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No. 09-30524

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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ASSET FUNDING GROUP, LLC, et al.,

*Plaintiffs - Appellees,*

v.

ADAMS & REESE LLP,

*Defendant - Appellant.*

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On Appeal from the United States District Court  
for the Eastern District of Louisiana  
Civil Action No. 07-2965

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**BRIEF OF THE FEDERAL BAR ASSOCIATION  
AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY**

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**SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES**

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Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following additional listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

*Amicus curiae*

Federal Bar Association

*The Federal Bar Association does not have a parent corporation, nor does any publicly held corporation own 10% or more of its stock.*

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# TABLE OF CONTENTS

	Page
SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES.....	i
TABLE OF AUTHORITIES .....	iv
INTEREST OF THE <i>AMICUS CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	6
I. THE PUBLIC INTEREST IS SERVED BY RECOGNIZING THAT IN-FIRM ETHICS CONSULTATIONS ARE SHIELDED BY ATTORNEY-CLIENT PRIVILEGE. ....	6
A. Lawyers Face A Complex Regulatory Environment And Therefore Have Need For Legal Advice About How To Conform Their Representation Of Clients To The Law. ....	8
B. There Is No Basis For Categorically Excluding In-Firm Ethics Consultations Regarding Current Clients From The Coverage Of The Attorney-Client Privilege.....	14
1. A Lawyer May Seek Ethics Advice Regarding An Ongoing Client Representation Without Creating A <i>Per</i> <i>Se</i> Conflict Between The Firm And The Current Client. ....	15
2. The Fiduciary Exception To The Attorney-Client Privilege Is Not An Appropriate Framework For Analyzing Claims Of In-Firm Privilege. ....	17
3. If Accepted, The “Current Client” And “Fiduciary Exception” Rationales Would Condemn Consultations With Outside Counsel As Well As Consultations With In-Firm Ethics Counsel. ....	24
II. REQUIRING LAWYERS TO CONSULT WITH OUTSIDE COUNSEL INSTEAD OF IN-FIRM ETHICS COUNSEL TO OBTAIN THE BENEFIT OF ATTORNEY-CLIENT PRIVILEGE WOULD HAVE SIGNIFICANT ADVERSE CONSEQUENCES.....	24
CONCLUSION .....	28
CERTIFICATE OF SERVICE .....	29
CERTIFICATE OF COMPLIANCE.....	30

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Asset Funding Group, LLC v. Adams &amp; Reese, LLP</i> , Civ. A. No. 07-2965, 2008 WL 4948835 (E.D. La. Nov. 17, 2008).....	<i>passim</i>
<i>Asset Funding Group, LLC v. Adams &amp; Reese, LLP</i> , Civ. A. No. 07-2965, 2009 WL 1605190 (E.D. La. June 5, 2009) .....	3
<i>Bank Russells Lambert v. Credit Lyonnais (Suisse)</i> , 220 F. Supp. 2d 283 (S.D.N.Y. 2002).....	15
<i>Garner v. Wolfinbarger</i> , 430 F.2d 1093 (5th Cir. 1970) .....	20, 21, 22
<i>Gilbert v. Master Washer &amp; Stamping Co., Inc.</i> , 104 Cal. Rptr. 2d 461 (Ct. App. 2001) .....	13
<i>Hertzog, Calamari &amp; Gleason v. Prudential Ins. Co.</i> , 850 F. Supp. 255 (S.D.N.Y. 1994).....	14, 15
<i>Jaffee v. Redmond</i> , 518 U.S. 1 (1996) .....	5, 6, 21
<i>Kay v. Ehrler</i> , 499 U.S. 432 (1991) .....	13
<i>Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman &amp; Lombardo, P.C.</i> , 212 F.R.D. 283 (E.D. Pa. 2002).....	23, 24
<i>Kyle v. La. Pub. Serv. Comm’n</i> , 878 So. 2d 650 (La. Ct. App. 2004).....	7
<i>Mead Data Cent., Inc. v. U.S. Dep’t of Air Force</i> , 566 F.2d 242 (D.C. Cir. 1977).....	10
<i>Natta v. Hogan</i> , 392 F.2d 686 (10th Cir. 1968).....	8
<i>Nesse v. Pittman</i> , 206 F.R.D 325 (D.D.C. 2002).....	14, 15, 21
<i>In re Sealed Case</i> , 737 F.2d 94 (D.C. Cir. 1984).....	8
<i>Smith v. Kavanaugh, Pierson &amp; Talley</i> , 513 So. 2d 1138 (La. 1987) .....	7, 9
<i>In re SonicBlue Inc.</i> , Nos. 03-51775, 03-51776 2008 WL 170562, (Bankr. N.D. Cal. Jan. 18, 2008) .....	23, 25

## TABLE OF AUTHORITIES

(continued)

Page(s)

<i>State v. Green</i> , 493 So. 2d 1178 (La. 1986).....	6
<i>In re Sunrise Securities Litigation</i> , 130 F.R.D. 560 (E.D. Pa. 1989) ....	17, 19, 22, 23
<i>Swidler &amp; Berlin v. United States</i> , 524 U.S. 399 (1998) .....	5, 21
<i>Thelen Reid &amp; Priest LLP v. Marland</i> , No. C-06-2071, 2007 WL 578989 (N.D. Cal. Feb. 21, 2007) .....	23, 25, 26, 27
<i>United States v. Rowe</i> , 96 F.3d 1294 (9th Cir. 1996) .....	8, 14
<i>Upjohn Co. v. United States</i> , 449 U.S. 383 (1981).....	<i>passim</i>
<i>Valente v. PepsiCo, Inc.</i> , 68 F.R.D. 361 (D. Del. 1975).....	<i>passim</i>
<i>Succession of Wallace</i> , 574 So. 2d 348 (La. 1991) .....	11
<i>Ward v. Succession of Freeman</i> , 854 F.2d 780 (5th Cir. 1988) .....	19, 21, 22
<i>Wildbur v. ARCO Chem. Co.</i> , 974 F.2d 631 (5th Cir. 1992).....	18, 21
<i>Willy v. Admin. Review Bd.</i> , 423 F.3d 483 (5th Cir. 2005).....	6, 7
<b>Statutes and Rules</b>	
Federal Rule of Appellate Procedure 29(b) .....	1
LA. CODE EVID. ANN. art. 506(A)(2). .....	8
MODEL RULES PROF'L CONDUCT R. 1.7(a)(2) (2002) .....	16, 23
<b>Other Authorities</b>	
American Bar Association Standing Committee on Ethics and Professional Responsibility, <i>In-House Consulting on Ethical Issues</i> , Formal Opinion 08-453 (Oct. 17, 2008).....	16, 17, 22
William T. Barker, <i>Law Firm In-House Attorney-Client Privilege Vis-À-Vis Current Clients</i> , 70 Def. Counsel J. 467 (2003) .....	22, 24, 26

