



5-1-2005

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## Recommended Citation

Elizabeth Chambliss, *The Scope of in-Firm Privilege*, 80 Notre Dame L. Rev. 1721 (2005).

Available at: <http://scholarship.law.nd.edu/ndlr/vol80/iss5/2>

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# THE SCOPE OF IN-FIRM PRIVILEGE

*Elizabeth Chambliss\**

## INTRODUCTION

Large law firms increasingly are hiring their own in-house counsel to provide day-to-day ethics advice, monitor internal policies and procedures, and respond to potential and actual malpractice claims against the firm.<sup>1</sup> Driven by the growing incidence of claims against lawyers<sup>2</sup> and insurers' efforts to promote better risk management within law firms,<sup>3</sup> the role of in-house counsel in law firms emerged in

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\* Professor of Law, New York Law School. Research for this Article was funded by the Open Society Institute and the Program on the Legal Profession at Harvard Law School. Special thanks to Bob Creamer, David Wilkins, and my colleagues at New York Law School for their thoughtful advice on this project. Thanks also to William T. Barker, Anthony Davis, Susan Fortney, Bruce Green, Leslie Levin, William J. Linklater, Charles E. Lundberg, Kurt W. Melchior, John J. Mueller, Douglas Richmond, Robert Rolfe, David Sasseville, John Steele, and William Wernz for helpful comments on earlier drafts.

1 See 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, 559-61 (2002) (examining the role of in-house counsel in thirty-two law firms); Jonathan D. Glater, *In a Complex World, Even Lawyers Need Lawyers*, N.Y. TIMES, Feb. 3, 2004, at C1 (reporting firms' increasing reliance on in-house counsel); see also Jerry Crimmins, *Bulk of Big Firms Have Own In-House Lawyer*, CHI. DAILY L. BULL., Apr. 5, 2004, at 1 (reporting that over half of fifty-six law firms surveyed by Altman Weil, a management consulting firm, have their own in-house counsel); Jaime Levy, *More Firms See Benefit of Using In-House General Counsel*, CHI. LAW., July 2004, at 28 (describing the increasing number of firms using in-house counsel).

2 See Jonathan M. Epstein, *The In-House Ethics Advisor, Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011, 1018-24 (1994) (discussing the "growth in the number and size of awards for legal malpractice"); Gary Taylor, *Counsel to Firms Goes In-House: Legal Costs Are Leading Firms, Like Their Clients, to Look Inside for Advice*, NAT'L L.J., July 18, 1994, at A1 (same).

3 See Chambliss & Wilkins, *supra* note 1, at 559-60, 590 (discussing the role of the Attorneys' Liability Assurance Society in promoting the position of "loss prevention counsel").

the early 1990s under a variety of titles<sup>4</sup> and in most firms has been formalized only within the past five to ten years.<sup>5</sup>

Most observers view law firms' increasing reliance on in-house counsel as a positive development. In addition to improving risk management and lowering the cost of liability insurance,<sup>6</sup> the presence of firm counsel may improve the ethical climate of the firm.<sup>7</sup> Although the role of firm counsel varies significantly from law firm to law firm,<sup>8</sup> at its most robust it includes a wide range of proactive, compliance-oriented activities, such as reviewing firm policies and procedures, conducting lawyer and nonlawyer ethics training, and going door to door to invite questions from firm members.<sup>9</sup> Such activities may contribute enormously to firm-wide compliance with professional regulation.

At the same time, the role of firm counsel raises a number of ethical and regulatory issues that are unique to the law firm context. Issues of privilege and disclosure, in particular, are even more difficult in the law firm context than in the corporate context (where they are difficult enough).<sup>10</sup> For instance, what is the scope of the attorney-client privilege between law firm in-house counsel and other members of the firm? What is firm counsel's duty to disclose firm members' misconduct to firm managers, clients and regulators? What is the scope of firm counsel's liability for failure to disclose? The answers to such questions will dramatically affect the developing role of firm counsel as well as firms' investment in that role.

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4 *Id.* at 565–66 (reporting the most common titles in a sample of thirty-two law firms). Titles include “firm counsel,” “general counsel,” “ethics advisor,” “professional responsibility partner,” “conflicts partner,” and “loss prevention partner.” *Id.*; see also Crimmins, *supra* note 1, at 24 (reporting the title “director of professional responsibility”); Levy, *supra* note 1, at 28 (reporting the title “claims counsel”).

5 Chambliss & Wilkins, *supra* note 1, at 559–69 (examining the evolution of in-house advising from an informal, volunteer service to a formal, paid position).

6 See Glater, *supra* note 1 (reporting that having in-house counsel may result in significant savings on liability insurance premiums); Levy, *supra* note 1, at 28.

7 See Epstein, *supra* note 2, at 1028–38 (discussing the benefits of in-house ethics counsel).

8 See Chambliss & Wilkins, *supra* note 1, at 570–83 (discussing the sources of variation between firms).

9 *Id.* at 573–76; see also Peter R. Jarvis & Mark J. Fucile, *Inside an In-House Legal Ethics Practice*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 103, 105–08 (2000) (describing their own in-house practice).

10 There is a vast literature on the ethical duties and dilemmas of corporate in-house counsel, much of it focusing on issues of privilege and disclosure. See, e.g., Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1011 (1997) (stating that “the role of corporate counsel is among the most complex and difficult of those functions performed by lawyers”).

This Article addresses the scope of the attorney-client privilege between law firm in-house counsel and other members of the firm. It focuses specifically on whether the privilege protects communications with firm counsel regarding a claim or potential claim by a current client of the firm. For instance, what if a partner runs into trouble with a client and goes to firm in-house counsel for advice? Is such advice privileged should the client later seek discovery? Or does the firm's fiduciary duty to the client require the firm to disclose to the client all internal communication relating to the representation?

There are, so far, three cases on the subject and all hold that the firm cannot claim the privilege because of its fiduciary duty to the client.<sup>11</sup> Thus, while courts have held that law firms generally enjoy the same attorney-client privilege as other organizations that use in-house counsel,<sup>12</sup> these cases establish a fiduciary exception<sup>13</sup> for internal communication regarding a current client of the firm.

I argue that these "current-client" cases were wrongly decided, on both analytical and policy grounds. As an analytical matter, I argue that the cases conflate two separate issues: the law firm's fiduciary duty to the client and in-house counsel's fiduciary duty to the firm.

To the extent that the denial of privilege is based on the law firm's duty to the client, this denial logically should extend to *any* attempt by the firm to prevent or assess client claims, including communication with outside counsel. Such a rule would leave the firm without recourse to privileged advice unless or until the firm or the client terminated the representation. This would create perverse in-

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11 See *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 287 (S.D.N.Y. 2002); *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 286 (E.D. Pa. 2002); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 597 (E.D. Pa. 1989).

12 See *United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996); *Nesse v. Pittman*, 206 F.R.D. 325, 329 (D.D.C. 2002); *Nesse v. Pittman*, 202 F.R.D. 344, 352-53 (D.D.C. 2001) (recognizing both the attorney-client and work product privileges); *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255, 255 (S.D.N.Y. 1994); *Lama Holding Co. v. Shearman & Sterling*, No. 89 Civ. 3639 (KTD), 1991 WL 115052, at \*1 (S.D.N.Y. June 17, 1991); see also Barbara S. Gillers, *Preserving the Attorney Client Privilege for the Advice of a Law Firm's In-House Counsel*, THE PROF'L LAWYER, June 2000, at 107; Cathryn M. Sadler, Note, *The Application of the Attorney Client Privilege to Communications Between Lawyers Within the Same Firm: Evaluating United States v. Rowe*, 30 ARIZ. ST. L.J. 859 (1998) (discussing the scope of in-firm privilege).

13 See *Garner v. Wolfenbarger*, 430 F.2d 1093, 1103 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971) (establishing a fiduciary exception to the corporate attorney-client privilege in shareholder litigation); Paul R. Rice, *The Corporate Attorney-Client Privilege. Loss of Predictability Does Not Justify Crying Wolfenbarger*, 55 BUS. LAW. 735, 736-37 (2000) (discussing the expansion of the fiduciary exception beyond shareholder litigation).

centives for both clients and firms and would be inconsistent with lawyers' right to defend themselves against client claims.<sup>14</sup>

To the extent that the denial of privilege is based on in-house counsel's duty to the law firm, typically a conflict of interest arises only by imputing the firm's duty to the client to in-house counsel as a member of the firm. Thus, the denial of privilege is based not on the firm's fiduciary duty to the client, as the cases suggest, but rather on the strength of the arguments for imputed conflicts in this context. Framed this way, I argue, the case for privilege is much stronger than the cases reflect.

As a policy matter, I argue for broad protection of communication with law firm in-house counsel, including communication about the representation of a current client of the firm. Such protection would encourage firm members to seek early advice about their duties to clients and to correct mistakes or lapses, if possible, to alleviate harm. Broad protection of in-firm privilege also would encourage law firms to pursue internal investigations where questions of misconduct arise. Finally, broad protection of communication with in-house counsel would encourage law firms to invest in and formalize the role of firm counsel, which in turn would promote compliance with professional regulation.

Part I examines the justifications for in-firm privilege and the scope of in-firm privilege for communication about nonclients. Part II examines the cases involving communication about a current client and criticizes the courts' reasoning in establishing a fiduciary exception. Part III explains how protecting the privilege, and promoting reliance on in-house counsel, would improve risk management within law firms to the benefit of clients and third parties as well as firms. I conclude by discussing the implications of my argument for firm counsel's duty of disclosure and liability for failure to disclose.

The Article builds on a recent study of in-house counsel in thirty-two law firms.<sup>15</sup> The study was based on focus groups and in-depth interviews with in-house counsel in a nonrandom sample of firms ranging in size from seventy-five to 1000-plus lawyers<sup>16</sup> and headquarter-

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14 See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2002); see also William T. Barker, *Law Firm In-House Attorney-Client Privilege Vis-à-Vis Current Clients*, 70 DEF. COUNS. J. 467, 471 (2003) (raising a similar objection).

15 See Chambliss & Wilkins, *supra* note 1 (presenting the main findings of the study).

16 The breakdown of firms by size category is 75–150 lawyers (five firms), 151–250 lawyers (six firms), 251–500 lawyers (ten firms), 501–1000 lawyers (seven firms), and 1000-plus lawyers (four firms). *Id.* at 561 n.17.

tered in twelve different cities.<sup>17</sup> These data were supplemented with focus groups and interviews with bar leaders, liability insurers, and lawyers who serve as outside counsel for law firms in ethics and professional liability matters.<sup>18</sup> To preserve participants' anonymity, direct quotes are referenced in the text by participant identification number.<sup>19</sup>

## I. JUSTIFICATIONS FOR IN-FIRM PRIVILEGE

The attorney-client privilege protects confidential communication between lawyers and their clients from discovery in litigation.<sup>20</sup> It applies only to communication made for the purpose of securing legal advice.<sup>21</sup> The chief purpose of the privilege is "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."<sup>22</sup> Proponents of the privilege argue that, without it, clients would be unwilling to disclose potentially damaging

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17 The cities with more than one firm in the sample are New York City (ten firms), Boston (six firms), Chicago (four firms), Philadelphia (three firms), and Washington, D.C. (two firms). *Id.* at 561 n.18.

18 *See id.* at 561 n.15.

19 We labeled the focus groups A, B, and C and refer to participants in each focus group by a unique number (e.g., A1, A2, B1, etc.). We refer to interview subjects with the letter I and a unique number (e.g., I1, I2, etc.). *See Chambliss & Wilkins, supra* note 1, at 561 nn.15–16.

20 *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000) ("[T]he 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."); *see also* *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950).

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

*Id.*

21 *See United Shoe Mach.*, 89 F. Supp. at 359–60.

22 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also* Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 69 (2002) (stating that "[t]he predominant modern rationale for the privilege is that it fosters client candor and full communication between attorneys and clients, which produces social benefits that outweigh the privilege's social costs").

facts to their attorneys, and attorneys therefore would be unable to offer sound legal advice.<sup>23</sup>

It is well settled that corporations, partnerships and other organizations can claim the attorney-client privilege.<sup>24</sup> Although the rationale for the "corporate" privilege has arisen somewhat after the fact<sup>25</sup> and some scholars continue to question the justifications for the privilege in an organizational context,<sup>26</sup> the Supreme Court has endorsed broad protection of the corporate privilege,<sup>27</sup> and some form of corporate privilege is recognized in every state.<sup>28</sup> According to the Supreme Court in *Upjohn Co. v. United States*, broad protection of the corporate privilege is needed to protect

the valuable efforts of corporate counsel to ensure their client's compliance with law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corpo-

23 See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (stating that "[t]he rationale for the privilege is that confidentiality enhances the value of lawyer-client communications and hence the efficacy of legal services"); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1475-76 (1985) (noting that the absence of the privilege may deter candid communication between lawyers and clients).

24 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (defining the privilege for an organizational client).

25 Initial cases considering questions of privilege in the corporate context simply assumed that the privilege was available and focused on its application. See, e.g., *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 332-38 (1914); *Grant v. United States*, 227 U.S. 74, 79 (1913) (applying privilege doctrine without questioning the existence of the corporate privilege). Fifty years later, an Illinois district court found no precedent explicitly holding that the privilege applied to corporations and therefore held that it did not. See *Radiant Burners, Inc. v. Am. Gas Ass'n*, 209 F. Supp. 321, 322 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir. 1963). The Seventh Circuit reversed, citing a large body of precedent implicitly recognizing the corporate privilege and a strong reliance interest in its continuing recognition. See *Radiant Burners, Inc. v. Am. Gas Ass'n*, 320 F.2d 314, 318-21 (7th Cir. 1963); see also JOHN WILLIAM GERGAZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE §§ 1.16-.18 (2003) (explaining the history of the corporate privilege).

