Association of Corporate Counsel

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September 30, 2014

Hon. Ann D. Montgomery
United States District Court
U.S. Courthouse, Suite 13W
300 South Fourth Street
Minneapolis, MN 55415
Sent by U.S. Post

Re: Request by Association of Corporate Counsel to submit amicus letter in support of JJ Holland Ltd., in JJ Holland Ltd. v. Fredrikson & Byron , PA*, Case No. 0:12-cv-03064-ADM-TNL*

Dear Judge Montgomery:

The Association of Corporate Counsel respectfully requests permission to submit the attached amicus letter in the above-captioned case, in support of JJ Holland's appeal from the July 17 order of the Magistrate Judge.

ACC is a global bar association that promotes the common professional and business interests of in-house counsel. For over 30 years, ACC has advocated across the country to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role of true in-house counsel and the legal departments where they work. ACC has over 30,000 members who are in-house lawyers employed in more than 75 countries by over 10,000 organizations.

The Magistrate Judge's July 17 order (Dkt. No. 111) would severely harm the attorney-client relationship, which in-house lawyers rely on. ACC's members hire law firms for every imaginable legal assignment – to litigate bet-the-company cases, to write and enforce contracts that ensure necessary revenue and resources, to restructure their businesses to better serve consumers and shareholders, and even to investigate them internally for potential wrongdoing when something may be wrong. Without trust and transparency, in-house lawyers and their clients would have no good reason to rely on outside lawyers. Indeed, the order would in effect allow lawyers at

law firms to protect themselves at the expense of their own clients, such as ACC's members. Therefore, ACC seeks to submit the attached amicus letter to support JJ Holland Ltd.'s motion to reverse the order of the Magistrate Judge.

Thank you for considering ACC's request.

Sincerely yours,

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Re: Amicus letter of Association of Corporate Counsel, in support of JJ Holland Ltd., in JJ Holland Ltd. v. Fredrikson & Byron, PA*, Case No. 0:12-cv-03064-ADM-TNL*

Dear Judge Montgomery:

The Association of Corporate Counsel respectfully urges this Court to refuse to recognize the existence of an internal law firm privilege, because doing so would undermines the lawyer's primary duty to the client.

INTRODUCTION AND STATEMENT OF INTEREST

Clients pay law firms to serve them as advocates, not fight them as adversaries. Therefore, law firms cannot place their own interests above those of their clients. If they could, law firms might turn their skills against clients whenever it suits them, as this case demonstrates. Creating a new privilege that allows law firms to hide information would allow lawyers to put their own interests first, and hurt clients. Lawyers would be free to hide evidence of malpractice from their clients, undermining the fundamental bond of trust that grounds the lawyer-client relationship. Minnesota's ethical rules and privilege law prohibit that. As the Minnesota Supreme Court has repeatedly held, "[u]nquestioned fidelity to their real interests is the duty of every attorney to his clients." *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982) (*quoting In re Estate of Lee,* 214 Minn. 448, 460 (Minn. 1943)).

The issue that this case presents – whether law firms can rely on misguided claims of privilege to hold back information from existing clients about the

clients' own matters – deeply affects the Association of Corporate Counsel and its members. ACC is a global bar association that promotes the common professional and business interests of in-house counsel. For over 30 years, ACC has advocated across the country to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role of true in-house counsel and the legal departments where they work. ACC has over 30,000 members who are in-house lawyers employed in more than 75 countries by over 10,000 organizations. These include public and private corporations, partnerships, trusts, and non-profits. But ACC's long-standing policy bars membership to lawyers who work at law firms, even if they claim to act as "in-house counsel.

Since its creation, ACC has championed attorney-client privilege. In one filing after another – in the United States and around the world – ACC has pushed courts and agencies to adopt and expand the scope of the privilege.[1] And ACC has especially advocated to ensure that a robust privilege applies to a client's confidential communications with in-house lawyers, as the Supreme Court held in *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). No one holds the bona fide attorney-client privilege in higher esteem than ACC.