## TABLE OF AUTHORITIES

(continued)

Page(s)

Ethan S. Burger, <i>Who Is the Corporation’s Lawyer?</i> , 107 W. VA. L. REV. 711 (2005) .....	12
Ethan S. Burger & Carol M. Langford, <i>The Future of Legal Ethics: Some Potential Effects of Globalization &amp; Technological Change on Law Practice Management in the Twenty-First Century</i> , 15 WIDENER L.J. 267 (2006).....	12
Elizabeth Chambliss, <i>The Scope of In-Firm Privilege</i> , 80 NOTRE DAME L. REV. 1721 (2005) .....	<i>passim</i>
Elizabeth Chambliss & David B. Wilkins, <i>The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms</i> , 44 ARIZ. L. REV. 559 (2002) .....	27
Mary C. Daly, <i>Resolving Ethical Conflicts in Multijurisdictional Practice— Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?</i> , 36 S. TEX. L. REV. 715 (1995) .....	12
Jonathan M. Epstein, <i>The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm</i> , 7 GEO. J. LEGAL ETHICS 1011 (1994).....	11, 26, 27
Susan Saab Fortney, <i>Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer’s Lawyer</i> , 53 U. KAN. L. REV. 835 (2005).....	13
Timothy P. Glynn, <i>Federalizing Privilege</i> , 52 AM. U.L. REV. 59 (2002).....	9
Bruce A. Green, <i>Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?</i> , 64 GEO. WASH. L. REV. 460 (1996).....	12
David Hricik, <i>Uncertainty, Confusion, and Despair: Ethics and Large-Firm Practice in Texas</i> , 16 REV. LITIG. 705 (1997) .....	11
1 McCormick On Evidence § 87 (6th ed. 2006).....	9

## TABLE OF AUTHORITIES

(continued)

Page(s)

New York State Bar Association Committee on Professional Ethics, <i>Consultation with a Law Firm’s In-House Counsel on Matters of Professional Ethics Involving One or More Clients of the Law Firm,</i> Opinion No. 789 (Oct. 26, 2006) .....	17, 25
Restatement (Second) of Agency § 381 .....	20
Restatement (Third) of Law Governing Lawyers § 73.....	8
Douglas R. Richmond, <i>Essential Principles for Law Firm General Counsel,</i> 53 U. KAN. L. REV. 805 (2005).....	21, 24
Douglas R. Richmond, <i>Law Firm Internal Investigations: Principles and Perils,</i> 54 SYRACUSE L. REV. 69 (2004).....	22, 26, 27
Robert Rubinson, <i>Attorney Fact-Finding, Ethical Decision-Making and the Methodology of Law,</i> 45 ST. LOUIS. U.L.J. 1185 (2001) .....	13
Greg Zipes, <i>Fostering Ethics in Complex Litigation,</i> 34 SUFFOLK U.L. REV. 53 (2000).....	11

## INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

Founded in 1920, the Federal Bar Association (“FBA”) is the leading professional organization of attorneys involved in federal law. The FBA’s approximately 16,000 members run the gamut of federal practice, and include attorneys practicing in law firms of all sizes, attorneys employed by corporations and federal agencies, and members of the judiciary.<sup>2</sup> The core objectives of the FBA are to advance the welfare, interests, education, and professional development of lawyers practicing federal law. It is committed to promoting the sound administration of justice and to ensuring high standards of professional competence and ethical conduct among federal practitioners.

The FBA believes that the robust protection of attorney-client confidences encourages “full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and the administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Consequently, the scope of attorney-client privilege and the circumstances under which the privilege may be overcome are issues of great importance to the FBA. A

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<sup>1</sup> By a concurrently filed motion, the Federal Bar Association has moved for leave to file this brief pursuant to Federal Rule of Appellate Procedure 29(b). Counsel for appellees withheld consent to the filing of this brief.

<sup>2</sup> Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the FBA. No member of the judiciary participated in the adoption, endorsement, or review of the positions expressed in this brief.

rule that categorically denies the protection of the privilege to intra-firm ethics consultations regarding an ongoing client relationship would have the counterproductive effect of discouraging lawyers from seeking advice about how best to comply with their professional obligations, with adverse consequences for attorneys and their clients.

With multi-plaintiff, multi-defendant, and multi-jurisdictional matters the norm rather than the exception in the federal system, federal practitioners are increasingly confronted with situations that raise complex questions under the rules of professional conduct. An overly restrictive view of the attorney-client privilege as it applies to an attorney's consultation with ethics counsel in his or her firm – what we refer to in this brief as “in-firm privilege” – would impair compliance with professional regulation and injure the public interest by attaching too high a price (the waiver of privilege vis-à-vis the affected client) to seeking guidance from specialized and knowledgeable in-firm ethics counsel. In deciding this case, the Court accordingly should, at the very least, assure the confidentiality of in-firm attorney-client consultations that take place before the firm becomes aware of an actual conflict that materially limits its ability to continue representing the affected client.