26 See, e.g., Rice, *supra* note 13, at 739-42; Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 158 (1993) (questioning the justifications for privilege in the corporate context).

27 See *Upjohn*, 449 U.S. at 392 (rejecting the "control group" test for corporate privilege as too narrow).

28 See Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, 1997 ANN. SURV. AM. L. 629, 633-45 (reviewing states' approaches to the corporate attorney-client privilege). There is no national law of privilege and no codification in federal courts. Thus, the scope of the attorney-client privilege is defined by federal and state common law. See GERGAZ, *supra* note 25, § 3.05; Glynn, *supra* note 22, at 59 (arguing that "the attorney client privilege is a mess" and calling for federal codification).

rations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," particularly since compliance with the law in this area is hardly an instinctive matter.<sup>29</sup>

In principle, the location of the lawyer does not affect the scope of the privilege; the privilege applies to communication with inside and outside counsel alike.<sup>30</sup> In practice, however, courts tend to apply more scrutiny to communication with in-house counsel because in-house counsel are viewed as more likely to mix business and legal advice.<sup>31</sup> The concern is that corporations (and, by analogy, other organizations) will funnel otherwise unprotected information through in-house counsel in order to create a "zone of silence" over ordinary business affairs.<sup>32</sup> Thus, courts have denied the protection of privilege where the in-house lawyer was found to be acting as a business adviser,<sup>33</sup> negotiator,<sup>34</sup> or in some other nonlegal role.<sup>35</sup>

29 *Upjohn*, 449 U.S. at 392 (citations omitted) (quoting Bryson P. Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 *BUS. LAW.* 901, 913 (1969)).

30 See *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 36 (D. Md. 1974); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 360 (D. Mass. 1950) (stating that there is no basis for distinguishing in-house counsel from outside counsel for privilege purposes); *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 73 cmt. i (2000) (stating that "[t]he privilege under this Section applies without distinction to lawyers who are inside legal counsel or outside legal counsel for an organization"); *GERGACZ*, *supra* note 25, § 3.18 (summarizing the case law).

31 See, e.g., *Ryall v. Appleton Elec. Co.*, 153 F.R.D. 660, 663 (D. Colo. 1994) (questioning "the fairly recent expansion of the privilege to encompass corporate in-house counsel"); *Strategem Dev. Corp. v. Heron Int'l N.V.*, No. 90 Civ. 6328 (SWK), 1991 WL 274328, at \*1 (S.D.N.Y. Dec. 6, 1991) (calling for heightened scrutiny in the case of in-house counsel); *Avianca, Inc. v. Corriea*, 705 F. Supp. 666, 676 (D.D.C. 1989); *Rossi v. Blue Cross & Blue Shield*, 540 N.E.2d 703, 705-06 (N.Y. 1989). There is no empirical evidence that in-house counsel are more likely than outside counsel to mix business and legal roles; in fact, the evidence suggests that outside counsel give business advice just as frequently. See Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 *ST. JOHN'S L. REV.* 191, 238-41 (1989). For a summary of factors that courts consider in determining whether in-house counsel was acting as a lawyer, see *GERGACZ*, *supra* note 25, §§ 3.21-30.

32 See *Upjohn*, 449 U.S. at 395; *Rossi*, 540 N.E.2d at 705; Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 *HOFSTRA L. REV.* 279, 288 (1984); see also Amy Weiss, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 *GEO. J. LEGAL ETHICS* 393, 394-400 (1998) (reviewing cases applying increased scrutiny to communications with in-house counsel based on the "zone of silence" concern).

33 See, e.g., *General Foods Corp. v. Jay V. Zimmerman Co.*, No. 86 Civ. 2697 (KLB), 1988 WL 5371, at \*1 (S.D.N.Y. Jan. 14, 1988).

34 See, e.g., *Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, No. 93 Civ. 5125 (RPP), 1996 WL 29392, at \*4 (S.D.N.Y. Jan. 25, 1996) (finding negotiation of environmental provisions in a contract to be outside a lawyer's "traditional function"); see also



### A. *Cases Recognizing In-Firm Privilege*

The first case to consider a claim of in-firm privilege was *In re Sunrise Securities Litigation*,<sup>36</sup> a current-client case. In *In re Sunrise*, a law firm (Blank Rome) representing a failed savings and loan association (Sunrise) was named as a defendant in claims against Sunrise by its outside directors, former shareholders, and the Federal Savings and Loan Insurance Corporation.<sup>37</sup> Upon a motion to compel discovery of certain internal documents, Blank Rome claimed the attorney-client privilege, on the grounds that the documents represented communications between the firm and its in-house counsel.<sup>38</sup>

The court initially rejected the possibility of in-firm privilege, holding that “[o]nly communications from one person or entity, a client, to another person or entity, an attorney, can be protected by the attorney client privilege,”<sup>39</sup> whereas the law firm and its in-house counsel were “members of one and the same entity.”<sup>40</sup> The court emphasized that the law firm had not formally designated any lawyer as in-house counsel, and “at least some of the attorneys purportedly seeking advice as ‘Blank Rome the client’ were themselves consulted for advice as ‘Blank Rome the attorney.’”<sup>41</sup> Thus, the court found “no facts to support treating the communications in question as between attorney and client.”<sup>42</sup>

Blank Rome moved for reconsideration on the issue of in-firm privilege, arguing that communications between a law firm and its in-house counsel are analogous to communications between a corporation and its in-house counsel, which may be protected by the attorney-client privilege.<sup>43</sup> On reconsideration, the court agreed “that it is possible in some instances for a law firm, like other businesses or professional associations, to receive the benefits of privilege when seeking

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Weiss, *supra* note 32, at 401–03 (“[W]hen in-house attorneys are not acting solely in a professional legal capacity, their communications with clients will not be privileged, even if they render legal advice during those communications.”).

35 See, e.g., *United States v. Frederick*, 182 F.3d 496, 502 (7th Cir. 1999) (denying the privilege where the lawyer was acting as accountant); *Cal. Union Ins. Co. v. Nat'l Union Fire Ins. Co.*, No. 86-CV-609, 1989 WL 48413, at \*2 (N.D.N.Y. Apr. 27, 1989) (denying the privilege where the lawyer was acting as claims manager).

36 130 F.R.D. 560, 597 (E.D. Pa. 1989).

37 *Id.* at 562–63.

38 *Id.* at 572.

39 *Id.*

40 *Id.*

41 *Id.* at 572 n.35.

42 *Id.* at 572.

43 *Id.* at 594–95.

legal advice from in-house counsel,"<sup>44</sup> thus becoming the first court to recognize the possibility of in-firm privilege.

The court went on, however, to note that "a law firm's consultation with in-house counsel may cause problems of conflicting fiduciary duties which seldom arise in corporations or other professional associations,"<sup>45</sup> and held that communication that "creates a conflict between the law firm's fiduciary duties to itself and its duties to the client" is not privileged.<sup>46</sup> Thus, *In re Sunrise* established a fiduciary exception to in-firm privilege where the communication at issue concerns a current client of the firm.

Following *In re Sunrise*, a series of cases upheld claims to in-firm privilege outside of the current-client context. In a 1991 memorandum opinion, *Lama Holding Co. v. Shearman & Sterling*,<sup>47</sup> the magistrate stated that "it is undisputed that an attorney-client relationship can exist within a law firm," citing *In re Sunrise*, and denied plaintiff's motion to compel discovery of client files and time sheet entries.<sup>48</sup> Three years later, in another memorandum opinion, *Hertzog, Calamari & Gleason v. Prudential Insurance Co. of America*,<sup>49</sup> the court held that "a law partnership which elects to use a partner or associate as counsel of record in a litigated matter" creates "the functional equivalent of a corporate staff attorney," and that the privilege attaches "[s]o long as the individual in question is acting only as an [in-house] attorney," rather than as a participant in the underlying events.<sup>50</sup>

In *United States v. Rowe*,<sup>51</sup> the Ninth Circuit extended the scope of in-firm privilege to cover factfinding by associates assigned to an internal investigation. In *Rowe*, the firm's senior partner (Rowe) learned of irregularities in a firm lawyer's handling of client funds and assigned two associates to look into the matter.<sup>52</sup> Rowe also wrote to the state bar asking it to "take appropriate action."<sup>53</sup> A grand jury investigating the lawyer later subpoenaed the associates to ask them about their conversations with Rowe, but the firm claimed that the conversations were privileged.<sup>54</sup>

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44 *Id.* at 595.

45 *Id.*

46 *Id.* at 597.

47 No. 89 Civ. 3639 (KTD), 1991 WL 115052 (S.D.N.Y. June 17, 1991).

48 *Id.* at \*4.

49 850 F. Supp. 255 (S.D.N.Y. 1994).

50 *Id.*

51 96 F.3d 1294 (9th Cir. 1996).

52 *Id.* at 1295.

53 *Id.*

54 *Id.* at 1296.

The district judge held that the law firm had not met the requirements for privilege because the associates never were told that they were working as the firm's attorneys and they did not record their hours or bill the firm for their time on the matter.<sup>55</sup> The Ninth Circuit reversed, holding that the associates "were, effectively, in-house counsel" because Rowe assigned them to perform services "on behalf of the firm."<sup>56</sup> The court held, further, that the factfinding in question qualified as "professional legal services," citing *Upjohn*.<sup>57</sup> As the *Upjohn* Court observed, "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."<sup>58</sup>

Finally, in *Nesse v. Pittman*,<sup>59</sup> the court held that the attorney-client and work product<sup>60</sup> privileges protect in-firm communication in anticipation of litigation, including communication from one partner to another for the purpose of conveying firm counsel's findings in an internal investigation.<sup>61</sup> In *Nesse*, a Chapter 11 trustee (*Nesse*) of a former client of the firm (*Blair*) sued the firm (*Shaw Pittman*) over the manner of its withdrawal from representation.<sup>62</sup> A central issue in the lawsuit was the conduct of one *Shaw Pittman* partner (*Webster*),

55 *Id.*

56 *Id.*

57 *Id.* at 1297.

58 *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981).

59 206 F.R.D. 325 (D.D.C. 2002); 202 F.R.D. 344 (D.D.C. 2001).

60 The work product privilege protects documents "prepared in anticipation of litigation" from discovery by the opposing party except on a showing of substantial need. *See Hickman v. Taylor*, 329 U.S. 495, 499-505 (1947). The work product privilege is codified in Federal Rule of Civil Procedure 26(b)(3), which provides, in pertinent part:

[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation . . . only upon a showing that the party seeking discovery has substantial need of the material in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

FED. R. CIV. P. 26(b)(3). This Article does not specifically address the scope of in-firm work product privilege. However, much of my analysis of the attorney-client privilege applies to the work product privilege as well.

61 *Nesse*, 206 F.R.D. at 329.

62 *Nesse*, 202 F.R.D. at 346-48.

whose status in the firm also was under review by the firm's management committee.<sup>63</sup>

The magistrate initially considered motions to compel discovery of a variety of documents, including documents prepared by Shaw Pittman's general counsel (Harvey) regarding a potential lawsuit by Blair<sup>64</sup> and notes from management committee meetings about Webster's role in the Blair matter and Webster's performance in general.<sup>65</sup> The magistrate held that the documents prepared by Harvey, which discussed settlement and litigation strategy, were "near perfect opinion work product" and therefore protected "absolutely" under the Federal Rules of Civil Procedure.<sup>66</sup> As to the notes from the management committee meetings, which summarized Harvey's findings about Webster's role in the Blair matter, the magistrate held that the application of the attorney-client privilege depended on the primary purpose of the meetings and ordered an evidentiary hearing to determine that purpose. According to the magistrate:

If the primary purpose of the . . . meetings was to evaluate Blair's potential claim, the attorney-client privilege attaches . . . . On the other hand, if . . . the meetings primarily concerned Webster's status at the firm, then Harvey's assistance could not fairly be described as legal.<sup>67</sup>

Following the evidentiary hearing, the magistrate issued a second opinion in which he held that most of the notes were protected by the attorney-client privilege,<sup>68</sup> including notes from two meetings in which Harvey was not present.<sup>69</sup> The magistrate based this holding not on the primary purpose of the meeting, as he had indicated would control, but rather on the primary purpose of Webster's communications to Harvey in the first place, citing *Upjohn*.<sup>70</sup> The magistrate stated:

Having heard the testimony and having considered more comprehensively the significance of the *Upjohn* case, I refine my decision. I must focus exclusively on the reason why the lawyer collects the in-

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63 *Nesse*, 206 F.R.D. at 327.

64 *Nesse*, 202 F.R.D. at 350-51.

65 *Id.* at 357-58.

66 *Id.* at 350 (citing FED. R. CIV. P. 26(b)(3)).

67 *Id.* at 357-58.

68 *Nesse*, 206 F.R.D. at 331 (stating that "all but one set of . . . notes are within the attorney-client privilege"). The one set of notes held not to be privileged were a partner's notes recording Webster's direct communications to the management committee. *Id.* at 329.

69 *Id.* at 329.

