfair anomaly in malpractice cases that would entitle the lawyer but not the client to all information relating to the claim. Under the "self-defense" exception, the law permits lawyers to disclose privileged information where needed to defend themselves in litigation against a client. *See* Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.6 (b)(5). By the same token, communications by attorneys discussing the ongoing representation of their clients should be subject to disclosure in litigation against the attorney. Lawyers should not be able to use privileged communications with their client in self-defense yet keep their own communications secret from their client. *See* Note, *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*, 48 Ga. L. Rev. 1225, 1254 (Summer 2014) (if lawyers are permitted to shield their communications relating to a current client's potential malpractice claim, "lawyers and more generally, law firms c[ould] 'have their cake and eat it too,' because they [could] use privileged communications with their client in self-defense and keep their intra-firm

communications secret from their client")**.** Accordingly, allowing attorneys to shield communications regarding the representation of a current client would deprive clients of an equal playing field in litigation with their attorneys.

III. NONE OF THE ARGUMENTS SET FORTH BY APPELLANTS AND THE AMICI LAW FIRMS COMPELS A CONTRARY POSITION

A. The Fiduciary Exception Does Not Support An Internal Law Firm Privilege

Both Appellants and the Amici Law Firms spend a large portion of their briefs attempting to demonstrate that their position is consistent with the so-called "fiduciary exception" to the attorney-client privilege, which allows beneficiaries of trusts to access legal advice that is obtained by trustees on the theory that the beneficiary is the "real client" with respect to such advice. *See* Appellants' Brief at 8-17; Appellants' Reply Brief at 3-12; Amici Law Firm Brief at 30-35. Appellants and the Amici Law Firms stress that "the exception applies only where the beneficiary, not the fiduciary, [i]s the 'real client' for the purposes of the communications with the attorney" and argue that is not the case when the advice is sought for "the benefit of the fiduciary" rather than for the benefit of the beneficiary. Appellants' Brief at 10-11 (citation omitted); *see also id*. at 10 ("the exception is inapplicable

if a fiduciary consulted counsel 'in order to defend itself'") (citation omitted); Amici Law Firm Brief at 31-34 (same).

According to Appellants and the Amici Law Firms, the lawyer, not his or her current client, is the "real client" of communications regarding ethical and malpractice issues regarding the client's representation because such communications relate to the lawyer's "duties, obligations and liabilities." *See* Amici Law Firm Brief at 34; *see also* Appellants' Brief at 12 ("Because the purpose of the consultations memorialized in the Privileged Communications was to ensure that Schnader and its lawyers understood their own obligations, Schnader was the "real client" for purposes of the lawyers' consultation with in-house counsel."). As a result, they argue, "the attorney-client privilege should be fully available to [the lawyer] as anyone else." Amici Law Firm Brief at 34.

That argument fails for two reasons. First, as explained above, the conclusion that a client's lawyer may not assert the privilege against his or her client for communications regarding the client's representation is not based on the fiduciary or any other exception to the doctrine of attorney-client privilege. Instead, it rests on an affirmative application of privilege doctrine itself, which holds that the client –not his or her lawyer – is "the client" for purposes of confidential communications relating to the

client's ongoing representation. In other words, as a matter of law, when an attorney is the fiduciary, the client is not merely the "real" – but the "only" – client for purposes of the attorney-client privilege. Accordingly, there is no need to determine whether the client has a right to the privileged materials under the fiduciary exception.[3]

Second, even if this Court were to apply the fiduciary exception, that exception would require attorneys to provide their clients with all communications regarding the representation of their current clients. While the fiduciary exception allows fiduciaries to shield legal advice that is obtained for their own benefit rather than for the benefit of the beneficiaries, that distinction does not and should not apply to lawyers. When attorneys obtain legal advice relating to the representation of a current client, that advice inevitably does and should benefit clients as well as their lawyers. *See Bank Brussels*, 220 F. Supp. 2d at 287 (rejecting argument that advice sought in performing a conflict check "was not sought for the benefit of [the client]" as "untenable"). Indeed, even Appellants appear to recognize that fact. *See* Appellants' Reply Brief at 7 (it is "clear" that "clients can benefit when their lawyers seek ethical advice"). Given the unique

[3] Because the fiduciary exception is not the proper legal framework for analyzing this issue, there is no need for this Court to address whether there was "good cause" for disclosure of the confidential communications to the client.

fiduciary duty of lawyers to place the interests of their clients above their own, it would make no sense to give attorneys the ability to shield communications relating to their client on the ground that the communications were undertaken to protect their own interests as opposed to those of the client.