## INTRODUCTION AND SUMMARY OF ARGUMENT

It is in the interest of both lawyers and their clients that attorneys seek expert advice about their professional obligations. For lawyers practicing with others, the most readily available source of such advice will often be a colleague at the same law firm. Many law firms now designate a specific lawyer who is knowledgeable in the field to address such queries and serve as in-firm ethics counsel. In this context, this appeal presents a recurring issue of considerable importance to the legal profession relating to this practice: the applicability of the attorney-client privilege to discussions between a law firm's lawyers and in-firm ethics counsel regarding the representation of a current client.

In the decision below, the district court held that intra-firm ethics consultations generally are not shielded by the privilege. *Asset Funding Group, LLC v. Adams & Reese, LLP*, Civ. A. No. 07-2965, 2008 WL 4948835, at \*4 (E.D. La. Nov. 17, 2008).<sup>3</sup> The trial court's conclusion appears to rest on two principal grounds. First, the court opined that "[a]sserting the privilege against a current client seems to create an inherent conflict against that client" and therefore that the privilege generally is not available in such circumstances to shield in-firm

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<sup>3</sup> In a subsequent order, *Asset Funding Group, LLC v. Adams & Reese, LLP*, Civ. A. No. 07-2965, 2009 WL 1605190 (E.D. La. June 5, 2009), the district court stated that the privilege was unavailable because at the time appellant sought advice from in-firm counsel it "knew or should have known it was obligated to seek a written waiver from its clients before engaging in further representation." *Id.* at \*3.

consultations. *Id.* at \*2. And second, the court reasoned that a “law firm’s fiduciary relationship with [its] client lift[s] the lid on” intra-firm consultations regarding that client (*id.* at \*3 (internal quotation marks omitted)); from this, it followed that any documents created “pursuant to conversations between [a law firm and in-firm counsel] while . . . [the law firm] owed a fiduciary duty” to the client are subject to disclosure. *Id.* at \*4.

The FBA takes no position on whether the specific intra-firm communications at issue in this appeal are properly subject to disclosure. The FBA submits this brief, however, to urge the protection of in-firm ethics consultations – even those concerning an existing client – from disclosure to the affected client, at least absent a showing of actual adversity between lawyer and client at the time of the consultation.

The efforts of in-firm counsel to promote lawyers’ “compliance with the law” (*see Upjohn*, 449 U.S. at 392) governing lawyers’ professional obligations would unavoidably be frustrated if in-firm ethics consultations pertaining to a current client were generally subject to disclosure. Such a narrow construction of in-firm privilege would in large part defeat the privilege’s salutary public purposes by discouraging lawyers from seeking prophylactic, forward-looking advice about their ethical obligations. It is no answer to suggest that the privilege will attach if the lawyer seeks advice *after* termination of the client relationship; after all, once a

client becomes a *former* client the damage may already have been done. Ethics advice is far more valuable when it arrives in time to avert or to alleviate the harm.

The rationales advanced in support of the contrary view do not support denying in-firm ethics consultations the shield of privilege—certainly not in the absence of an actual, existing conflict between the firm and the client at the time the advice was sought. The suggestion that the privilege should be vitiated whenever the in-house consultation involves a “current client” is based on the unsupported conclusion that representation of a client is necessarily impaired whenever a lawyer seeks advice about how to fulfill his or her professional duties in relation to that client. The “fiduciary exception” to attorney-client privilege is similarly unsound: at bottom, it relies almost entirely on a district court decision that applied trust-law principles arising in a wholly distinct context. Moreover, both of these rationales prove too much: because their logic does not turn on the status of in-firm counsel, their application would require law firms to disclose discussions with *outside* counsel regarding current clients. There is no support for such a rule.

If the in-firm privilege is narrowed excessively, lawyers simply will not make “such communications in the first place.” *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998). Thus, in the long term “the likely evidentiary benefit that would result from the denial of the privilege is modest” (*Jaffee v. Redmond*,

518 U.S. 1, 11 (1996)); “[t]his unspoken ‘evidence’ [*i.e.*, communications between firm lawyers] will . . . serve no greater truth-seeking function than if it had been spoken and privileged.” *Id.* at 12. On the other hand, the harm produced is significant and real, because denial of the privilege would discourage lawyers from having “full and frank communication[s]” with in-firm ethics counsel. *See Upjohn*, 449 U.S. at 389. It would also discourage firms from taking steps to institutionalize their compliance apparatus. Ultimately, it is clients—and the public’s interest in the ethical administration of justice—that will be harmed if lawyers who find themselves facing difficult questions about their ethics obligations hesitate before seeking advice about their professional responsibilities from a knowledgeable source.

## ARGUMENT

### **I. THE PUBLIC INTEREST IS SERVED BY RECOGNIZING THAT IN-FIRM ETHICS CONSULTATIONS ARE SHIELDED BY ATTORNEY-CLIENT PRIVILEGE.**

“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.” *Willy v. Admin. Review Bd.*, 423 F.3d 483, 495 (5th Cir. 2005) (internal quotation marks omitted); *State v. Green*, 493 So. 2d 1178, 1180 (La. 1986). By freeing clients to confide fully in their counsel without fear of later disclosure, the privilege enables clients to “obtain the

aid of persons having knowledge of the law and skilled in its practice.” *Willy*, 423 F.3d at 495 (internal quotation marks omitted).

As the U.S. Supreme Court has explained, the privilege is “founded upon the necessity, in the interest and administration of justice,” of facilitating effective communication between attorneys and their clients. *Upjohn*, 449 U.S. at 389 (internal quotation marks omitted).<sup>4</sup> It “recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” *Id.* Louisiana courts have reached the same conclusion, recognizing that “lawyers . . . can act effectively only if they are advised of the facts.” *Smith v. Kavanaugh, Pierson & Talley*, 513 So. 2d 1138, 1142 (La. 1987). Consequently, an unduly narrow reading of the privilege not only makes it difficult for attorneys to “formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.” *Upjohn*, 449 U.S. at 392. These principles apply fully here, and support rejection of the approach taken below.