70 *Id.* at 330.

formation from the client in the first place, and disregard the motivation behind the lawyer's subsequent communication thereof, so long as the lawyer is speaking to persons with whom the lawyer has a privilege.<sup>71</sup>

Based on this logic, the magistrate held that the attorney-client privilege covered all communications from Webster to Harvey for the purpose of evaluating Blair's claim, even when such communications were relayed by others for the purpose of evaluating Webster's performance.<sup>72</sup>

### B. *The Scope of the Privilege in Regard to Nonclients*

Taken together, the nonclient cases offer broad protection for in-firm communication under the attorney-client privilege. The cases protect not only direct communication with in-house counsel<sup>73</sup> and lawyers acting as the functional equivalent of in-house counsel,<sup>74</sup> but also factfinding by junior attorneys<sup>75</sup> and partner-to-partner communication conveying the results of internal factfinding.<sup>76</sup>

The cases also provide some guidelines for firms seeking to preserve the privilege while relying on in-house counsel. For instance, the cases suggest that the role of firm counsel should be formally designated by the firm, so that it is clear that firm counsel is acting as the "functional equivalent of a corporate staff attorney."<sup>77</sup> The designated firm counsel should act only as an attorney for the firm and have no involvement in the underlying events (such as the representation that gave rise to the claim).<sup>78</sup> To underscore this separation and the firm's identity as the client, firm counsel should bill the firm for time spent on in-house advising.<sup>79</sup>

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71 *Id.*

72 *Id.* at 329-30.

73 *Id.* at 328.

74 *United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996); *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255, 255 (S.D.N.Y. 1994).

75 *Rowe*, 96 F.3d at 1296-97.

76 *Nesse*, 206 F.R.D. at 329-30.

77 *Hertzog*, 850 F. Supp. at 255; *see also In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 572 (E.D. Pa. 1989) (criticizing the firm for failing to distinguish between the lawyers acting as firm counsel and the lawyers acting as clients); *Gillers*, *supra* note 12, at 111 (identifying the precautions a law firm should take to preserve in-firm privilege).

78 *Hertzog*, 850 F. Supp. at 255; *Gillers*, *supra* note 12, at 111.

79 *Rowe*, 96 F.3d at 1296 (citing the district court's disapproval of the fact that the junior attorneys assigned to an internal investigation did not "bill the firm or record hours expended on the firm's behalf"); *see also Gillers*, *supra* note 12, at 111 (recommending that the firm set up a separate billing number for in-house matters).

Protection of the privilege under these guidelines encourages law firms to invest in and formalize the role of firm counsel. The requirements for privilege are most easily satisfied when the lawyer who acts as firm counsel does so on a permanent, full-time basis and maintains no outside practice.<sup>80</sup> In that circumstance, there can be no question of opportunistic hat-switching by the firm (as seemed to be the case in *In re Sunrise*) or the firm's identity as the client. Partners who act as firm counsel on a part-time but ongoing basis and bill the firm directly for that service<sup>81</sup> also make it easy for courts to define them as the "functional equivalent of a corporate staff attorney,"<sup>82</sup> especially if their professional title reflects their in-house role.

Partners who step in as advisers on an ad hoc basis, however—or, as in *Rowe*, who direct associates to dig around on a problem partner—run the risk that the courts will worry about abuse of the privilege. As the plaintiff argued in *Rowe*, courts should not reward a law firm simply for being a law firm by finding an attorney-client relationship whenever one lawyer talks to another about a potential problem in the firm.<sup>83</sup> Although the Ninth Circuit reversed the district court's denial of privilege in *Rowe*, the district court's concerns in that case should stand as a warning to firms. What counts as the "functional equivalent" of corporate counsel may be a moving target, especially in large law firms. As more large law firms invest in permanent, paid in-house counsel, firms that do not may begin to have trouble claiming the privilege for less formal arrangements.

## II. THE CURRENT-CLIENT CASES

While courts have extended broad protection to in-firm privilege in regard to nonclients, courts have refused to recognize in-firm privilege for communication about a current client. *In re Sunrise* is the leading case on the current-client issue. According to *In re Sunrise*, the problem with asserting in-firm privilege for communication about a current client is the potential conflict of interest between the firm's representation of the client and the firm's "representation of itself." The court repeated this characterization of the conflict numerous

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80 See Chambliss & Wilkins, *supra* note 1, at 573 (reporting that ten of the thirty-two firms in the study had full-time in-house counsel); Levy, *supra* note 1 (reporting that "[m]ore than a quarter of firms polled by Altman Weil" had full-time in-house counsel).

81 See Chambliss & Wilkins, *supra* note 1, at 573 (reporting that five of the thirty-two firms in the study had part-time firm counsel who billed the firm directly for in-house advising).

82 *Hertzog*, 850 F. Supp. at 255.

83 *Rowe*, 96 F.3d at 1297.

times in its opinion. For example: "[W]hen a law firm seeks legal advice from its in house counsel, the law firm's representation of itself (through in house counsel) might be directly adverse to, or materially limit, the law firm's representation of another client, thus creating a prohibited conflict of interest."<sup>84</sup> Blank Rome's conflict, if any, arose from the firm's simultaneous representation of both itself and Sunrise.<sup>85</sup>

To assess the implications of this conflict, the court turned to a line of cases that establish a fiduciary exception to the corporate attorney-client privilege in shareholder litigation. The seminal case in this line was *Garner v. Wolfinbarger*,<sup>86</sup> which involved a shareholder derivative action, but the court treats *Garner* in a footnote.<sup>87</sup> Instead, it relies on *Valente v. PepsiCo*,<sup>88</sup> an application of *Garner*, presumably because it is from the same circuit as the *In re Sunrise* court.

*Valente* was a class action brought by the minority shareholders of Wilson Sporting Goods following Wilson's merger with PepsiCo.<sup>89</sup> At issue were pre-merger communications between PepsiCo and PepsiCo's general counsel (DeLuca) about the tax consequences of various merger alternatives.<sup>90</sup> PepsiCo, at the time of the merger, was the majority shareholder of Wilson, and some PepsiCo officers, including DeLuca, sat on Wilson's board.<sup>91</sup> Because of PepsiCo's controlling interest in Wilson, the *Valente* court held that PepsiCo and its officers owed a fiduciary duty to Wilson's minority shareholders and could not claim the privilege against them, citing *Garner*.<sup>92</sup> The court also held that DeLuca owed a fiduciary duty to Wilson as a member of Wilson's board.<sup>93</sup> Thus, when Wilson sought to discover a memorandum prepared for PepsiCo by DeLuca, the court held that PepsiCo could not claim the privilege because of DeLuca's conflicting fiduciary duties. According to *Valente*,

[a]t the time . . . [the memorandum] was drafted, its author, Peter DeLuca, sat as a member of the Board of Directors of Wilson. He was, in addition, General Counsel to PepsiCo. In those positions,

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84 *In re Sunrise* Sec. Litig., 130 F.R.D. 560, 596 (E.D. Pa. 1989).

85 *Id.* at 597 n.12.

86 430 F.2d 1093 (5th Cir. 1970).

87 *In re Sunrise*, 130 F.R.D. at 596 n.9 (calling *Garner* "the seminal case").

88 68 F.R.D. 361 (D. Del. 1975) (denying privilege in a conflict between majority and minority shareholders).

89 *Id.* at 363.

90 *Id.* at 364.

91 *Id.*

92 *Id.* at 366-67.

93 *Id.* at 368.

he owed separate fiduciary obligations to two separate entities and their interests. He could not subordinate the fiduciary obligations which he owed to Wilson and the minority shareholders . . . to those of his client PepsiCo. The fact that Wilson may not have had an attorney-client relationship with him is of no import. His knowledge in one capacity cannot be separated from the other, nor can his duties as a fiduciary be lessened or increased because of professional relationship. It 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.<sup>94</sup>

As this passage makes clear, *Valente* focused on in-house counsel's fiduciary duties rather than those of his client, PepsiCo. *In re Sunrise* correctly summarized the holding of *Valente* as follows:

[T]he [*Valente*] Court addressed the issue of how conflicting fiduciary duties owed by the attorney affect a client's attorney client privilege . . . . The *Valente* Court held that the conflicting fiduciary duties owed by DeLuca to Wilson and PepsiCo prevented assertion of the attorney client privilege against Wilson.<sup>95</sup>

Yet in applying *Valente*, *In re Sunrise* shifted the focus to the law firm's duties to its client, Sunrise, and ignored the role of the in-house lawyer. According to *In re Sunrise*,

the reasoning of *Valente* would dictate that a law firm's communication with in house counsel is not protected by the attorney client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication. Because I find that the *Valente* Court's well-reasoned analysis accommodates the interests of both the fiduciary or attorney and the beneficiary or client, I will adopt it as the controlling rule in this case. The attorney client privilege therefore will protect only those otherwise privileged documents . . . which do not contain communications or legal advice in which Blank Rome's representation of itself violated Rule 1.7 with respect to a Blank Rome client seeking the document. As a result, examination of individual documents will be necessary.

In short, determination of whether the documents in question are protected by the attorney-client privilege requires application of two tests. First, the document must meet the requirements [for privilege] set forth in *United Shoe*. Second, the document must not contain communications or legal advice in which Blank Rome's representation of

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94 *Id.*

95 *In re Sunrise* Sec. Litig., 130 F.R.D. 560, 596 (E.D. Pa. 1989).



itself violated Rule 1.7 with respect to a Blank Rome client seeking the document.<sup>96</sup>

The court then turned all but three documents over to a special master for review.<sup>97</sup>

The preceding passage contains the court's entire analysis of the current-client issue. The court begins with *Valente*, but ends with a test that does not seem to depend on *Valente* at all, but rather on ordinary conflict analysis.<sup>98</sup> Moreover, the "test" that the court announces is little more than a restatement of the original issue; that is, to what extent does a law firm lose the protection of privilege when the communication at issue concerned a current client of the firm?

Numerous cases have criticized *Valente* as an application of *Garner*,<sup>99</sup> and other writers have criticized *Valente* as the foundation for *In re Sunrise*.<sup>100</sup> Yet despite the problems with *Valente* and *In re Sunrise*, *In re Sunrise* has become the touchstone for the current-client analysis.

After *In re Sunrise* was decided in 1989, the current-client issue lay dormant until two cases decided in 2002. In the first, *Bank Brussels Lambert v. Credit Lyonnaise (Suisse), S.A.*,<sup>101</sup> the law firm (Rogers & Wells) had represented the client (CLS) in the client's financing of certain oil transactions and in subsequent litigation growing out those transactions. During that litigation, CLS told Rogers & Wells that if CLS were found liable in the litigation, Rogers & Wells would be liable to CLS. This assertion prompted the head of Rogers & Wells's Clients and Ethics Committee,<sup>102</sup> whom the court refers to as "in-house counsel,"<sup>103</sup> to conduct an internal review of the firm's representation of

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96 *Id.* at 597–98 (footnotes omitted).

97 *Id.* at 598.

98 *See id.* at 597 n.12 (referring to Pennsylvania Rule of Professional Responsibility 1.7 on conflicts of interest).

99 *See, e.g.*, *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 722–23 (N.D. Ill. 1978) ("To the extent that *Valente* abandons the requirement that plaintiff-shareholders demonstrate 'good cause,' we disagree with that court's reasoning."); *Lee v. Engle*, Nos. Civ. A. 13323, Civ. A. 13284, 1995 Del. Ch. LEXIS 149, at \*7 n.2 (Del. Ch. Dec. 15, 1995) (criticizing *Valente* for establishing a per se fiduciary exception to the privilege rather than requiring the plaintiffs to show "good cause" why the privilege should not apply, as in *Garner*).

100 *See Barker, supra* note 14, at 471 (stating that "the many flaws in [*Valente's*] reasoning render it an infirm foundation for the *Sunrise Securities* rule"); Douglas Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 SYRACUSE L. REV. 69, 97–99 (2004) (criticizing *Valente's* application of the common interest exception to the privilege and stating that "any decision in which a court relies on *Valente* is also suspect").

101 220 F. Supp. 2d 283 (S.D.N.Y. 2002).

102 *Id.* at 284.

103 *Id.* at 287.

CLS, including a review of potential conflicts and the firm's potential liability.<sup>104</sup> CLS later fired the firm and filed a lawsuit alleging malpractice, breach of contract, breach of fiduciary duty, and fraud.<sup>105</sup>

In support of its malpractice action, CLS sought discovery of documents related to the internal review, claiming that such documents were created in violation of Rogers & Wells's fiduciary duty to CLS.<sup>106</sup> Rogers & Wells claimed that the documents were privileged, citing *Rowe, Hertzog*, and *Lama*, but the court held that they were not, citing *In re Sunrise* and the New York disciplinary rule governing conflicts of interest.<sup>107</sup> According to the court,

[w]hen R & W performed the conflict check, CLS was still its client. Therefore, R & W was under an ethical duty to disclose to CLS the results of its internal conflict check, and in no position to claim a privilege against their client. While the privilege will be applicable against all the world, it cannot be maintained against CLS.

R & W has taken the untenable position that "the advice [sought in performing its conflict check] was not sought for the benefit of CLS." However, the purpose of the conflict review . . . is to maintain the fiduciary duties of loyalty and confidentiality owed to the client . . . . It would seem inadvisable to expect in-house counsel to be shielded from a client's inquiries by attorney-client privilege in performing a conflict check when it is common knowledge that a conflict as to one attorney at a firm is a conflict as to all . . . .

. . . Therefore, this Court finds that a law firm cannot invoke the attorney-client privilege against a current client when performing a conflict check in furtherance of representing that client.<sup>108</sup>

Although the court rested its holding on the current client issue, the court also signaled its skepticism of in-firm privilege more generally. According to *Bank Brussels*, in-house counsel are not as independent as outside counsel and are more likely to mix business and legal functions.<sup>109</sup> Further, "[o]nly recently . . . have courts begun to struggle with the question of the attorney-client privilege being applied to in-house counsel communications within a law firm."<sup>110</sup> Thus, according to the court in *Bank Brussels*, in-firm privilege is not as robust as *Rowe et al.* might suggest:

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104 *Id.* at 284.

105 *Id.* at 284–85.

106 *Id.* at 285.

107 *Id.* at 287 (citing N.Y. CODE OF PROF'L RESPONSIBILITY DR 5-105 (1999)).

108 *Id.* at 287–88 (alteration in original) (citations omitted).