B. The Fact That A Conflict Of Interest Does Not Typically Abrogate The Privilege Is Irrelevant

Appellant further contends that even if it would be a conflict of interest for an attorney to withhold communications on ethical or malpractice issues from a current client, that conflict would not vitiate an otherwise valid evidentiary privilege between the attorney and his or her attorney. *See* Appellants' Reply Brief at 18-19 (citing cases for the proposition that a conflict of interest does not affect the validity of the attorney-client privilege); *id*. at 20-21 ("a current client exception to New York's attorney-client privilege" would "confuse the law of professional responsibility with the law of Evidence").

That argument is legally flawed. To be sure, some of the early cases applying the so-called "current client" exception unfortunately suggested that lawyers may not assert a privilege against their current client for confidential communications with other lawyers regarding the client's representation because to do so would constitute a conflict of interest. While

this reasoning has its heart in the right place, it is analytically incorrect. The reason that a lawyer may not assert the privilege against his or her current client for communications with other lawyers about that client's representation is not because to do so would constitute a conflict of interest, but because they are not privileged in *the first place* vis-à-vis the client. Accordingly, the principle that a conflict of interest does not vitiate the privilege is completely inapposite.

What is more, the policies underlying the principle render it inapplicable in this case. The principle was designed to ameliorate the unfairness of abrogating a client's privilege protection based on his or her attorney's violation of the ethics rules. That is a completely different situation than that at issue here, where the party seeking to assert the privilege is the attorney who committed the ethical violation.

C. The Various Bar Association Opinions Cited By Appellants And The Amici Law Firms Are Unpersuasive

Both Appellants and the Amici Law Firms also rely on several bar association opinions to bolster their position. *See* Appellants' Brief at 3, 23-24; Appellants' Reply Brief at 19; Amici Law Firm Brief at 15-17, 25-29. That reliance is misplaced. To begin with, N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 789 (Oct. 26, 2005) offers no support. As the Amici Law Firms explain, that opinion merely sets forth the reasons why "law firms

should not be viewed as having a conflict of interest with their clients when they consult with in-house counsel to assess and assure compliance with their ethical obligations." Amici Law Firm Brief at 15; *see also* Appellants' Reply Brief at 19 (Opinion 789 rejected the "conclusion that a conflict is created under New York's ethical rules when attorneys seek advice regarding current clients").

As the leading representative of in-house counsel and their corporate clients, ACC completely agrees that lawyers can and should seek ethical advice from other lawyers inside and outside their firm. As Opinion 789 makes clear, a firm "is not only entitled, but required, to consider the ethical implications of what it does on a daily basis." New York N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 789 ¶12. However, the fact that communications regarding ethical issues arising from a current client's representation are not a conflict of interest does not mean that such communications are privileged as against the client. Indeed, Opinion 789 specifically notes that it takes no position on whether and when the privilege applies to such communications. *See id*. ¶ 14 (stating that it was only opining on "what constitutes a conflict of interest"); ¶ 4 ("[t]he question of the applicability of the privilege is an evidentiary issue for the courts").

Nor do the ABA opinions cited by Appellants and the Amici Law Firms require this Court to find an internal law firm privilege. *See* Appellants' Brief at 3 (citing ABA House of Delegates Res. (2013)); Amici Law Firm Brief at 25-29 (same); Amici Law Firm Brief at 2, 5, 22, 36 (citing ABA Committee On Ethics & Professional Responsibility, Formal Op. 08-453 (2008)). To the extent these opinions support the ability of law firms to conceal evidence from the clients they are hired to serve, they are completely self-serving and unconvincing authority. Lawyers working for firms – including the 74 New York law firms that have signed on to the Amici Brief – clearly have a vested interest in keeping evidence of potential ethical violations and malpractice hidden from their clients. *See* Note, 48 Ga. L. Rev. at 1257 n.196 (noting that the ABA "has long been criticized for taking a more 'lawyer friendly' stance"). Not surprisingly, the 2013 ABA resolution was proposed by the ABA tort trial and insurance practice section.