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<sup>4</sup> “[T]he propositions of law considered” by the Supreme Court in *Upjohn* are “sound” and “instructive” in evaluating privilege claims under Louisiana law. *Kyle v. La. Pub. Serv. Comm’n*, 878 So. 2d 650, 659 (La. Ct. App. 2004).

**A. Lawyers Face A Complex Regulatory Environment And Therefore Have Need For Legal Advice About How To Conform Their Representation Of Clients To The Law.**

1. In *Upjohn*, the Supreme Court confirmed that the privilege protects communications between corporate employees and counsel for the corporation made for the purpose of seeking legal advice. 449 U.S. at 390, 394; *see also* LA. CODE EVID. ANN. art. 506(A)(2) & cmt. f. Nothing in *Upjohn* premised this conclusion on the business of the corporation, the subject of the advice, or whether the counsel consulted was in-house or retained.<sup>5</sup>

Before *Upjohn*, some federal courts applied a restrictive “control group” test that limited the corporate attorney-client privilege to communications with “upper-echelon management.” 449 U.S. at 388-89. This rule failed to appreciate that lawyers can help the corporation navigate difficult legal shoals only if they are adequately informed about the relevant facts. Often, the information “needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations,” and other laws will not be “available from upper-echelon management.” *Id.* at 394. For that reason, the Supreme Court

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<sup>5</sup> It has been elsewhere recognized that the attorney-client privilege does not “distinguish between ‘inside’ and ‘outside’ counsel.” *United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996); *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984); *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968); Restatement (Third) of Law Governing Lawyers § 73, cmt. i (“[T]he privilege extends to communications with inside legal counsel as well as outside counsel.”). Accordingly, the confidences that employees reveal to in-house corporate counsel are afforded the same protections as those related to retained counsel.

announced a more protective rule, covering *all* communications “to counsel for [the corporation] acting as such . . . in order to secure legal advice.” *Id.*

In so holding, the Supreme Court recognized that “the valuable efforts of corporate counsel to ensure their client’s compliance with the law” would be frustrated if employees could not “safely and readily avail” themselves of legal advice. *Id.* at 389, 392 (internal quotation marks omitted). Given “the vast and complicated array of regulatory legislation confronting the modern corporation,” compliance with which is “hardly an instinctive matter,” the Court reasoned that corporations and their personnel should be not be discouraged in “go[ing] to lawyers to find out how to obey the law.” *Id.* at 392 (internal quotation marks omitted).<sup>6</sup> Louisiana courts have likewise acknowledged that the privilege “promotes compliance with the law, particularly in complex areas of business law,” because “[t]he attorney to whom confidences are freely expressed has a greater opportunity to learn of and counsel against potentially unlawful conduct.” *Smith*, 513 So. 2d at 1142.

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<sup>6</sup> *Accord* 1 McCormick On Evidence § 87 (6th ed. 2006) (“[T]he law is complex and in order for members of the society to comply with it in the management of their affairs . . . they require the assistance of expert lawyers.”); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U.L. REV. 59, 70-71 (2002) (explaining that “candid interchange between attorney and client” allows “counseling in avoidance of risks, adverse consequences, and litigation in our modern, complex regulatory regime” and “facilitates ongoing compliance with the law”).

2. The ability to obtain legal advice from a trained professional is no less important to a lawyer's efforts to conform his or her conduct to the law than it is to a corporate employee's efforts to do the same. "'Attorney' and 'client' are not mutually exclusive classes . . . and simply because one is . . . a lawyer should not debar him from seeking professional legal counsel with the assurance that his communications will not be subject to disclosure without his assent." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 253 n.21 (D.C. Cir. 1977). In both contexts, the "broader public interests in the observance of law and administration of justice" are promoted by ready access to legal advice. *Upjohn*, 449 U.S. at 389.

Like business corporations, lawyers face a demanding regulatory environment, compliance with which "is hardly an instinctive matter." *See Upjohn*, 449 U.S. at 392. And the efforts of in-firm counsel to ensure "compliance with the law" are no less valuable because the relevant law is that governing lawyers' professional responsibilities. *See id.* In fact, it would be impossible to overstate the "vast and complicated array of regulatory legislation" to which law firms and lawyers are today subject. *Upjohn*, 449 U.S. at 392.<sup>7</sup> "[E]thics' has become a

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<sup>7</sup> In Louisiana, for example, a lawyer would have to consider, at a minimum, the Louisiana Rules of Professional Conduct, the Louisiana State Bar Association's Public Ethics Advisory opinions (*see* <http://www.lsba.org/2007MemberServices/ethicsadvisoryopinions.asp>), the Louisiana Attorney Disciplinary Board's rulings (*see* <http://www.ladb.org/>), and the decisions of the Louisiana courts, which are

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substantive area of law requiring specialized expertise.” Jonathan M. Epstein, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011, 1012 (1994). The regulation of lawyering is not a single, coherent body of law:

Courts must choose from a menu of sources for ethical considerations, including the Constitution, incorporating notions of due process and equal protection. Courts also look to statutes for ethical guidance, which may be derived in whole, or in part, from the Model Code of Professional Responsibility or the Model Rules of Professional Conduct. When specific laws do not exist, courts may look to ethical and hortatory rules formulated by bar associations in attempting to formulate a response to a particular ethical problem. Courts can, and do, ignore bar association rules if they believe the rules frustrate existing laws. Courts have also deemed it appropriate to promulgate ethical standards on a case-by-case basis, even in the absence of formal standards.

Greg Zipes, *Fostering Ethics in Complex Litigation*, 34 SUFFOLK U.L. REV. 53, 56-57 (2000); *see also* Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1756 (2005).