109 *Id.* at 286.

110 *Id.*

In raising the attorney-client privilege to protect its conflict check, R & W assumes that the privilege will automatically apply to in-house legal consultation. However, this assumption glosses over the general reluctance and narrow, grudging application of the privilege in these cases. The novel idea which R & W puts fourth [sic] first appeared in *In re Sunrise Securities Litigation*. In *Sunrise*, the Court initially refused to recognize the privilege . . . . However, on reconsideration, the Court . . . noted "that it is possible in some instances for the privilege to apply."<sup>111</sup>

The second current-client case decided in 2002 was *Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*<sup>112</sup> In *Koen Book*, the client (Koen Book) had retained the law firm (Powell, Trachtman) for advice concerning a security interest of one of its customers, which later filed for bankruptcy. Powell, Trachtman continued to represent Koen Book as creditors in the bankruptcy proceeding, but Koen Book became dissatisfied with the firm's services and informed the firm that it was considering a malpractice action against it. During this period, Koen Book engaged other outside counsel, whom they consulted regarding the quality of Powell, Trachtman's services,<sup>113</sup> but also continued to retain Powell, Trachtman until shortly after a previously scheduled bankruptcy hearing.<sup>114</sup>

After Koen Book threatened malpractice, but before it fired Powell, Trachtman, the Powell, Trachtman lawyers who were working on the Koen Book matter consulted with "another lawyer in the firm concerning ethical and legal issues that had arisen out of the portent of a malpractice action."<sup>115</sup> Koen Book sought discovery of the documents related to this consultation. The firm claimed that the documents were protected by the attorney-client and work product privileges, but the court held that they were not, citing *In re Sunrise*, *Valente*, and the Pennsylvania rule on concurrent conflicts of interest.<sup>116</sup>

Unlike the court in *Bank Brussels*, the court in *Koen Book* was sympathetic to the law firm's claim. The court stated that "[i]t is clear that the attorney-client privilege applies in the corporate setting when an employee seeks legal advice from in-house counsel,"<sup>117</sup> and that

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111 *Id.* at 286-87 (citations omitted).

112 212 F.R.D. 283 (E.D. Pa. 2002).

113 *Id.* at 283-84.

114 *Id.* at 286.

115 *Id.* at 284. The opinion does not indicate the status or title of the lawyer consulted.

116 *Id.* at 285 (citing PA. RULES OF PROF'L CONDUCT R. 1.7 (2004)).

117 *Id.* at 284.

the documents “clearly would have been protected from discovery . . . if a third party . . . had sought access to them.”<sup>118</sup> However, the court held that “it is the relationship between the clients and the law firm from which discovery is sought that is central to the analysis.”<sup>119</sup> The court noted that, once the client threatened to sue, the firm could have tried to withdraw or sought the client’s consent for its in-firm consultation, but the firm did neither.<sup>120</sup> Thus, as long as the firm continued to represent the client, the court held that the firm could not maintain any privilege against the client.

We recognize that the firm was enmeshed in an unenviable situation once the [malpractice] threat had been made with a hearing before the bankruptcy judge . . . only two weeks away. Nonetheless, the firm still owed a fiduciary duty to plaintiffs while they remained clients. This duty is paramount to its own interests.<sup>121</sup>

*Koen Book* is the clearest analysis of the current-client issue. Although the court politely cites *In re Sunrise* and *Valente*, acknowledging the judge in *In re Sunrise* as a colleague<sup>122</sup> and calling *Valente* “the seminal case in this circuit,”<sup>123</sup> the court focuses mainly on the test from *In re Sunrise*, which points to the state conflict rule, and raises the issues of withdrawal and waiver, which are relevant to the application of that rule.

Further, unlike *In re Sunrise*, *Koen Book* does not conflate the duties of the law firm and its in-house counsel—perhaps because *Koen Book* does not address the duties of in-house counsel at all. Nevertheless, as I argue below, *Koen Book* reaches the wrong result on the issue of in-firm privilege.

### A. Critique

There are three problems with the courts’ analysis in the current-client cases. First, the courts fail to distinguish between two potential sources of conflict: the firm’s duty to the client and in-house counsel’s duty to the firm. This problem is most pronounced in *In re Sunrise*, in its characterization of the conflict and its application of *Valente*, but the problem haunts *Bank Brussels* as well.

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118 *Id.* at 286.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.* at 284 (stating “[m]y colleague Judge Thomas O’Neill faced a like issue a number of years ago in *In re Sunrise Securities Litigation*”).

123 *Id.* at 285.

This leads to the second problem, again most pronounced in *In re Sunrise*, which is that the courts misapply *Garner*, via *Valente*, in their analysis of the firm's duty to the client. This problem stems in part from the infirmities in *Valente*, but also from the courts' confusion about which fiduciary relationship is at issue.

Finally, why apply *Garner* at all? 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? The *Garner* doctrine is controversial even in its original context, and a number of jurisdictions have declined to adopt it.<sup>124</sup> The extension of *Garner* to other types of fiduciary relationships also is controversial,<sup>125</sup> even without any intrusion on competing professional rules. In any event, the invocation of *Garner* via *Valente* does little to advance the analysis in *In re Sunrise* or the cases that follow. In the end, all three cases return to the profession's own rules governing conflicts of interest.

The following sections elaborate on these problems and propose an alternative approach. I propose that the scope of the privilege in regard to current clients be governed by the rules of professional conduct and traditional privilege analysis, including the traditional exceptions (such as the crime-fraud exception and waiver). I argue that this approach strikes the appropriate balance between the interests of firms and clients and advances the public interest in law firm self-regulation.

### B. *The Law Firm's Duty to the Client*

*In re Sunrise* characterizes the conflict at issue as a conflict between the firm's representation of the client and the firm's "represent-

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124 See *Milroy v. Hanson*, 875 F. Supp. 646, 651 (D. Neb. 1995) (criticizing *Garner* as inconsistent with *Upjohn*); *Lefkowitz v. Duquesne Light Co.*, CIV. A. Nos. 86-1046, 86-2085, 1988 WL 169273, at \*6 (W.D. Pa. June 14, 1988) (quoting *Shirvani v. Capital Investing Corp.*, 112 F.R.D. 389 (D. Conn. 1986), for the court's rejection of *Garner* on the basis that it ignores the "genuine need of management in the ordinary course of confidential communication and advice"); *Shirvani v. Capital Investing Corp.*, 112 F.R.D. 389, 390-91 (D. Conn. 1986) (criticizing *Garner* for ignoring the needs of management for confidential advice); *Nat'l Football League Props., Inc. v. Superior Court of Santa Clara County*, 75 Cal. Rptr. 2d 893, 897 (Ct. App. 1998) (stating that California courts have refused to recognize a shareholder exception to the statutory corporate privilege); *Agster v. Barmada*, 43 Pa. D. & C.4th 353, 363 (Pa. Ct. Com. Pl. 1999) (stating that *Garner* is inconsistent with Pennsylvania case law on the corporate privilege).

125 See generally Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 HOFSTRA L. REV. 817 (1984) (criticizing *Garner* and its extension).

tation of itself.”<sup>126</sup> This phrase conflates two separate issues: whether the firm can defend at all against a claim by a current client (the “representation” piece) and whether the firm can use in-house counsel to do so (the “itself” piece).

Although its phrasing is confusing, the court in *In re Sunrise* seems to object primarily to the use of in-house counsel. For instance, the court states in a footnote

Blank Rome’s conflict, if any, arose from the firm’s simultaneous representation of both itself and Sunrise . . . . If, for example, the documents sought were communications by Blank Rome to its own outside counsel, Rule 1.7 would not apply since Blank Rome would be represented by outside counsel, not by Blank Rome itself.<sup>127</sup>

Yet the court goes on to apply *Garner*, which does not distinguish between inside and outside counsel.<sup>128</sup> *Garner* involved the right of shareholders to gain access to otherwise privileged communication in a derivative action.<sup>129</sup> Under *Garner*, the privilege may be withheld from *any* attorney-client communication that “occurred prior to the assertion of charges and relates directly to those charges.”<sup>130</sup> Thus, if *Garner* is to govern the scope of in-firm privilege, law firms will risk losing the privilege for any communication about the representation of a current client, including communication with outside counsel, when the communication occurs prior to the assertion of charges and relates directly to those charges. Such a rule would make the privilege uncertain whenever a law firm made the effort to sort out its duties to a client prospectively to prevent a problem from arising. How perverse an incentive is that?

To make matters worse, the current-client cases misapply *Garner* in two important respects, such that the denial of privilege is even broader than *Garner* would demand. First, the cases rely on *Valente*, and *Valente* gets *Garner* wrong. *Garner* established a balancing test to determine the application of privilege<sup>131</sup> and placed the burden of proof on the party seeking discovery to show “good cause” why the privilege should be denied.<sup>132</sup> According to *Garner*,

126 *In re Sunrise* Sec. Litig., 130 F.R.D. 560, 596 (E.D. Pa. 1989).

127 *Id.* at 597 n.12.

128 *Garner v. Wolfenbarger*, 430 F.2d 1093, 1102 n.18 (5th Cir. 1970) (“We do not consider it determinative whether the attorney consulted is incorporated [sic] or house counsel.”).

129 *Id.* at 1095–96.

130 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 85(b) (2000) (summarizing the *Garner* doctrine).

131 *Garner*, 430 F.2d at 1103.

132 *Id.* at 1104 (identifying nine factors that courts should consider in determining

[t]he corporation is not barred from asserting [the privilege] merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.<sup>133</sup>

*Valente*, however, shifts the burden to the party claiming the privilege, creating a rule of presumptive disclosure.<sup>134</sup> According to *Valente*,

*Garner* . . . stand[s] generally for the proposition that where a corporation seeks advice from legal counsel, and the information relates to the subject of a later suit by a minority shareholder in the corporation, the corporation is not entitled to claim the privilege as against its own shareholder, absent some special cause.<sup>135</sup>

Secondly, both *Bank Brussels* and *Koen Book* ignore the distinction in *Garner* between communication that occurs prior to the assertion of charges and communication that occurs in response to the charges.<sup>136</sup> The fiduciary exception in *Garner* is based on the existence of a common interest between corporate managers and shareholders.<sup>137</sup> Once shareholders bring an action against management, this common interest disappears. Thus, the fiduciary exception to the privilege does not apply once a claim is asserted.<sup>138</sup>

In *Bank Brussels* and *Koen Book*, the communication at issue was prompted by an assertion of wrongdoing by the client and made for the purpose of assessing the client's claims. Such communication is outside the scope of the *Garner* doctrine, properly applied.

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the presence or absence of good cause).

133 *Id.* at 1103–04.

134 See *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 723 (N.D. Ill. 1978) (criticizing *Valente* for abandoning the good cause requirement); *Lee v. Engle*, Nos. Civ. A. 13323, Civ. A. 13284, 1995 Del. Ch. LEXIS 149, at \*6 n.1 (Del. Ch. Dec. 15, 1995) (stating that *Garner* and *Valente* are “facially at odds,” and that the court would follow *Garner* rather than *Valente*); see also *supra* note 99 and accompanying text.

135 *Valente v. PepsiCo*, 68 F.R.D. 361, 367 (D. Del. 1975).

136 See *Barker*, *supra* note 14, at 470 (criticizing *Bank Brussels* and *Koen Book* on this point).

137 *Garner*, 430 F.2d at 1103 (discussing the common interest exception to the privilege as a useful analogy for the relationship between shareholders and management).

138 *Id.* at 1104 (identifying the factors to be considered in determining whether the fiduciary exception applies); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 85 cmt. c & reporter's note (2000) (explaining that the *Garner* doctrine covers communications that were “contemporaneous with the acts being challenged” rather than communications that occur during the corporation's defense of the claim).

As a result of these two misapplications of *Garner*, the current-client cases create a presumptive denial of in-firm privilege both before *and* after a charge is asserted. Under this approach, there is no in-firm privilege for communication about a current client, even if the client is suing the firm. In fact, there is no privilege at all for law firms that seek advice about an ongoing representation, whether from inside *or* outside counsel.<sup>139</sup> Instead, a firm that wants privileged advice must first withdraw from the representation.<sup>140</sup> And if withdrawal is not possible—for instance, because of pending litigation<sup>141</sup>—the firm must simply forgo privileged advice altogether.<sup>142</sup>

This approach is inconsistent with *Upjohn*, which emphasizes the role of in-house counsel in promoting organizational compliance with law.<sup>143</sup> It also is inconsistent with the profession's own rules governing lawyers' fiduciary duties to clients. While it is true that lawyers owe "fiduciary duties of loyalty and confidentiality . . . to the client,"<sup>144</sup> these duties are not always "paramount to [lawyers'] own interest,"<sup>145</sup> or to lawyers' duty to comply with the rules of professional conduct. The Model Rules of Professional Conduct contain an explicit exception to the duty of confidentiality, for instance, to the extent that the lawyer reasonably believes necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."<sup>146</sup> Lawyers also may reveal client confidences to the extent necessary "to secure legal advice about the lawyer's compliance with these Rules."<sup>147</sup>

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139 The *In re Sunrise* court acknowledges this logic, but declines to make it part of the holding, stating: "Since the question is not before me, I express no opinion as to whether *Garner* and its progeny would require a law firm to disclose to a client communications between the law firm and its outside counsel relating to the law firm's representation of that client." *In re Sunrise* Sec. Litig., 130 F.R.D. 560, 597 n.12 (E.D. Pa. 1989).

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

141 See MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2003) (requiring lawyers to "comply with applicable law requiring notice to or permission of a tribunal when terminating a representation"); *id.* R. 1.16(d) (requiring the lawyer to give "reasonable notice" to the client and "time for employment of other counsel" before withdrawing); see also *Barker*, *supra* note 14, at 470 (noting that the firm in *Koen Book* "probably could not have withdrawn until the completion of the bankruptcy hearing").