D. *Denying Lawyers The Ability To Assert Privilege Against Their Currents Clients Would Not Make New York An "Outlier"*

Appellants and the Amici Law Firms also rely on cases from other jurisdictions that have upheld the privilege for communications between lawyers and law firm "in-house" counsel about matters concerning a current client's representation. *See* Appellants' Brief at 24-26; Amici Law Firm Brief at 18-19. Indeed, the Amici Law Firms claim that a contrary decision

"would make New York a significant outlier on this issue." Amici Law Firm Brief at 19.

These cases are not and should not be dispositive for several reasons. To begin with, in addition to the court below, a number of other courts have held that attorneys are required to disclose internal law firm communications that took place while the firm was still representing the client. *See, e.g., Asset Funding Grp., L.L.C. v. Adams & Reese*, L.L.P., 2009 U.S. Dist. LEXIS 48420, at *9-10 (E.D. La. June 4, 2009); *VersusLaw, Inc. v. Stoel Rives,* 111 P.3d 866, 878-79 (Wash. App. 2005); *Bank Brussels*, 220 F.Supp.2d at 287; *Koen Book Distribs.*, 212 F.R.D. at 286; *In re Sunrise Secs. Litig.*, 130 F.R.D. 560, 597 (E.D. Pa. 1989). While Appellants and the Amici Law Firms stress that courts in eight states have ruled to the contrary, only three were state supreme courts. Thus, a ruling that lawyers may not assert the privilege against clients for communications relating to their ongoing representation would hardly make New York a "significant outlier on this issue." Amici Law Firm Brief at 19.

More importantly, the cases permitting attorneys to assert a privilege against their current clients are based on faulty legal reasoning. Most of the cases merely knock down the "fiduciary exception" and "conflict of interest" rationales without addressing the real reason why lawyers may not assert a

privilege against their current client for communications about that client's representation: the client, not the lawyer, is the client for purposes of such communications. Of course, after a client's representation is terminated and the client is no longer the "client," the lawyer may assert the privilege for subsequent communications her or she has regarding the former representation. But until that time, the privilege is the client's to assert.

E. Allowing Attorneys To Hide Their Communications About A Client's Ongoing Representation Is Not Necessary To Ensure That Lawyers Comply With Their Ethical Obligations

Appellants and Amici Law Firms also contend that permitting lawyers to assert a privilege against their clients is necessary to enable them to obtain sound ethical advice. *See* Appellants' Brief at 27 (allowing attorneys to assert a privilege for communications with their firms' in-house counsel about ethical issues arising from work for a current client will encourage "[f]rank and full communication" which "in turn, increases the likelihood that an attorney's consultation with in-house counsel will lead to prompt resolution of an ethical issue, often to a client's benefit"); Appellants' Reply Brief at 19 ("internal communication between attorneys and their firm's in-house General Counsel benefits all concerned by facilitating prompt recognition of errors or conflicts and resolution of the same"); Amici Law

Firm Brief at 1-2 ("The Amicus Firms believe that it is of great importance that law firms and their lawyers have the protection of the attorney-client privilege when consulting with individuals charged with identifying and assessing issues of firm risk, conflicts or ethics relating to the representation of current clients"; without such protection, open discussion of these issues "will be chilled."); *id*. at 2 (emphasizing "the importance of development of an ethical infrastructure in law firms to achieve compliance with professional responsibilities").

The above reasoning does not withstand analysis for a number of reasons. For starters, it fails as a matter of law, because the client, not his or her lawyer, is the client for purposes of communications relating to the client's ongoing representation. Thus, even if the failure to allow attorneys to assert the privilege against a current client would deter communications between the client's attorney and counsel, that is irrelevant because the privilege belongs to the client, not the attorney.

Moreover, there is no reason to think that lawyers will not obtain the advice they need to act ethically if they cannot assert a privilege against their current clients. As officers of the court, lawyers have a professional duty to act ethically. Unlike clients, attorneys have a license that the State can revoke. Both to protect their clients and their own

interests, lawyers have every incentive to seek advice regarding their ethical obligations. There is no basis for concluding that law firms will not provide, and lawyers will not seek, ethical counseling unless that advice can be shielded from clients. As one court explained, "[the firm] can still perform its responsibilities under the Code of Professional Responsibility – it just is not protected by the attorney-client privilege." *Bank Brussels*, 220 F. Supp. 2d at 288.