Sometimes, it will not even be clear *whose* law governs, because “legal ethics rules vary from state to state” and the “difficulties with choice of law are serious.” David Hricik, *Uncertainty, Confusion, and Despair: Ethics and Large-Firm Practice in Texas*, 16 REV. LITIG. 705, 712 (1997). Moreover, choice-of-law

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vested with the “exclusive and plenary power to define and regulate all facets of the practice of law, including . . . the professional responsibility” (*see Succession of Wallace*, 574 So. 2d 348, 350 (La. 1991)).

issues will often remain latent until a case is tried and it is known which jurisdiction's rules apply. Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460, 524 (1996). Thus, those engaged in multi-jurisdictional practice must "spot a legal matter having implications for the ethical practice of the law, both under the rules of their own jurisdictions, and the norm-promulgating bodies in other states." Ethan S. Burger & Carol M. Langford, *The Future of Legal Ethics: Some Potential Effects of Globalization & Technological Change on Law Practice Management in the Twenty-First Century*, 15 WIDENER L.J. 267, 281 (2006). This task is made even harder because thus far "scant attention [has been] paid to resolving inconsistent and conflicting professional standards" in multijurisdictional practice. Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 720-21 (1995).

Furthermore, lawyers are increasingly required to look beyond traditional ethics rules to determine their professional duties. To offer just one example, in passing the USA PATRIOT Act, Congress authorized agencies to "'deputize[]' lawyers to serve as regulatory gatekeepers," required to report certain misconduct to government authorities. Ethan S. Burger, *Who Is the Corporation's Lawyer?*, 107 W. VA. L. REV. 711, 717 & n.21 (2005); *see also* Chambliss, 80 NOTRE DAME

L. REV. at 1757 (Sarbanes-Oxley Act); Susan Saab Fortney, *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer's Lawyer*, 53 U. KAN. L. REV. 835, 838-39 (2005) (Treasury Department regulations); Robert Rubinson, *Attorney Fact-Finding, Ethical Decision-Making and the Methodology of Law*, 45 ST. LOUIS. U.L.J. 1185, 1232 n.235 (2001) (“banking and securities law”).

In the face of these complexities, it would be folly for lawyers who were uncertain about their professional duties to keep their own counsel. As the Supreme Court has quipped, “[t]he adage that ‘a lawyer who represents himself has a fool for a client’ is the product of years of experience by seasoned litigators.” *Kay v. Ehrler*, 499 U.S. 432, 437-38 (1991). And the recognition that the attorney-client privilege serves the public interest by freeing lawyers to seek advice from counsel applies whether or not that advice is sought from other lawyers at the attorney’s firm: “An attorney who asks his partners or associates to represent him, by contrast, is no fool.” *Gilbert v. Master Washer & Stamping Co., Inc.*, 104 Cal. Rptr. 2d 461, 469 (Ct. App. 2001).

Protecting the communications necessarily incident to obtaining that advice encourages lawyers to come forward with concerns before they develop into problems. Conversely, a privilege rule that made it unduly risky for in-firm ethics counsel to address potential issues regarding ongoing client relationships would harm clients and impair compliance with lawyers’ professional obligations.

**B. There Is No Basis For Categorically Excluding In-Firm Ethics Consultations Regarding Current Clients From The Coverage Of The Attorney-Client Privilege.**

The proposition that lawyers are entitled to seek privileged advice regarding their ethics obligations should not be controversial. That principle should apply whether the advice is sought from outside or from within the lawyer's firm. After all, a lawyer at a firm who performs legal services on behalf of the firm effectively functions as "in-house counsel." *United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996)). And "[n]o principled reason appears for denying a comparable attorney-client privilege to" communications between lawyers and in-firm counsel as is available to contacts with outside counsel. *Hertzog, Calamari & Gleason v. Prudential Ins. Co.*, 850 F. Supp. 255, 255 (S.D.N.Y. 1994). The in-firm counsel "is the functional equivalent of a corporate staff attorney representing a corporate employer." *Id.*; *Nesse v. Pittman*, 206 F.R.D 325, 328 (D.D.C. 2002) ("The 'client' . . . is the firm itself. By extension, [the lawyers] of the firm are also clients. . . [T]he firm's general counsel[] is the 'attorney.'"). It makes no difference that law firms "happen[] to have employees who are lawyers, which ma[kes] it easier . . . to 'hire' a lawyer." *Rowe*, 96 F.3d at 1297. Once the choice is made to seek legal advice from in-firm counsel, the parties are "justified in expecting that communications . . . will be privileged." *Id.*

And indeed, courts have widely recognized in-firm attorney-client privilege. *E.g.*, *id.* at 1296; *Nesse*, 206 F.R.D at 328; *Hertzog*, 850 F. Supp. at 255. Yet in some recent decisions, as in the one below, district courts have concluded that discussions between lawyers and in-firm counsel are not protected by the privilege if they pertain to one of the firm's current clients. This limitation is impossible to reconcile with the logic of *Upjohn*, *Smith*, and the important public purposes served by enabling lawyers to seek advice about how to comply with their ethical obligations.

**1. A Lawyer May Seek Ethics Advice Regarding An Ongoing Client Representation Without Creating A *Per Se* Conflict Between The Firm And The Current Client.**

Echoing *Bank Russells Lambert v. Credit Lyonnais (Suisse)*, 220 F. Supp. 2d 283, 287 (S.D.N.Y. 2002), the district court below stated that “[a]sserting the privilege against a current client seems to create an inherent conflict against that client.” *Asset Funding*, 2008 WL 4948835, at \*2. According to the court, “the seeking of legal advice by one lawyer from another lawyer inside the firm ‘implicates or creates a conflict of interest,’” which “vitiat[e]s” the “attorney-client privilege between the lawyers in the firm.” *Id.* at \*4. But this reasoning simply assumes that a lawyer's efforts to comply with professional regulation and the lawyer's duty to represent his or her client are inherently at odds.