142 See *Koen Book*, 212 F.R.D. at 286 (calling the firm's position "unenviable").

143 *Upjohn Co. v. United States*, 449 U.S. 388, 392 (1981).

144 *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 287 (S.D.N.Y. 2002).

145 *Koen Book*, 212 F.R.D. at 286.

146 MODEL RULES OF PROFESSIONAL CONDUCT R. 1.6(b)(5).

147 *Id.* R. 1.6(b)(4).



The Restatement (Third) of the Law Governing Lawyers also explicitly protects lawyers' interests in assessing their duties to clients and protecting such assessments from disclosure to the client. For instance, the rule governing documents relating to a representation provides that "a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation."<sup>148</sup> However, the comment to this rule provides

[a] lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing . . . the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved.<sup>149</sup>

As this comment makes clear, a presumptive denial of privilege in regard to current clients is unjustified. A law firm, like any fiduciary, maintains the right to seek legal advice regarding its duties to clients, and there is nothing about the firm's duty to the client per se that prevents the privilege from attaching. There may be limits on the scope of the privilege, for instance stemming from ambiguities in the in-house lawyer's role or from the law firm's effort to perpetuate a crime or fraud, but these limits are properly defined by way of traditional privilege analysis, not simply by pointing to the law firm's status as fiduciary. As a critic of *Garner* writes,

[t]he word "fiduciary" has no talismanic quality that dictates abdication of the usual approach to attorney-client privilege whenever the word is invoked. Those who have fiduciary responsibility often want legal advice concerning their responsibilities. They should have the same opportunity to consult with counsel and to speak freely and without fear of making admissions as any other clients.<sup>150</sup>

### C. *In-House Counsel's Duty to the Firm*

Having disposed of the current-client issue based on the law firm's duty to the client, *In re Sunrise* et al. say relatively little about in-house counsel's duty to the firm. If the firm cannot claim the privilege at all, the duties of in-house counsel do not matter. In fact, however, as noted above, *In re Sunrise* and *Bank Brussels* turn primarily on concerns about the role of firm in-house counsel.

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148 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46(2) (2000).

149 *Id.* § 46 cmt. c.

150 Saltzburg, *supra* note 125, at 846.

This section argues that the role of firm counsel is the proper focus of analysis in evaluating in-firm privilege claims. Assuming that law firms have *some* right to privileged legal advice about their duties to current clients, the question is whether (if ever) a law firm may obtain such advice from firm in-house counsel. The answer, I argue, depends on whether there is a conflict of interest between firm counsel's duty to the law firm and firm counsel's duty to the outside client.

Whether firm counsel has a conflict of interest is, in part, a factual question. In some circumstances, there is an obvious conflict. In *In re Sunrise*, for instance, the law firm had not designated any one lawyer as firm in-house counsel, and some of the lawyers who counseled the firm were involved in the representation at issue.<sup>151</sup> Clearly, the same lawyer who represents the outside client cannot simultaneously represent the firm in a dispute between the firm and that client without the informed consent of both clients.<sup>152</sup> If the outside client is suing the firm, the same lawyer cannot represent both clients even with the clients' consent.<sup>153</sup>

The question becomes more difficult, however, when the firm observes the guidelines established in *Rowe, Hertzog, and Nesse*, such that firm counsel's only conflict of interest is that imputed to all members of the firm.<sup>154</sup> For instance, what if the firm employs full-time firm counsel, such that firm counsel has no involvement in the representation of outside clients and does not profit directly from any one client's fees?

The question also becomes more difficult when the outside client alleges wrongdoing and threatens to bring a claim against the firm, but nevertheless expects the firm to continue the representation (as in both *Bank Brussels* and *Koen Book*). Under these circumstances, may the firm obtain privileged advice from firm counsel without the express consent of the outside client?

The current-client cases say no. According to the logic of *In re Sunrise* et al., a conflict of interest must be imputed to firm in-house

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151 *In re Sunrise* Sec. Litig., 130 F.R.D. 560, 572 n.35 (E.D. Pa. 1989).

152 See MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (stating "a lawyer shall not represent a client if . . . the representation of one client will be directly adverse to another client").

153 See *id.* R. 1.7(b)(3) (stating that, notwithstanding the existence of a conflict under Rule 1.7(a), a client may consent to the representation if "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation").

154 See *id.* R. 1.10(a) (stating "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so").

counsel regardless of the structure of the in-house position or the facts of the representation at issue. As the court states in *Bank Brussels*, "it is common knowledge that a conflict as to one attorney at a firm is a conflict as to all."<sup>155</sup> Moreover, under *Koen Book*, the client's desire to continue the representation despite allegations of wrongdoing does not count as a waiver of the imputed conflict.<sup>156</sup> Thus, in order to enjoy the protection of privilege, the firm must obtain the outside client's express consent to the firm's use of in-house counsel.

This approach is consistent with the American Bar Association (ABA) position on the imputation of conflicts of interest,<sup>157</sup> which permits nonconsensual screening only in the case of former government lawyers.<sup>158</sup> Though an increasing number of jurisdictions take a more flexible approach, for instance by permitting nonconsensual screening of private lawyers who move between firms ("lateral screening"),<sup>159</sup> or by limiting lawyers' duty to withdraw in the case of "thrust

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155 *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 288 (S.D.N.Y. 2002).

156 *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 286 (E.D. Pa. 2002) (suggesting that the firm should have sought the client's express consent to the firm's in-house consultation).

157 See MODEL RULES OF PROF'L CONDUCT R. 1.10 (Imputation of Conflicts of Interest: General Rule).

158 See *id.* R. 1.11(b) (providing that conflicts of interest stemming from former government employment are not imputed to other lawyers in the firm provided that the former government lawyer "is timely screened from any participation in the matter and is apportioned no portion of the fee" and that "written notice is promptly given to the appropriate government agency").

159 As of Fall 2004, sixteen states allow some form of lateral screening (Arizona, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Carolina, Oregon, Pennsylvania, Tennessee, and Washington). See ARIZ. RULES OF PROF'L CONDUCT R. 1.10(d) (2004); DEL. RULES OF PROF'L CONDUCT R. 1.10(c) (2004); ILL. RULES OF PROF'L CONDUCT R. 1.10(b)(2), (e) (2004); IND. RULES OF PROF'L CONDUCT R. 1.10(c) (2004); KY. RULES OF PROF'L CONDUCT R. 1.10(d) (1999); MD. RULES OF PROF'L CONDUCT R. 1.10(c) (2004); MASS. RULES OF PROF'L CONDUCT R. 1.10(d)(2) (2004); MICH. RULES OF PROF'L CONDUCT R. 1.10(b) (2005); MINN. RULES OF PROF'L CONDUCT R. 1.10(b)(2) (2005); MONT. RULES OF PROF'L CONDUCT R. 1.10(c)(1) (2004); N.J. RULES OF PROF'L CONDUCT R. 1.10(c)(2) (2004); N.C. REVISED RULES OF PROF'L CONDUCT R. 1.10(c)(1) (2004); OR. RULES OF PROF'L CONDUCT R. 1.10(c) (2005); PA. RULES OF PROF'L CONDUCT R. 1.10(b)(1) (2004); TENN. RULES OF PROF'L CONDUCT R. 1.10(c)(3) (2004); WASH. RULES OF PROF'L CONDUCT R. 1.10(b)(1) (2004). Some other states, as well as an increasing number of federal courts, allow lateral screening by court decision. See, e.g., *In re County of Los Angeles*, 223 F.3d 990, 993 (9th Cir. 2000) (noting that while "the lawyer himself is automatically disqualified, his law firm may serve as counsel, so long as an ethical wall has been erected to bar the disqualified lawyer from any participation in the case"); *Cromley v. Bd. of Educ.*, 17 F.3d 1059, 1064 (7th Cir. 1994) (employing a three-part analysis to determine if the attorney should be disqualified and

upon" conflicts,<sup>160</sup> the ABA has rejected proposals to limit the imputation of conflicts, including, most recently, a proposal to allow lateral screening under Rule 1.10.<sup>161</sup>

Nevertheless, as applied to firm counsel, the automatic imputation of conflicts serves no one's interest. From the firm's perspective, its main effect is to increase the cost of privileged advice by requiring the firm to retain outside counsel or withdraw from the representation at issue. As a practical matter, the chief consequence of this approach will be to discourage firms from seeking early advice when problems with clients arise<sup>162</sup> or at least to make sure that in-firm communication is not conducted in writing or by e-mail.<sup>163</sup>

Requiring the firm to obtain outside counsel or withdraw from the representation also does not serve the interests of the outside client. Certainly, the client is no better off if the firm retains outside counsel.<sup>164</sup> And the client's interests may be seriously harmed by encouraging the firm to withdraw at the first hint of a problem because withdrawal limits the firm's opportunity (and incentive?) to mitigate harm to the client.<sup>165</sup> Finally, the traditional arguments for imputing conflicts are unpersuasive when the firm itself is the potentially adverse client. The primary reasons for imputation are to "[give] effect to the principle of loyalty to the client as it applies to lawyers who

recognizing a rebuttable presumption); *Richard B. v. State*, 71 P.3d 811, 820–21 (Alaska 2003) (noting that the knowledge of a conflict is not automatically imputed to every lawyer within the firm); *Kala v. Aluminum Smelting & Ref. Co.*, 688 N.E.2d 258, 267–68 (Ohio 1998) (adopting a rebuttable-presumption test as to whether disqualification should occur).

160 See D.C. RULES OF PROF'L CONDUCT R. 1.7(d) (limiting the lawyer's duty to withdraw from representing directly adverse interests when "a conflict not reasonably foreseeable at the outset of representation arises . . . after the representation commences").

161 The Ethics 2000 Commission recommended that Rule 1.10 be amended to permit lateral screening, but the ABA House of Delegates rejected the proposal in August 2001 by a 176 to 130 vote. See Robert A. Creamer, *Three Myths About Lateral Screening*, 13 THE PROF'L LAW. 20 (2002) (summarizing the debate about lateral screening and criticizing the ABA's approach). Nevertheless, a number of states have adopted the Ethics 2000 Commission proposal into their state rules of professional conduct. See *supra* note 159.

162 See Barker, *supra* note 14, at 471.

163 As one firm counsel from the focus groups queried: "Somebody comes in and reports to you: do you document or do you not? I mean, do you use e-mail? I hate e-mail. I don't want anything on the system . . . . [A13]." Chambliss & Wilkins, *supra* note 1, at 590–91.

164 See Barker, *supra* note 14, at 471.

165 See Anthony E. Davis, *Professional Responsibility: Multijurisdictional Practice, Internal Discussions, Counsel's Advice*, N.Y. L.J., July 7, 2003, at 3 (criticizing *Koen Book*).

practice in a law firm"<sup>166</sup> and to prevent the misuse of confidential information by lawyers in the same firm. According to the Restatement, "[l]awyers affiliated [in the same law firm] . . . ordinarily have access to files and other confidential information about each other's clients . . . . Sharing confidential client information among affiliated lawyers might compromise the representation of one or both clients if the representations conflict."<sup>167</sup>

These arguments make little sense, however, when the firm itself is seeking advice about a potential dispute with a client. As noted above, the firm's duty of loyalty to the client does not prevent the firm from attempting to defend against client claims. This effort to defend is no more "disloyal" when it involves inside rather than outside counsel. Further, the right to defend includes the right to reveal client confidences when necessary "to secure legal advice about the lawyer's compliance with these Rules"<sup>168</sup> or "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."<sup>169</sup> Thus, the imputation of conflicts to firm in-house counsel adds nothing to the protection of the outside client's interests in loyalty or confidentiality. Instead, its primary effect is to discourage law firms from using in-house counsel.

#### D. *A Suggested Approach to In-Firm Privilege*

Rather than simply denying the privilege for in-firm advice about current clients, the scope of the privilege vis-à-vis current clients should turn on the facts of the representation at issue. Where firm counsel individually has no conflict of interest under Rule 1.7<sup>170</sup> or Rule 1.9,<sup>171</sup> and the in-firm communication meets the ordinary requirements for privilege, courts should not automatically impute a conflict under Rule 1.10. Instead, the imputation of conflicts should depend on the structure of the in-house position.

Where firm counsel holds a full-time position and does not represent outside clients, courts should not impute a conflict under Rule 1.10. This exception to imputation is justified by the structural segregation of the in-house position and the formal designation of the firm as firm counsel's only client.

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166 MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. 2 (2003).

167 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. b (2000).

168 MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4).

169 *Id.* R. 1.6(b)(5).

170 *See id.* R. 1.7 (Conflict of Interest: Current Clients).

171 *See id.* R. 1.9 (Duties to Former Clients).

Courts also should not impute a conflict to part-time firm counsel where the lawyer who serves in that capacity does so on a formal, ongoing basis, such that the firm is clearly established as the client before the in-firm communication occurs. While firm counsel's outside practice may lead to individual conflicts of interest—for instance, where firm counsel has formerly represented the current client seeking discovery—the maintenance of an outside practice, per se, presents no additional argument in favor of imputation. As long as firm counsel has no involvement in the outside representation at issue and the firm is clearly established as the client before the in-firm communication occurs, firm counsel should be treated as the functional equivalent of corporate in-house counsel.

Lawyers who act as firm counsel on a one-shot or ad hoc basis should be subject to imputation unless the firm can show that an attorney-client relationship was established before the in-firm communication occurred. In other words, in the absence of a formal “firm counsel” position—or where firm counsel delegates matters to other lawyers in the firm<sup>172</sup>—the burden should shift to the law firm to show that the identity and role of “firm counsel” was clearly defined.