While Appellants and the Amici Law Firms complain that lawyers will be "chilled" from seeking advice, any "chilling" is likely to be minimal in light of the economic self-interest of law firms to avoid ethical violations and/or malpractice liability. As one commentator noted, "it is in a law firm's own interest to seek legal advice early and resolve malpractice disputes." *See* Note, 48 Ga. L. Rev. at 1258. "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." *Id*; *see also id.* at 1257 ("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.' 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.") (citation omitted).

Notably, law firms can indeed assert an internal law firm privilege when there is no duty to an existing client. ACC is not asking this Court to always deny attorney-client privilege to internal communications among lawyers at law firms. Rather, this case only addresses the ability of law firm lawyers to assert the privilege *against their current clients*. In other contexts, where duties to clients do not apply or have not yet attached, law firms can treat lawyers within their firm as in-house counsel, complete with privilege. They can do so when deciding whether to accept new clients; when they sue someone on their own behalf, or get sued, and no duty to existing clients apply; 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 representation of existing clients.

In any event, any potential chilling of attorney communications is outweighed by more important public policies. As explained earlier, a robust attorney-client relationship is integral to the administration of justice in our society and that relationship depends on the ability of clients to trust their lawyers. If attorneys are allowed to keep communications regarding their client's representation secret, that trust will be impaired, significantly undermining public confidence in the legal system. As a result, clients will

be less likely to seek legal advice – a result that directly contradicts the purpose of the attorney-client privilege.

In addition, clients and society as a whole would suffer substantial harm if lawyers were permitted to bury communications that reveal evidence of malpractice or other issues clients should or need to be aware of concerning their representation. The inevitable result would be to grant attorneys wide latitude to conceal from their own clients the discovery of documents and communications that evidence improper conduct. Attorneys who know that their communications will be forever hidden from their clients will inevitably use that privilege to their own benefit and/or to the benefit of their law firm, to the detriment of their client. Indeed, the amount of communications that lawyers would be able to keep from their clients under Appellants' theory is staggering. *See* Appellants' Reply Brief at 9 (maintaining that lawyers should be able to shield their communications whenever they are "evaluating their own responsibilities and potential liabilities"). As both a matter of law and policy, this Court should reject such a broad rule that would grant lawyers the far-reaching power to hide their mistakes from their own clients.

CONCLUSION

For the foregoing reasons, ACC urges this Court to affirm the decision below and make clear that lawyers can and should obtain ethical advice from attorneys either inside or outside their law firm, but to the extent that advice relates to the representation of a current client, lawyers may not assert a privilege against the client.

Dated: May 12, 2015
New York, New York

Respectfully submitted,

Ralph M. Stone

STONE BONNER & ROCCO LLP
145 West 45th Street, Suite 701
New York, New York 10036
(212) 239-4340
rstone@lawssb.com

Counsel for Amicus Curiae
Association of Corporate Counsel

Of Counsel:

Amar D. Sarwal
Wendy E. Ackerman
Association of Corporate Counsel
1025 Connecticut Ave., NW
Suite 200
Washington, DC 20036-5425
(202) 293-4103
sarwal@acc.com
w.ackerman@acc.com

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 600.10(d)(1)(v)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14 point in text
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any addendum containing statutes, rules, and regulations, etc. is 7,254.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

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KEITH STOCK,

Plaintiff-Respondent,

-against-

SCHNADER HARRISON SEGAL & LEWIS and M. CHRISTINE CARTY,

Defendants-Appellants.

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New York County Clerk's
Index No. 651250/13

AFFIDAVIT OF SERVICE

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The undersigned, being duly sworn, deposes and says:

3. I am not a party to this action, am over 18 years of age, and reside in New York County.

4. On May 12, 2015 I served a true and correct copy of the foregoing *Affirmation of Ralph M. Stone with annexed Brief of Amicus Curiae Association of Corporate Counsel* on the following counsel by personally delivering same to their offices listed below:

Jordan M. Kam Esq.
The Roth Law Firm, PLLC
295 Madison Ave., 22nd Floor,
New York, New York 10017

Frederick B. Warder III, Esq.
Jesse A. Townsend, Esq.
YiLing Chen-Josephson, Esq.
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036

Baldwin Giang

Sworn to before me this
12th day of May 2015

Notary Public
SUSAN M. DAVIES
Notary Public, State Of New York
No. 02DA5007693
Qualified In New York County
Commission Expires March 04, 2019