In fact, analyzing this exact issue, the American Bar Association concluded that an ethics consultation within a law firm “does not give rise to a per se conflict of interest between the firm and its client.” American Bar Association Standing Committee on Ethics and Professional Responsibility (“ABA”), *In-House Consulting on Ethical Issues*, Formal Opinion 08-453, at 6 (Oct. 17, 2008). The reason is plain: A lawyer may not represent a client if there is a conflict—*i.e.*, if “there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer.” MODEL RULES PROF’L CONDUCT R. 1.7(a)(2) (2002). But a conflict arises only when a “lawyer’s ability to consider, recommend or carry out an *appropriate* course of action” is impaired. *Id.* cmt. 8 (emphasis added). And conduct that is *unethical* could never be considered *appropriate*.

Thus, “[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.” ABA, Formal Opinion 08-453, at 3. Although the lawyer might well have an “interest in avoiding conduct that will violate her own ethical duties,” that motivation is in harmony with the “legitimate purpose” of securing advice about the “legality and wisdom of the proposed course of action.” *Id.* Indeed, the lawyer’s interest in behaving ethically and the client’s interest in securing sound professional advice should be one and the same—achieving zealous representation of the client “within the bounds of the law.” New York

State Bar Association Committee on Professional Ethics (“NYSBA”), *Consultation with a Law Firm’s In-House Counsel on Matters of Professional Ethics Involving One or More Clients of the Law Firm*, Opinion No. 789 ¶ 16 (Oct. 26, 2006). “A lawyer’s interest in carrying out . . . ethical obligations . . . is not an interest extraneous to the representation of the client. . . . [It does not] ‘affect[]’ the lawyer’s exercise of independent professional judgment, but rather is an inherent part of that judgment.” *Id.* ¶ 12.

Of course, “[t]his is not to say that the firm’s interest in protecting itself can never give rise to a conflict of interest.” *Id.* ¶ 13. Instead, the point is that an in-firm ethics consultation regarding an ongoing client representation does not *by itself* create a conflict between the firm and the current client absent additional considerations raising a significant risk that “the consulting lawyer’s representation of the firm’s client will be materially limited” because it may be too difficult “for that lawyer (or anyone in the lawyer’s firm) to give the client sufficiently detached advice.” ABA, Formal Opinion 08-453, at 3. The district court’s opinion does not address this significant point.

**2. The Fiduciary Exception To The Attorney-Client Privilege Is Not An Appropriate Framework For Analyzing Claims Of In-Firm Privilege.**

a. The decision below also relied upon a line of district court cases that, beginning with *In re Sunrise Securities Litigation*, 130 F.R.D. 560 (E.D. Pa. 1989),

invoked the language of the so-called “fiduciary exception” to the attorney-client privilege. *Asset Funding*, 2008 WL 4948835, at \*3-\*4. The district court stated that, under this doctrine, the privilege could not be asserted when the “fiduciary [holding the privilege] has [a] conflicting interest” to the party seeking disclosure. *Id.* at \*1 (quoting *Valente v. PepsiCo, Inc.*, 68 F.R.D. 361, 369 (D. Del. 1975)). The district court concluded that the discussions at issue here took place while the law firm still represented the client and thus “owed a fiduciary duty to” the client (*id.* at \*4), and for that reason that the firm’s “communication with in-house counsel [was] not protected by the attorney-client relationship because it create[d] a conflict between the law firm’s fiduciary duties to itself and its duties to” the client. *Id.* Respectfully, however, we submit that the fiduciary exception has no application in the circumstances of this case.

As background, the “fiduciary exception” was developed in the trust context. In that setting, when a trustee seeks legal advice regarding a matter pertinent to the trust, he or she does so to advance the interests of the trust’s beneficiaries. *See Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 645 (5th Cir. 1992). Accordingly, some courts have allowed trust beneficiaries to inquire into otherwise privileged communications between the trustee and counsel upon a showing of cause. In the derivative litigation context, courts have applied this principle by indulging the fiction that “shareholders stand in the shoes of a client when management seeks

counsel on matters that ultimately should benefit shareholder interests.” *Ward v. Succession of Freeman*, 854 F.2d 780, 785 (5th Cir. 1988).

But none of this would seem relevant to application of the attorney-client in-firm privilege. The fiction that the trust beneficiary is really the one making the inquiry of the attorney has no parallel in the context of a case where the inquiring attorney is concerned with his or her own ethical obligations. And the “legal profession has its own rules governing lawyers’ fiduciary duties and the avoidance of conflicts of interest; why reach out to apply a doctrine developed in the context of shareholder litigation?” Chambliss, 80 NOTRE DAME L. REV. at 1740. Nonetheless, the court in *In re Sunrise* applied trust precedents in this context, finding that the “fiduciary exception” recognized for shareholder litigation in *Valente* “accom[m]odates the interests of both the fiduciary or attorney and the beneficiary or client” when resolving questions of privilege for in-firm ethics consultations regarding current clients. 130 F.R.D. at 597. The court below in this case in turn applied the doctrine of *In re Sunrise*. But there are two reasons to question this approach: (1) *Valente*’s application of the fiduciary exception was itself defective and (2) *Valente* assumed, without support, that all fiduciary relationships are identical for privilege purposes, treating interchangeably the shareholder-company relationship, the director-company relationship, and the attorney-client relationship.

b. In *Valente*, minority shareholders of Wilson brought suit against PepsiCo following a merger. In the years leading up to the merger, PepsiCo had acquired a majority interest in Wilson. 68 F.R.D. at 363. The plaintiffs sought disclosure of communications between PepsiCo and its general counsel, who at the time of the merger also sat on Wilson's board. *Id.* at 368. Relying on this Court's decision in *Garner v. Wolfinbarger*, 430 F.2d 1093, 1102-04 (5th Cir. 1970), the *Valente* court held that PepsiCo's officers, including its general counsel, owed a fiduciary duty to Wilson's shareholders. 68 F.R.D. at 367-68. The court also found that PepsiCo's general counsel owed a fiduciary duty to Wilson as member of Wilson's board. *Id.* at 368. Because the general counsel owed fiduciary duties to both Wilson (as its director and as an officer of its majority owner) and PepsiCo (as its lawyer), the court concluded that "PepsiCo cannot now claim a privilege as to [the general counsel's] communications with PepsiCo officials concerning the interests of the Wilson shareholders." *Id.*

This analysis, however, provides no basis for the ruling below in this case. *First*, the holding in *Valente* it cannot be justified on the basis of general fiduciary principles, because a fiduciary has no duty to "communicate to the principal any information" that he possesses as a result of a confidential relationship with another. Restatement (Second) of Agency § 381 cmt. e. For example, "[d]octors are fiduciaries to their patients[,] . . . [y]et a court would never suggest that a

doctor threatened with a malpractice suit by a current patient could not invoke the attorney-client privilege to protect the doctor's related communications with a lawyer." Douglas R. Richmond, *Essential Principles for Law Firm General Counsel*, 53 U. KAN. L. REV. 805, 832 (2005).