Compensation is the clearest way to demarcate the role of firm counsel. As *Rowe* suggests,<sup>173</sup> formal billing procedures help to establish the firm as the client and to distinguish the lawyer who acts as firm counsel from other lawyers in the firm. Thus, a lawyer who acts as firm counsel on an ad hoc basis should bill the firm for time spent on in-house matters, or at least create a separate billing number in order to record the time spent.<sup>174</sup> A firm-wide announcement that a particular lawyer or lawyers will be representing the firm also could help to establish the existence of an attorney-client relationship. In the absence of such formalities, however, a lawyer who acts as firm counsel on an ad hoc basis should be subject to imputation under Rule 1.10.

This structural approach is designed to encourage firms to formalize the role of firm counsel and to compensate lawyers directly for their in-house service to the firm. As I explain in Part III, such formal investment has important cultural benefits within firms, while providing a benchmark for the recognition of in-firm privilege.

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172 In some firms, firm counsel acts primarily as a point person, who delegates questions and problems to specialists in the firm. See Chambliss & Wilkins, *supra* note 1, at 575 (providing examples).

173 *United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996).

174 See Gillers, *supra* note 12, at 111 (recommending that the firm set up a separate billing number for in-house matters).

A structural approach also helps to insure that both the firm and firm counsel take seriously the responsibilities of the firm counsel role. If the firm is the client, firm counsel's responsibilities are defined in part by Rule 1.13,<sup>175</sup> which creates a host of specialized ethical and regulatory duties for lawyers. These duties should not be taken lightly by law firm in-house counsel or ignored by lawyers who act as firm counsel on an ad hoc basis. My approach encourages law firms to clearly define the role of firm counsel and encourages firm counsel to clearly define the firm as the client.

My approach eliminates the need to distinguish between communication that occurs prior to, versus in response to, a claim by the client.<sup>176</sup> This distinction would be relevant only to an analysis of waiver where firm counsel has a conflict of interest individually or by imputation. For instance, if a lawyer acts as firm counsel on an ad hoc basis and does not qualify for an exception to the ordinary imputation of conflicts, but the communication at issue occurred in response to an assertion of wrongdoing by the client, then the client's willingness to continue the representation might be viewed as a waiver of the imputed conflict. Where the firm discovers potential wrongdoing and promptly notifies the client, there also may be an argument for waiver if the client elects to continue the representation. Where the firm discovers potential wrongdoing and has not yet notified the client, however, there is no argument for waiver, since the client has not been informed of firm counsel's potential conflict.

My approach supports the denial of privilege in both *In re Sunrise* and *Bank Brussels*, but on different grounds than the courts articulated in those cases. In *In re Sunrise*, as noted above, firm in-house counsel had an obvious conflict of interest under Rule 1.7 because the lawyers who acted as so-called firm counsel were mostly the same lawyers who represented the outside client.<sup>177</sup> Thus, my approach would deny the privilege on straight conflict of interest grounds (without the invocation of the *Garner* doctrine).

In *Bank Brussels*, there were two problems with the firm's claim to privilege. First, the lawyer who served as firm counsel (Cirillo) was the head of the firm's Clients and Ethics Committee (read: conflicts committee) and probably was not formally designated or compensated as in-house counsel.<sup>178</sup> Under my approach, Cirillo therefore would be

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175 See MODEL RULES OF PROF'L CONDUCT R. 1.13 (Organization as Client).

176 See *supra* notes 136-38 and accompanying text.

177 See *supra* note 151 and accompanying text.

178 Lawyers who provide in-house advising as part of committee service to the firm typically are not compensated directly for their in-house service. See Chambliss & Wilkins, *supra* note 1, at 572.

subject to the imputation of conflicts under Rule 1.10. And though the communication at issue—a conflicts check—occurred in response to an allegation of wrongdoing by the client, the firm appears to have hidden the results of the conflicts check from the client for almost two years.<sup>179</sup> A law firm has an ethical duty to “promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required,”<sup>180</sup> including any conflict of interest. Since there was not adequate notice to the client of the firm’s potentially adverse interests, the firm has no argument for waiver of firm counsel’s imputed conflict.

The second problem with the firm’s claim to in-firm privilege in *Bank Brussels* is that the firm appears to have had an actual conflict of interest with the client and to have sought Cirillo’s advice primarily in order to conceal the conflict.<sup>181</sup> If that is the case, the communication at issue does not meet the ordinary requirements for privilege. The attorney-client privilege does not apply when a client uses the lawyer’s advice “to engage in or assist a crime or fraud.”<sup>182</sup> Though one might argue that concealing a professional conflict of interest does not amount to the type of fraud required by the crime-fraud exception, the Restatement states that, for the purpose of the exception, “[f]raud . . . requires a knowing or reckless misrepresentation (or nondisclosure when applicable law requires disclosure) likely to injure another.”<sup>183</sup> This definition would seem to cover the knowing nondisclosure of a conflict under the rules of professional conduct.<sup>184</sup>

My approach does not support the denial of privilege in *Koen Book* unless the lawyer who served as firm counsel had an individual conflict of interest under Rule 1.7 or Rule 1.9 (a fact that is not provided in the opinion).<sup>185</sup> In *Koen Book*, the client threatened to sue the firm for malpractice, but continued to use the firm for five weeks

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179 *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 284–85 (S.D.N.Y. 2002) (suggesting that the law firm concealed its own malpractice from the client, including the extent and significance of its conflicting interests).

180 MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(1).

181 *Bank Brussels*, 220 F. Supp. 2d at 285.

182 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82(b) (2000).

183 *Id.* § 82 cmt. d.

184 See Richmond, *supra* note 100, at 103–04 (arguing that the crime-fraud exception should not defeat claims to in-firm privilege where the communication concerns “ongoing or future conduct that might be characterized as merely negligent or as amounting to a breach of fiduciary duty, rather than as fraudulent or criminal,” but noting that the exception “might apply where a law firm consults with counsel to ‘cover up’ malpractice or other wrongdoing”).

185 The opinion states only that the lawyers representing the outside client consulted with “another lawyer in the firm concerning ethical and legal issues.” Koen



until the conclusion of a pending bankruptcy hearing. During that period, the client retained separate counsel to build its malpractice case against the firm.<sup>186</sup>

The court held that in order to claim the privilege for its own defense preparations, the firm should have tried to withdraw or to seek the client's express consent to its in-firm consultation,<sup>187</sup> but these are not realistic options. The firm probably could not have withdrawn given the impending hearing, and the client had no incentive to consent to a claim of in-firm privilege by the firm.<sup>188</sup>

Instead, the court should have protected the firm's claim to in-firm privilege on policy grounds. The policies favoring the firm's right to confer with counsel in this context—that is, during a five-week period of open dispute where the client was represented by separate counsel and the firm was not free to withdraw—are stronger than the policies requiring the imputation of conflicts. Thus, even if firm counsel did not qualify for an exception to imputation based on the criteria outlined above, under the facts of *Koen Book*, the client should be held to have waived any imputed conflict.

One might protest that there is no need to find a constructive waiver since, after all, the firm was free to seek privileged advice from outside counsel. However, the firm's freedom to hire outside counsel only strengthens my argument. Assuming that inside counsel had no individual conflict of interest, the only difference between outside counsel and inside counsel is that inside counsel is subject to the imputation of conflicts. And the only interest served by imputation in this context is the client's strategic interest in limiting the firm's choice of counsel. Thus, I maintain that under the facts of *Koen Book*, the policy arguments favor the protection of in-firm privilege.

### III. THE BENEFITS OF BROAD PROTECTION

My argument thus far has turned primarily on a criticism of the courts' analysis in the current-client cases and on analytical arguments for limiting the imputation of conflicts. These arguments, in turn, rely heavily on existing exceptions to lawyers' duty of loyalty to clients, such as the exceptions to lawyers' duty of confidentiality under Rule 1.6(b)(4) (allowing lawyers to reveal confidences in order to "secure

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Book Distributions v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C., 212 F.R.D. 283, 284 (E.D. Pa. 2002).

186 *Id.* at 284.

187 *Id.* at 286.

188 *See* Barker, *supra* note 14, at 470.

legal advice”)<sup>189</sup> and Rule 1.6(b)(5) (allowing lawyers to reveal confidences in order to “establish a claim or defense on behalf of the lawyer”).<sup>190</sup>

These exceptions are controversial. The self-defense exception, in particular, has drawn harsh criticism from some legal scholars, who call it “scandalously self-serving”<sup>191</sup> and a “slap in the face”<sup>192</sup> to clients. As Professor Daniel Fischel has noted, before the 2002 amendments to Rule 1.6, which expanded the grounds for permissive disclosure of client confidences to prevent death or substantial bodily harm,<sup>193</sup> lawyers were prohibited from disclosing client confidences “to exonerate someone falsely accused of a capital crime,” but “perfectly free to disclose confidential information when he or she is the one accused” or to collect a fee.<sup>194</sup> Fischel argues that the self-defense exception is “obviously hypocritical.”<sup>195</sup>

Some readers may have a similar reaction to my proposal to protect in-firm privilege where the party seeking discovery was a client at the time of the communication at issue. As the current-client cases suggest, the protection of in-firm privilege in the current-client context seems to fly in the face of traditional notions of lawyers’ fiduciary duty to clients.<sup>196</sup> Especially insofar as one doubts the independence

189 MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(4) (2003).

190 *Id.* R. 1.6(b)(5).

191 ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 101 (1980).

192 Gilda M. Tuoni, *Society Versus the Lawyers: The Strange Hierarchy of Protections of the “New” Client Confidentiality*, 8 ST. JOHN’S J. LEGAL COMMENT. 439, 469 (1993).

193 Before the 2002 amendments, Rule 1.6(b)(1) permitted lawyers to reveal client confidences only “to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.” See STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 69–72 (2004) (summarizing the legislative history of Model Rule 1.6). In 2002, Rule 1.6(b)(1) was amended to permit disclosure “to prevent reasonably certain death or substantial bodily harm.” See MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1).

194 Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 10 (1998).

195 *Id.* at 12.

196 See *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002) (stating that “[t]he fiduciary duties of an attorney owed to a client are very serious”); *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 286 (E.D. Pa. 2002) (stating that the firm’s fiduciary duty to the client “is paramount to its own interests”); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 595 (E.D. Pa. 1989) (stating that issues of in-firm privilege “may cause special problems which seldom arise when other business or professional organizations consult their in-house counsel” because of law firms’ ethical and fiduciary duties to clients).

of in-house counsel generally,<sup>197</sup> or of law firm in-house counsel in particular,<sup>198</sup> one might be inclined to view in-firm privilege as a tool for lawyers with something to hide, but unnecessary for ethical lawyers and firms.<sup>199</sup>

After all, denying the privilege does not prevent lawyers from consulting firm in-house counsel for advice about current clients. Assuming that the lawyer seeking advice and the in-house counsel providing it both mean to follow the rules, arguably there is no need for secrecy from the client (or anyone else). Moreover, “[i]t is well-established that lawyers (and firms) have an ethical obligation to inform clients when the lawyer or firm becomes aware that the client may have a malpractice claim.”<sup>200</sup> If lawyers are obligated to notify their clients of any potential wrongdoing, what is the point of in-firm privilege in the current-client context?

Yet these arguments ignore the traditional justifications for the attorney-client privilege. The primary justification for the privilege in both the individual and organizational context is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>201</sup> This goal is just as important in law firms as it is in other organizational contexts.

Moreover, even well-meaning clients need the privilege to encourage them to reveal questionable conduct and voice their fears about liability. Despite the continuing academic controversy over the usefulness of the corporate privilege in encouraging employee candor,<sup>202</sup> most lawyers and corporate officials believe that the privilege

197 See *supra* notes 31–35 and accompanying text.

198 See, e.g., *Bank Brussels*, 220 F. Supp. 2d at 286 (stating that “‘because they are employees of their client, and their livelihood depends on [a] single . . . client, in-house counsel are not as independent as outside counsel,’” and “are more likely to mix legal and business functions” (quoting Janet J. Higley et al., *Confidentiality of Communications by In-House Counsel for Financial Institutions*, 6 N.C. BANKING INST. 265, 280 (2002))).

199 Some have criticized the corporate attorney-client privilege on precisely these grounds. See, e.g., 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 302–04 (Fred B. Rothman & Co. 1995) (1827); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1062 (1978) (discussing this critique).

200 Davis, *supra* note 165, at 3; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (stating that “[i]f the lawyer’s conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client”).

201 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

202 See, e.g., Rice, *supra* note 13, at 739–42 (questioning the role of the corporate privilege in encouraging candor by lower-level employees given that the privilege be-

does, in fact, promote candor in attorney-client communication,<sup>203</sup> especially as to potential litigation and other “sensitive” matters.<sup>204</sup>

In any case, the issue is not whether law firms should enjoy the protection of privilege; that issue was settled with the recognition of the corporate privilege<sup>205</sup> and its broad protection in *Upjohn*.<sup>206</sup> The issue is whether law firms should be *denied* the protection of in-firm privilege when the communication at issue concerns a current client of the firm.

This section makes a policy case for protecting in-firm privilege in the current-client context. I begin by reviewing the Supreme Court’s arguments for broad protection of the corporate privilege in *Upjohn* and show how these arguments apply equally to law firms. I then examine the emerging role of law firm in-house counsel and show how firms’ investment in in-house counsel improves law firm self-regulation. I conclude by explaining how protecting the privilege based on the guidelines proposed in Part II would encourage law firms to invest in firm counsel to the benefit of clients and third parties as well as firms.