But attorney-client privilege exists to strengthen the relationship between the real client and its law firm. The privilege that the law firm asserts here would weaken that relationship, and introduce great uncertainty. For instance, if law firms retained privilege over this client-related information and the government or some third party wanted access to that confidential information, who would have authority to waive the privilege? The law firm? The client? Both? And the perplexity does not end there. Traditionally, if a law firm seeks payment on fees from a client or to otherwise defend the representation itself, it is free to introduce otherwise-confidential information into the case. *See* Minn. R. Prof. Conduct 1.6(b)(8); *see also* ABA MODEL RULE 1.6(b)(5) (same language).

If there is indeed an internal law firm privilege along the lines the law firm asserts in this case, can a client seeking to prove malpractice by its law firm introduce otherwise-confidential information (from the law firm's

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

perspective) into the case? If not, why not? These questions matter greatly: as the Supreme Court has held, "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

Worse, by creating fear and distrust between real clients and their outside law firms, an internal law firm privilege would make it less likely that clients will consult lawyers. That result directly contradicts the goal of the attorney-client privilege, which is to *encourage* legal advice, not thwart it.

Finally, ACC emphasizes that it knows in-house counsel. Its members are in-house counsel. It works to promote and protect the interests of in-house counsel in a legal culture that can treat them as second-class citizens while often going out of its way to accommodate law firms at the expense of their clients. Law-firm lawyers are not in-house counsel – especially not when they wear that hat to harm their actual clients. Law-firm lawyers are not at liberty to act as free agents. They must put their clients' interests before their own. In the relationship, they cannot use privilege to protect themselves at the expense of their own clients. Firm lawyers representing actual clients must answer to a higher standard.

Therefore, ACC urges this Court to refuse to recognize the existence of an internal law firm privilege that undermines the lawyer's primary duty to the client.

ARGUMENT

I. Law firms must put the needs of their real clients first.

ACC represents in-house lawyers who work at organizations other than law firms. Put another way, our members work for real clients -- companies that often turn to outside law firms for help. These are the clients whose interests and needs come first.

ACC's members hire law firms for every imaginable legal assignment – to litigate bet-the-company cases, to write and enforce contracts that ensure necessary revenue and resources, to restructure their businesses to better serve consumers and shareholders, and even to investigate them internally for potential wrongdoing when something may be wrong. These issues are sensitive. Companies by necessity make themselves vulnerable to law firms they hire. For them to take that leap of faith, clients need to trust law firms to

do right by the client, even if it hurts the lawyers. Without trust and transparency, in-house lawyers and their clients would have no good reason to rely on lawyers.

Viewed properly, the two main legal themes in this case -- the scope of the duty of loyalty, and the scope of the privilege -- both exist to give the clients reasons to place their trust in lawyers. The duty of loyalty makes the client's needs primary. According to the American Bar Association, "the most important ethical duties are those obligations which a lawyer owes to clients." ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS at 6 (1992).[2] Privilege also buttresses the importance of the client. As the Supreme Court held in *Upjohn*, the purpose of attorney client privilege "is to encourage full and frank communication between attorneys and their clients," and therefor also encourage compliance with the law. *Upjohn*, 449 U. S. 389.

Those two themes -- loyalty and privilege -- work together, because both serve the needs of the real client. By contrast, creating a new internal law firm privilege will cloud transparency and increase suspicion between real client and their lawyers. As a result, the internal law firm privilege that the firm asserts will make it *less* likely that real clients will seek legal advice. That outcome would directly contradict the goal of the attorney-client privilege, which is to *encourage* clients to seek legal advice. It would invert the goals of loyalty and privilege, by placing the law firms' interests above the clients'. Therefore, this Court should not adopt it.

II. Lawyers owe their real clients profound loyalty, including full disclosure.

A. In the U.S., the attorney-client relationship relies on loyalty and transparency.

U.S. Supreme Court Justice Joseph Story held in a case almost 200 years ago that a lawyer must work with "exclusive devotion to the cause confided to him," and ensure "that he has no interest, which may betray his judgment, or endanger his fidelity." *Williams v. Reed*, 29 F. Cas. 1386, 1390 (CC Me

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[2] Hereinafter "ABA STANDARDS", *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf.