*Second*, it departs in an important respect from *Garner*, which is the controlling statement of the "fiduciary exception" in this Circuit. Under *Valente*, the corporation is "not entitled to claim the privilege as against its own shareholder, absent some special cause," thus requiring the *party asserting the privilege* to demonstrate some special reason for keeping the disputed materials confidential. 68 F.R.D. at 367. *Garner*, however, makes clear that it is the *party seeking disclosure* that must "show cause why [the privilege] should *not* be invoked in the particular instance." 430 F.2d at 1104 (emphasis added).<sup>8</sup>

*Third*, and most important, *Valente's* reliance on the "fiduciary exception" is doubtful as a logical matter. The *Garner* rule is justified because "shareholders *stand in the shoes of a client* when management seeks counsel on matters that ultimately should benefit shareholder interests." *Ward*, 854 F.2d at 785 (emphasis added). In such circumstances, "the attorney's [real] clients are the . . . beneficiaries for whom the fiduciary acts," not the nominal client, the corporation.

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<sup>8</sup> Even placing the burden on the party seeking to breach the privilege is problematic because any "[b]alancing *ex post*. . . introduces substantial uncertainty into the privilege's application." *Swidler*, 524 U.S. at 409; *see also Jaffee*, 518 U.S. at 17; *Nesse*, 206 F.R.D. at 331.

*Wildbur*, 974 F.2d at 645. But plainly, in *Valente* the real – and only – client of PepsiCo’s general counsel was *PepsiCo itself*; Wilson was merely an “outside party seeking disclosure of [those] privileged communications.” The fiduciary exception recognized in *Garner* therefore should not have been applied in *Valente*. See *Ward*, 854 F.2d at 785.<sup>9</sup>

c. Unsurprisingly given these points, *Valente*’s “fiduciary exception” has been widely criticized.<sup>10</sup> And even when cited, the *Valente* analysis generally has not really been applied by other courts. For example, in *In re Sunrise*, the decision relied upon below, “[t]he court begins with *Valente*, but ends with a test

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<sup>9</sup> In addition, *Valente* may have meant to rely on the “common-interest exception” to defeat the privilege, observing that “[i]t is a common, universally recognized exception to the attorney-client privilege, that where an attorney serves two clients having common interests and each party communicates to the attorney, the communications are not privileged in a subsequent controversy between the two.” 68 F.R.D. at 368. If so, however, its analysis was questionable. PepsiCo’s lawyers did *not* have an attorney-client relationship with Wilson. *Id.* And “[i]f the *Valente* court really meant to invoke the common interest exception to defeat PepsiCo’s claim of attorney-client privilege . . . [that] lack of an attorney-client relationship . . . was of great import.” Douglas R. Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 SYRACUSE L. REV. 69, 97 (2004). For similar reasons, the common-interest exception cannot support the abrogation of the in-firm privilege simply because the subject of the consultation is a current client of the firm: there is no “joint client relationship on which to premise a common interest exception.” *Id.* at 100. In-firm “ethics counsel in the first instance represents the law firm” (ABA, Formal Opinion 08-453, at 3), not the client or the lawyer representing the client.

<sup>10</sup> See Richmond, 54 SYRACUSE L. REV. at 99 (“Accordingly, any decision in which a court relies on *Valente* is also suspect.”); William T. Barker, *Law Firm In-House Attorney-Client Privilege Vis-À-Vis Current Clients*, 70 DEF. COUNSEL J. 467, 471 (2003) (“[The] flaws in [*Valente*’s] reasoning render it an infirm foundation for the *Sunrise Securities* rule.”).

that does not seem to depend on *Valente* at all, but rather on ordinary conflict analysis.” Chambliss, 80 NOTRE DAME L. REV. at 1736. The court’s analysis in *In re Sunrise* focused on whether the in-firm ethics consultation “implicates or creates a conflict” between the firm and its client, with “conflict” given the meaning found in Rule 1.7(a)(2) of the Rules of Professional Conduct—*i.e.*, whether the circumstances are such that the seeking of ethics advice “materially limits” the firm’s representation of the client. 130 F.R.D. at 597 & n.12. Other decisions largely follow the same pattern.<sup>11</sup>

In any event, a formalistic labeling of fiduciary roles is not a helpful way to analyze claims of in-firm privilege. What ultimately matters is whether there was actual adversity between lawyer and client at the time of the in-firm ethics consultation. The “fiduciary exception” language therefore can cause substantial mischief if it is given independent valence, as the district court here appears to have done. *Valente*’s (and by extension, *In re Sunrise*’s) “fiduciary exception” framework should be discarded in favor of traditional conflicts analysis. Under those rules, an in-firm ethics consultation does not itself give rise to a *per se* conflict between the firm and one of its clients.

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<sup>11</sup> See also *In re SonicBlue Inc.*, Nos. 03-51775, 03-51776, 03-51777, 03-51778-MM, 2008 WL 170562, at \*9 (Bankr. N.D. Cal. Jan. 18, 2008); *Thelen Reid & Priest LLP v. Marland*, No. C-06-2071, 2007 WL 578989, at \*8 (N.D. Cal. Feb. 21, 2007); *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 285 (E.D. Pa. 2002).