#### A. *The Need for Day-to-Day Legal Advice*

As the Supreme Court noted in *Upjohn*, corporations are subject to a “vast and complicated array of regulatory legislation” and thus are in need of constant advice from lawyers about how to comply with the law.<sup>207</sup> Recognizing that “[t]he first step in the resolution of any legal problem is ascertaining the factual background,”<sup>208</sup> and that “it will frequently be employees . . . who will possess the information needed,”<sup>209</sup> the Court rejected the narrow control group test adopted by the Court of Appeals, which limited the privilege to communication between lawyers and corporate officials responsible for acting on

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longs to the corporation and the corporation is free to waive it); Thornburg, *supra* note 26, at 178–79 (same).

203 See Alexander, *supra* note 31, at 244 (finding that “a solid majority” of 182 New York City corporate executives, in-house counsel, and outside counsel interviewed believed that the privilege encourages candor).

204 *Id.* at 266, 268–69.

205 See *supra* notes 27–28 and accompanying text.

206 See *Upjohn*, 449 U.S. at 392–93 (rejecting the control group test as too narrow).

207 *Id.* at 392.

208 *Id.* at 390.

209 *Id.* at 391.

legal advice,<sup>210</sup> and instead adopted a broader, case-by-case approach to the privilege.<sup>211</sup>

According to *Upjohn*, a broader approach is necessary to protect “the valuable efforts of corporate counsel to ensure their client’s compliance with the law.”<sup>212</sup> Employees must be encouraged to come forward with relevant information and to communicate openly with the corporation’s lawyer,<sup>213</sup> and the lawyer, likewise, must have the freedom to give “full and frank legal advice to the employees who will put into effect the client corporation’s policy.”<sup>214</sup> The Court thus emphasized the role of the privilege in promoting ready access to lawyers and day-to-day legal advice.

Access to lawyers is equally important in ensuring law firms’ compliance with law. Law firms, like corporations, face “a vast and complicated array of regulatory legislation,” where the line between permissible and prohibited conduct is not always “an instinctive matter.”<sup>215</sup> In addition to state and federal law, including civil liability for legal malpractice, lawyers also are subject to an elaborate web of professional regulation, including state-by-state ethics rules, formal and informal bar opinions, judicial regulation, and federal agency regulation. Lawyers engaged in transnational practice face additional layers of regulation as well as complex choice of law questions about which regulations apply.<sup>216</sup>

Moreover, the pace of regulatory development is increasing. The Model Rules of Professional Conduct, adopted in 1983, have been amended nearly every year since 1987 and substantially amended

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210 *Id.* at 392–93 (stating that the control group test “frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation”).

211 *Id.* at 396–97 (stating that a case-by-case approach “obeys the spirit” of the Federal Rules of Evidence).

212 *Id.* at 392.

213 *Id.* at 391.

214 *Id.* at 392.

215 *Id.*

216 See, e.g., Jay L. Krystinik, *The Complex Web of Conflicting Disciplinary Standards in International Litigation*, 38 TEX. INT’L L.J. 815, 819–23 (2003) (discussing conflicts between the ABA Model Rules of Professional Conduct and the Code of Conduct for Lawyers in the European Community); Stewart M. Young, *Whistleblowing in a Foreign Key: The Consistency of Ethics Regulation Under Sarbanes-Oxley with the WTO GATS Provisions*, 32 DENV. J. INT’L L. & POL’Y 55, 74–80 (2003) (arguing that the rules governing corporate whistleblowing under Sarbanes-Oxley are inconsistent with the provisions of the General Agreement on Trade in Services (GATS)).

twice in the past three years alone.<sup>217</sup> In 2002, Congress passed the Sarbanes-Oxley Act,<sup>218</sup> which gave the Securities and Exchange Commission unprecedented authority to create federal standards for corporate lawyers' conduct.<sup>219</sup> In December 2003, both the U.S. Patent and Trademark Office<sup>220</sup> and the Internal Revenue Service<sup>221</sup> issued proposed changes to their rules of practice. And in 2005, the World Trade Organization is scheduled to resume negotiations under the General Agreement on Trade in Services, which may dramatically affect the regulation of legal services in the United States.<sup>222</sup>

In response to the growing complexity of the law governing lawyers, law firms increasingly are turning to ethics and professional liability specialists for advice. Though many firms continue to rely on periodic consultation with outside counsel, large firms increasingly are choosing to invest in in-house counsel so as to have a specialist readily available on a day-to-day basis.<sup>223</sup>

### B. *The Emerging Role of Firm Counsel*

From a regulatory standpoint, the emergence of law firm in-house counsel is a pivotal development.<sup>224</sup> First, the ready availability of counsel encourages lawyers to raise questions that they otherwise might ignore. The firm counsel in our study report that lawyers come to them with urgent questions throughout the day: "I answer the phone all the time . . . . The pace of one's practice is much different when you've got 150 clients right there in the building who feel abso-

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217 See Am. Bar Ass'n, *Model Rules of Professional Conduct*, at [http://www.abanet.org/cpr/mrpc/mrpc\\_home.html](http://www.abanet.org/cpr/mrpc/mrpc_home.html) (last visited Feb. 23, 2005).

218 Pub. L. No. 107-204, 116 Stat. 745 (2002).

219 Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205 (2003).

220 See Changes to Representation of Others Before the United States Patent and Trademark Office, 68 Fed. Reg. 69,442, 69,442-562 (proposed Nov. 17, 2003) (to be codified at 37 C.F.R. pts. 1, 2, 10, and 11).

221 See Press Release, Internal Revenue Service, Department of the Treasury, Treasury Issues Rules to Increase Transparency and Halt Abusive Tax Avoidance Transactions, Dec. 29, 2003, available at <http://www.irs.gov/newsroom/article/0,,id=118955,00.html>.

222 See Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 1006 (2001); Laurel S. Terry, *Corrections to Laurel S. Terry, GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 35 VAND. J. TRANSNAT'L L. 1387, 1393-94 (2002) (summarizing the likely effects of GATS on U.S. lawyer regulation).

223 See *supra* note 1 and accompanying text.

224 See Chambliss & Wilkins, *supra* note 1, at 560 (reviewing research on the importance of "in-house compliance specialists" in other regulatory contexts).

lutely free to come in at any time . . . .’ [C2].”<sup>225</sup> “‘Every day it’s a constant flow of questions . . . . They don’t usually take more than fifteen minutes each but sometimes there’s research to be done.’ [C3].”<sup>226</sup> “‘People call me at home, and everything is an emergency. I was going to wallpaper my office with those little yellow message slips, all of them say ‘it’s an emergency, please call me in the next five minutes.’ I could work 24 hours a day . . . .’ [I2].”<sup>227</sup>

Further, firm counsel tend to be professionally committed to promoting compliance with ethical and legal rules. Most of the firm counsel in our small sample (twenty-three out of thirty-two) have a long record of service on bar committees dealing with professional responsibility issues,<sup>228</sup> and about a third (twelve) teach legal ethics as adjunct professors.<sup>229</sup> Several told us that they lie awake at night worrying about how to increase their partners’ awareness of ethical rules.<sup>230</sup> Thus, firm counsel tends to promote the development of “ethical infrastructure” within firms; that is, resources and procedures for insuring compliance with professional regulation.<sup>231</sup> For instance, one firm counsel in our study describes his role as follows:

I have spent an awful lot of time developing our intranet site as an ethics and loss prevention library. We have links to every third party source I can find, the rules of all the states . . . . And then the materials I have created . . . . I have, say, an outline on each of the major Rules of Professional Conduct . . . . [I also spend time on] systems monitoring and systems planning. That is, I spend a certain amount of time making sure our trust account is working the way it is supposed to . . . . I review—more than I care to—our marketing materials and web site and that sort of thing . . . . We do a fair amount of non-lawyer ethics training too . . . . [A14].<sup>232</sup>

By encouraging questions, providing resources, and monitoring internal policies and procedures, firm counsel may dramatically improve the quality of law firm self-regulation. Recognizing this, liability

225 *Id.* at 586.

226 *Id.*

227 *Id.*

228 *Id.* at 585.

229 *Id.* at 585–86 (discussing the personal and professional characteristics of firm in-house counsel).

230 *Id.* at 587.

231 See Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 S. TEX. L. REV. 245, 246 (1998) (introducing the phrase “ethical infrastructure”).

232 Chambliss & Wilkins, *supra* note 1, at 574–75.

insurers increasingly are encouraging law firms to appoint in-house counsel.<sup>233</sup>

The extent to which firm counsel are able to take a proactive role, however, depends significantly on firms' investment in the in-house position. In some firms, the role of 'firm counsel' is an informal, volunteer role, played by the partner who takes the most interest and is willing to donate the time. Such service is viewed as one way to fulfill partners' administrative duties to the firm.<sup>234</sup> Consider the following comments from partners who volunteer in their firms: "You're expected as an attorney, and then as a partner, to pick up administrative duties around the firm, and that was one of the things I ended up doing.' [B1]."<sup>235</sup> "I have taken the title of ethics partner just to have something to call myself, but I have never been officially appointed anything.' [A4]."<sup>236</sup>

In such firms, the lawyer who acts as firm counsel may volunteer upwards of 500 hours per year to in-house advising<sup>237</sup> as a "labor of love";<sup>238</sup> however, most of that time necessarily is spent responding to day-to-day questions rather than proactively monitoring the firm's compliance with professional regulation.<sup>239</sup> As one volunteer complained:

The 500 hours, I would tell you, on a year-to-year basis, over maybe the last 10 years, is almost all reactive time . . . It's sort of one of my complaints, because it doesn't give me much chance, or anyone in the firm much chance, to spend time thinking proactively about policies and procedures. We probably have some gaps as a result of that. [C2].<sup>240</sup>

Other firms have created formal, compensated in-house positions, with titles such as "general counsel," "ethics advisor," "conflicts

233 The Attorneys' Liability Assurance Society (ALAS) requires insureds to designate a loss prevention partner to serve as a liaison between ALAS and the firm. Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 *Geo. J. Legal Ethics* 335, 347 (2003). In some firms, this role has evolved into a broader firm counsel position. See *id.* at 347-49 (discussing the role of ALAS in promoting the appointment of law firm in-house counsel). Other insurers offer discounts on liability premiums for firms with in-house counsel. See Glater, *supra* note 1; Levy, *supra* note 1, at 28.

234 See Chambliss & Wilkins, *supra* note 1, at 571-72 (discussing the effect of firm management philosophy on the structure of the in-house position).

235 *Id.* at 572.

236 *Id.* at 565.

237 *Id.* at 574 (providing examples).

238 *Id.* at 585 (quoting several firm counsel who used this term).

239 *Id.* at 573-74 (examining the role of unpaid firm counsel).

240 *Id.* at 574.



partner," and the like.<sup>241</sup> Typically, the lawyers who hold these positions began as practicing partners in the firm who volunteered as in-house advisors and eventually had their service recognized with a formal title and direct compensation.<sup>242</sup> In some firms, the in-house position is a full-time position such that the partner who holds it gives up all outside practice. As one full-time general counsel reports: "I'm still a partner but I have given up my rights to be compensated like a partner. In fact, I'm incentivized not to practice at all [for outside clients].' [B11]."<sup>243</sup> In other firms, in-house counsel bills the firm for in-house matters, but also maintains an outside practice,<sup>244</sup> often specializing in litigation or ethics and professional liability matters.<sup>245</sup>

Not surprisingly, the lawyers in formal positions, who are compensated directly for in-house advising, tend to define the role more broadly and devote more time and attention to it than partners who provide in-house advising as a volunteer sideline to a full outside practice.<sup>246</sup> Volunteers tend to focus primarily on conflicts questions and the occasional claim and most describe their role as reactive.<sup>247</sup> As one partner explains: "Conflicts tend to dominate because it is regular and it is always there. There are also big money issues and usually somebody is getting disappointed or there is the potential for that.' [A8]."<sup>248</sup>

Paid in-house counsel, by contrast, deal with a host of ethics and regulatory issues<sup>249</sup> and tend to be more proactive, going door to door (and even city to city) to answer questions, provide training, and review firm policies and procedures.<sup>250</sup> One full-time firm counsel reports: "I spend at least two days a month in each of our other offices. And when I'm in [our main office], I'm constantly just walking around the floors. I've knocked on doors rather than having people

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241 *Id.* at 565-66 (reporting the most common titles used for the in-house position).

242 *Id.* at 565-70, 573 (discussing the "evolutionary" nature of the in-house position).

243 *Id.* at 573.

244 *Id.* at 572-73 (noting that hours billed to the firm for in-house matters are compensated equally as hours billed to outside clients).

245 *Id.* at 585 (discussing firm counsels' practice specialties).

246 *Id.* at 573-77 (examining the effect of direct compensation on the scope of in-house advising).

247 *Id.* at 573-74.

248 *Id.* at 574.

249 *Id.* at 574-75; *see also* Jarvis & Fucile, *supra* note 9, at 105-08 (describing the scope of their in-house roles).