3. **If Accepted, The “Current Client” And “Fiduciary Exception” Rationales Would Condemn Consultations With Outside Counsel As Well As Consultations With In-Firm Ethics Counsel.**

Finally, the “current client” and “fiduciary exception” rationales contain no limiting principle that would prevent them from applying to consultations with *outside* as well as in-firm counsel. “Under [these] rigid rules . . . law firms . . . cannot even shield their communications with outside counsel that they retain to advise them.” Richmond, 53 U. KAN. L. REV. at 831. But it cannot be that law firms are forbidden “to do anything to defend [themselves] against the client’s accusations, even where the defensive activity involved only the consultation of outside counsel.”<sup>12</sup> Barker, 70 DEF. COUNSEL J. at 471. For this reason as well, the analysis leading to denial of the privilege in this case does not provide a coherent basis for resolving claims of privilege.

**II. REQUIRING LAWYERS TO CONSULT WITH OUTSIDE COUNSEL INSTEAD OF IN-FIRM ETHICS COUNSEL TO OBTAIN THE BENEFIT OF ATTORNEY-CLIENT PRIVILEGE WOULD HAVE SIGNIFICANT ADVERSE CONSEQUENCES.**

As explained above, there is no sound basis for recognizing a *per se* exception to the general rule of in-firm privilege simply because a lawyer seeks

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<sup>12</sup> *Koen Book* suggests that a law firm that wanted privileged advice could “promptly [seek] to withdraw” from the representation. 212 F.R.D. at 286. That is not always feasible. Richmond, 53 U. KAN. L. REV. at 831. And even if withdrawal were possible, it would not necessarily be in the interests of the client because it “limits the firm’s opportunity (and incentive?) to mitigate harm to the client.” Chambliss, 80 NOTRE DAME L. REV. at 1747.

advice regarding his or her professional obligations vis-à-vis a current client of the firm. Conversely, there are compelling practical reasons why such a rule would be detrimental to the sound administration of justice.

Even courts that have denied specific claims of privilege have taken note of the public purposes served by facilitating lawyers' efforts to conform their conduct to the requirements of their profession. The *In re SonicBlue* court declared that "public policy encourages lawyers to consult with in-house counsel to understand and comply with their professional responsibilities and ethical restraints." 2008 WL 170562, at \*9. Similarly, *Thelen Reid* "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." 2007 WL 578989, at \*7. The court explained: "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." *Id.*; see also NYSBA, Opinion No. 789 ¶ 12 ("A lawyer's interest in carrying out . . . ethical obligations . . . [is] a required part of the work in carrying out the representation.").

In-firm ethics counsel are better positioned than are outside counsel to provide timely and relevant advice. A rule requiring a firm's lawyers to always "seek guidance outside its halls in order to preserve an attorney-client relationship

. . . is simply impractical in the day-to-day life of many law firms, when issues of professional responsibility frequently require prompt responses most usefully provided by lawyers knowledgeable about the firm, its client relationships and its culture.” *Id.* ¶ 8. Such a rule also would make “conformity costly by forcing the firm either to retain outside counsel or terminate an existing attorney-client relationship to ensure confidentiality of all communications relating to that client.” *Thelen Reid*, 2007 WL 578989, at \*7; Chambliss, 80 NOTRE DAME L. REV. at 1747. As a consequence, “[i]f retention of outside counsel is necessary to obtain the benefits of the privilege,” some firms may not seek ethics advice at all, something that serves the interests of neither the lawyer nor the client. Barker, 70 DEF. COUNSEL J. at 471. In-firm privilege should not be so narrowly construed as to “discourage firms from seeking early advice when problems with clients arise.” Chambliss, 80 NOTRE DAME L. REV. at 1747.

Leaving ethics consultations with in-firm counsel regarding current clients unprotected would also have a pronounced second-order effect. By reducing law firm incentives to commit institutional resources to maintaining a formal “ethics infrastructure,” such a rule would make ethically problematic situations more likely to occur. Richmond, 54 SYRACUSE L. REV. at 101.

A robust in-firm ethics counsel position plays not only a reactive role, but “a proactive role in ensuring proper representation of clients.” Epstein, 7 GEO. J.

LEGAL. ETHICS at 1012-13; *id.* at 1018. Ethics counsel likely “spend far more time dispensing prophylactic advice valuable to their firms and to their firms’ clients alike than they do conducting internal investigations after potential problems are alleged to arise.” Richmond, 54 SYRACUSE L. REV. at 101; Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 587-88 (2002) (emphasizing “importance of proactive strategies,” “regular in-house training, and other educational efforts”). “[T]he existence of an ethics committee . . . can send a positive signal to lawyers within the firm[], . . . help keep the firm’s lawyers aware of ethics issues[, and] encourage institutionalized conduct by creating an accessible mechanism for dealing with ethical dilemmas.” Epstein, 7 GEO. J. LEGAL. ETHICS at 1037.

As a consequence, the “broad protection of communication with in-house counsel” “encourage[s] law firms to invest in and formalize the role of firm counsel, which in turn . . . promote[s] compliance with professional regulation.” Chambliss, 80 NOTRE DAME L. REV. at 1724. The limits of in-firm privilege therefore should be drawn “consistent[ly] with a law firm in-house ethical infrastructure.” *Thelen Reid*, 2007 WL 578989, at \*7. And a *per se* rule deeming the attorney-client privilege inapplicable to consultations with in-firm ethics

counsel regarding the firm's representation of a current client would frustrate the development of this "ethical infrastructure."

### **CONCLUSION**

For the foregoing reasons, this Court should reject a per se rule barring the application of the attorney-client privilege to in-firm ethics consultations regarding current clients of the firm.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2009, two paper copies of the foregoing brief, as well as an electronic version of the same in PDF format, were served, pursuant to Fed. R. App. P. 31(b) and Fifth Circuit Rule 31.1, by overnight delivery on the following:

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## CERTIFICATE OF COMPLIANCE

On this 17th day of September, 2009, I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B)(i), and Fifth Circuit Rule 32.2, because the brief contains 6835 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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