250 *See* Chambliss & Wilkins, *supra* note 1, at 588-89.

come to see me . . . . I have the luxury of time to be able to do that.' [A11]."<sup>251</sup>

In part, of course, firms' level of investment in the in-house counsel position is a function of firm size. Small firms may be unlikely to need permanent full- or even part-time firm counsel, and may be less likely to compensate partners for ad hoc advising (although there is no evidence of this point). Some readers of an earlier draft of this Article were critical of using direct compensation as a criterion for in-firm privilege, arguing that it would disadvantage small firms. In response to this criticism, I softened my original insistence on direct compensation and suggested additional means of establishing an attorney-client relationship, such as time recording and the formal announcement of firm counsel's identity.<sup>252</sup>

Nevertheless, it is important not to overstate the significance of firm size as a determinant of firms' appetite for self-regulation. Our study of firms ranging in size from seventy-five to 1000-plus lawyers<sup>253</sup> found that firms' investment in the in-house position was not directly correlated with size, but rather appeared to depend significantly on firm culture and management philosophy. For instance, of the eleven firms in our sample with more than 500 lawyers, six compensate in-house counsel and four do not (information for one firm is missing).<sup>254</sup> Likewise, of the ten firms with full-time in-house counsel, six have fewer than 500 lawyers and two have fewer than 250 lawyers.<sup>255</sup>

Thus, as one firm counsel remarked, "[t]he decision as to how to deal with ethical issues . . . is not dictated by the quantum of the work.' [B2]."<sup>256</sup> Instead, it appears that the level of firm investment determines the scope and substance of the issues that get addressed. Consider the following comments by two full-time firm counsel:

The thing I notice is there's a lot more [in-house] business now that we have made a resource available . . . [W]e used to have a system where two of us would spend about 500 hours a year on conflicts, and maybe a third of that time on other professional responsibility matters. Now, in my new [full-time] position, I am astounded that I can't get everything done in a day and I don't think there are a lot of different issues than there used to be when we spent 1,000 hours on this. [A11].

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251 *Id.* at 588.

252 *See supra* notes 172-74 and accompanying text.

253 *See supra* note 16 and accompanying text.

254 *See* Chambliss & Wilkins, *supra* note 1, at 576-77 (discussing the effects of firm size).

255 *Id.*

256 *Id.* at 577.

. . . .

What occurs to me as I am sitting here listening is there is no industry standard for this. . . . I don't know how many times I have said to either myself or a colleague: "I don't believe this firm goes to this length to deal with an ethics issue," or "I can't believe that this firm *doesn't* go to this length" . . . . The spectrum is so broad. [A12].<sup>257</sup>

### C. *Promoting Investment in Firm In-House Counsel*

My proposed approach to defining the scope of in-firm privilege vis-à-vis current clients is designed in part to reward law firms that invest directly in the in-house position. By conditioning exception to the imputation of conflicts under Rule 1.10 on structural indicators such as formal appointment and direct compensation, I hope to promote the formal appointment and direct compensation of firm in-house counsel. As our study shows, formal investment by firms contributes directly to firm counsels' efforts to promote compliance with professional regulation.

My approach also is designed to encourage firms and firm counsel to take seriously the firm's identity as the client and the professional duties associated with the organization as client. Our study revealed several questions on this front. For instance, should firm counsel ever represent individual members of the firm in disciplinary proceedings? (The firm counsel in our study were split on this issue, which suggests a blurring of the identity of the firm as client.) Can firm counsel promise confidentiality to associates who want to report a partner's misconduct? (Again, a split; though most said no.) Do firm counsel have a duty to report firm members' misconduct under Rule 8.3<sup>258</sup> or Rule 1.13?<sup>259</sup> Could firm counsel be liable for a failure to disclose? (We conducted the study before the 2003 changes to Rule

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257 *Id.*

258 *Compare* MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2003) (requiring lawyers to report any violation of the Rules of Professional Conduct that "raises a substantial question" as to the lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects"), *with id.* R. 8.3(c) (stating "[t]his Rule does not require disclosure of information otherwise protected by Rule 1.6"), *and id.* R. 8.3 cmt. 4 (stating "[t]he duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional misconduct is in question").

259 *See id.* R. 1.13(b) (requiring organizational lawyers to report up the ladder certain kinds of illegal conduct by an organization member); *id.* R. 1.13(c) (allowing organizational lawyers to report out organizational fraud under certain circumstances).

1.13,<sup>260</sup> thus these questions were not systematically addressed.) Though these are issues for a separate paper, this short list highlights the importance of formal investment in the firm counsel role.

One might argue that investing in firm in-house counsel is in law firms' economic self-interest; thus, we need not hold out the privilege as a carrot. However, law firms are notoriously under-managed.<sup>261</sup> Despite their increasing exposure to professional liability, most firms invest very little in monitoring internal compliance with professional regulation.<sup>262</sup> Indeed, much of the impetus for firms' existing investment in in-house counsel and other ethical infrastructure stems from the demands of liability insurers<sup>263</sup> rather than rational management by firms.

Further, law firms, as entities, are unregulated under the professional rules of most states.<sup>264</sup> Despite repeated proposals for "law firm discipline,"<sup>265</sup> the American Bar Association has resisted the direct regulation of law firms on the grounds that entity regulation would

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260 In response to a series of corporate scandals, and pressure from Congress and the Securities and Exchange Commission, the ABA House of Delegates amended the reporting requirements for organizational lawyers under Rule 1.13. For an annotated summary of the changes, see GILLERS & SIMON, *supra* note 193, at 143–56.

261 S.S. Samuelson, *The Organizational Structure of Law Firms: Lessons from Management Theory*, 51 OHIO ST. L.J. 645, 645 (1990) (arguing that law firms have serious organizational and management problems); Joel A. Rose, *Who Makes the Best Lawyer Manager? Lawyer Managers Must Balance the Concerns of Firms and Attorneys*, LEGAL INTELLIGENCER, Apr. 17, 2000, at 7 (reporting that only two firms participating in an informal survey of twenty firms had full-time managing partners); On-line Roundtable, *Learning from Baker & McKenzie*, AM. LAW., Oct. 1994, at 83 (discussing large law firms' resistance to full-time, specialized management).

262 See Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 692–702 (2002) (reviewing research on the prevalence and effectiveness of various types of ethical infrastructure within law firms and concluding that a large majority of law firms lack adequate internal procedures for insuring ethics and regulatory compliance).

263 See Chambliss & Wilkins, *supra* note 1, at 560, 590; Glater, *supra* note 1; Levy, *supra* note 1, at 28 (discussing the role of liability insurers in promoting investment in firm in-house counsel).

264 The two exceptions are New Jersey and New York. See N.J. RULES OF PROF'L CONDUCT R. 5.1(a) (1984) (requiring law firms to make "reasonable efforts to ensure that member lawyers . . . undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct"); N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-104 (1996) (requiring firms to "make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules").

265 See, e.g., Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1977) (calling for entity regulation under Model Rule 5.1(a)).

undermine individual partner accountability.<sup>266</sup> Thus, the profession cannot compel law firms to invest in adequate internal controls, or even to designate someone to be responsible for monitoring internal controls.<sup>267</sup> In short, in other words, there is no “stick.”

I do not claim that protecting the privilege in the current-client context suddenly will prompt under-managed law firms to appoint paid in-house counsel (though it might). However, the denial of privilege in this context almost certainly will have a chilling effect. Unlike nonlawyer executives<sup>268</sup> and lower-level corporate employees,<sup>269</sup> who may not be aware of the doctrinal boundaries of the attorney-client privilege, lawyers are likely to understand the implications of the courts' position, and firm counsel, especially, are keenly aware.<sup>270</sup>

Given the current underinvestment in ethical infrastructure within firms and the profession's continuing reluctance to regulate law firms directly, it hardly makes sense to stifle the efforts that firms do make to promote ethical and regulatory compliance by denying those efforts the protection of privilege in a misplaced effort to pro-

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266 See Chambliss & Wilkins, *supra* note 233, at 335–38 (reviewing the law firm discipline debate). Model Rule 5.1 places responsibility for law firm regulation on law partners, individually and collectively, but does not include a provision for the direct regulation of firms. See MODEL RULES OF PROF'L CONDUCT R. 5.1 (2003). Rule 5.1(a) states:

A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

*Id.*

267 See Elizabeth Chambliss, *MDPs: Toward an Institutional Strategy for Entity Regulation*, 4 LEGAL ETHICS 45, 61 (2002) (calling for the ABA to amend the comment to Rule 5.1(a) to include an explicit reference to the benefits of firm in-house counsel); Chambliss & Wilkins, *supra* note 233, at 346–50 (2003) (arguing that the formal appointment of firm in-house counsel is critical to the success of law firm self-regulation).

268 See Alexander, *supra* note 31, at 359 (reporting that most corporate executives, while aware of the privilege, do not understand the *Gamer* doctrine or know that it exists).

269 *Id.* at 266, 315 (finding that most lower-level employees know very little about the privilege).

270 The two most recent current-client cases prompted immediate criticism from professional liability specialists. See, e.g., Barker, *supra* note 14, at 470–71 (Barker is a partner and professional liability specialist at Sonnenschein Nath & Rosenthal LLP); Richmond, *supra* note 100, at 90–94 (Richmond is Senior Vice President, Professional Services Group, Aon Risk Services); Davis, *supra* note 165 (Davis is a professional liability specialist and a past president of the Association of Professional Responsibility Lawyers).

mote loyalty to clients. The emergence of in-house counsel in law firms is the most promising development in years for improving self-regulation by law firms. In the long run, clients collectively stand to benefit far more from firms' investment in in-house counsel than from sporadic access to in-firm communication in lawyer-client disputes. The profession and the courts should do everything possible to encourage law firms to invest in firm counsel and to shape the role of firm in-house counsel to serve the interests of professional regulation.

### CONCLUSION

We have trouble defining the ethical duties of in-house counsel. Some countries prohibit the private employment of lawyers altogether, viewing such employment as fatal to lawyers' professional independence.<sup>271</sup> In the United States, too, corporate counsel initially were viewed as "kept lawyers"<sup>272</sup> who "had not quite made the grade as partner"<sup>273</sup> and were all too likely to behave unethically in the interests of their corporate masters. In the 1920s, some bar leaders and scholars claimed that the trend toward "house lawyers" threatened the viability of the profession.<sup>274</sup>

Today, of course, the tables have turned, and corporate counsel have become the masters—at least relative to their law firm counterparts. Corporate counsel control the division of work between inside and outside counsel; they control the selection of lawyers and firms invited to bid on and perform outside work; and they supervise the performance of outside counsel.<sup>275</sup> Compensation for general coun-

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271 See R. E. Rosen, *In-House Counsel*, in 4 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 2851, 2852 (2001) (stating that "[i]n many civil law countries, a lawyer must resign from the bar before taking salaried employment"). In France, in-house counsel are barred from appearing in court. See Carlos Viladés Jene, *The Legal Profession in Spain: An Understudied but Booming Occupation*, in 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 376 (Richard L. Abel & Philip C.S. Lewis eds., 1988) (comparing in-house counsel in France and Spain).

272 Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 479 n.1 (1989) (tracing the evolution of professional labels from "kept lawyer" in the 1920s to "house counsel" in the 1930s to "corporate counsel" today).

273 Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277 (1985) (stating that "[t]he traditional house counsel was a relatively minor management figure, stereotypically, a lawyer from the corporation's principal outside law firm who had not quite made the grade as partner").

274 Ted Schneyer, *Professionalism and Public Policy: The Case of House Counsel*, 2 GEO. J. LEGAL ETHICS 449, 458 n.53 (1988).

275 Chayes & Chayes, *supra* note 273, at 289–93 (discussing corporate general counsels' management of outside counsel); see also Rosen, *supra* note 271, at 484–86.

sel in the largest U.S. companies exceeds that of most law firm partners.<sup>276</sup>

Corporate counsel also play an increasingly important role in corporate self-regulation. In addition to “the valuable efforts of corporate counsel to ensure their client’s compliance with law,”<sup>277</sup> recent scandals highlight the importance of corporate counsels’ duty to protect shareholders and the public from fraud and other corporate misconduct.<sup>278</sup> The precise boundaries of corporate counsels’ duty to report organizational misconduct promises to be a lively topic in years to come.

The emergence of in-house counsel in law firms raises many of the same ethical issues that are found in the corporate context, as well as unique issues stemming from law firms’ own fiduciary duty to clients. The adjudication of firm counsels’ various professional responsibilities—to the law firm, its clients and the public—will significantly affect law firms’ investment in the firm counsel position as well as firm counsels’ authority and effectiveness within firms.

This Article has argued for broad protection of the attorney-client privilege between law firm in-house counsel and other members of the firm, claiming that such protection will promote investment in the firm counsel position and thereby improve the effectiveness of law firm self-regulation. Given the high ethical standards of the firm counsel in our study, and the role of firm counsel in promoting the development of ethical infrastructure within firms, promoting firm counsel seems a promising strategy for promoting law firms’ attention to and compliance with professional regulation.

In pitching for broad protection of in-firm privilege, however, I am mindful of academic and judicial concerns about abuse of the corporate privilege,<sup>279</sup> as well as the notable failure of corporate counsel to guard the public interest in the case of Enron and other recent

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276 See Eriq Gardner, *Bottoms Up*, CORP. COUNS., Aug. 2003, at 78, available at <http://www.law.com/jsp/cc/pubarticleCC.jsp?id=1058416383413> (reporting that the average salary and bonus package for the top 100 general counsel in the Fortune 500 exceeded one million dollars in 2002, not counting stock options); Michael T. Burr, *The 2004 In-House Counsel Compensation Report*, CORP. LEGAL TIMES, Mar. 2004, at 28, 34, available at <http://www.cltmag.com/editorial/surveys/04-Mar.pdf> (reporting salaries and bonuses for fifty of the highest paid general counsel in 2002).

277 *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).

278 See Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1210 (2003) (calling for the creation of a special professional role called “Independent Counselor” with a “distinct governance regime of ethical codes, liability and malpractice rules, special statutory duties and privileges, and judicial rules of practice”).

279 See *supra* notes 25–26 and accompanying text.

scandals.<sup>280</sup> Law firms' reliance on in-house counsel carries responsibilities as well as privileges, and the balance between firm counsels' duties to the firm, its clients, and the public cannot be established in the abstract, or for all time. Thus, as we move forward in defining the duties of law firm in-house counsel, we must learn from our successes and failures in the corporate context and take care to test our regulatory strategies against the actual practices of firm counsel and firms.

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280 See Gordon, *supra* note 278, at 1185–90 (detailing examples of professional failure and wrongdoing by lawyers for Enron).