1824). As the ABA has emphasized, "[m]embers of the public are entitled to be able to trust lawyers to protect their property, liberty, and their lives." ABA STANDARDS at 6. Similarly, the RESTATEMENT (THIRD) OF THE LAW OF GOVERNING LAWYERS makes clear that "the law seeks to assure clients that their lawyers will represent them with *undivided loyalty*" and that "[a] client is entitled to be represented by a lawyer whom *the client can trust*." RESTATEMENT at § 121 cmt. b (emphasis added). Put another way, for lawyers, "[n]ot honesty alone, but the punctilio of an honor the most sensitive, is . . . the standard of behavior." *Bank Brussels v. Credit Lyonnais*, 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002), *quoting Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 (N.Y. 1928) (Cardozo, J).

B. Minnesota enforces strict standards on loyalty and disclosure.

Minnesota goes to great lengths to establish these same tenets. "Loyalty" is an "essential element[] in the lawyer's relationship to a client." Minn. R. Prof. Conduct. 1.7 Cmt. [1]. Crucially, "[c]oncurrent conflicts of interest can arise . . . *from the lawyer's own interests.*" *Id.* (emphasis added). As is mentioned in the introduction above, the Minnesota Supreme Court has repeatedly held up the importance of loyalty, stating that "[u]nquestioned fidelity to their real interests is the duty of every attorney to his clients." *Rice,* 320 N.W.2d at 411 (*quoting In re Estate of Lee,* 214 Minn. at 460).

The loyalty duty includes a strict obligation to disclose. The Minnesota Supreme Court held in *Rice*, 320 N.W.2d at 410, that "it is the undoubted duty of an attorney to communicate to his client whatever information he obtains that may affect the interests of his client in respect to the matters intrusted to him," (*quoting Selover v. Hedwall*, 149 Minn. 302, 306, (Minn. 1921)). *See also* Minn. R. Prof. Conduct 1.4 (b), which states "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment 7 to Rule 1.4 goes so far as to state that "[a] lawyer may not withhold information to serve the lawyer's own interest or convenience . . . ." Thus, the Minnesota Supreme Court disbars lawyers for failing to properly communicate with clients by failing to disclose a conflict of interests. *In re Coleman*, 793 N.W. 2d 296 (Minn. 2011).

In Minnesota, the lawyer's duty to disclose facts that do not "serve the lawyer's own interest or convenience" (to repeat the language from the comments) explicitly extends to informing clients about the lawyer's own

malpractice. According to Minnesota's State Board of Professional Responsibility, pursuant to Rules 1.4 and 1.7:

> A lawyer who knows that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client's interests has one or more duties to act under the Minnesota Rules of Professional Conduct.

Opinion No. 21 (Oct. 2, 2009).[3] The opinion notes that at least three other states -- Wisconsin, New York, and New Jersey -- have adopted a similar rule. New Jersey's opinion, which the Minnesota opinion cites, is especially clear that a lawyer must "notify the client that he or she may have a legal malpractice claim *even if notification is against the attorney's own interest.*" *Id.* (emphasis added) (*quoting N.J. Ethics Op. 694*, 151 N.J.L.J. 994 (Mar. 9, 1998), *quoting Olds v. Donnelly*, 150 N.J. 424, 442-443 (N.J. 1997).

It makes no sense to create a new internal law firm privilege, which would potentially gut Minnesota's strict loyalty and disclosure duties, including the requirement to disclose the lawyer's own potential malpractice.

C. The duty of loyalty prohibits a law firm from taking on a client with conflicting interests, including itself.

1. Minnesota's ethics rules prohibit conflicts between current clients.

This vital duty of loyalty, not surprisingly, prohibits lawyers from taking on clients whose interests conflict with existing clients. According to Minnesota Rule 1.7(a)(1), a lawyer of course must avoid direct conflicts. More than that, lawyers must also avoid even potential conflicts. According to Rule 1.7(a)(2), lawyers violate ethics requirements even if "there is a *significant risk* that the representation of one or more clients will be materially limited

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[3] *Available at* https://www.revisor.mn.gov/court_rules/rule.php?type=pr&subtype=lawy&id=21. While the Board's opinions do not bind the Minnesota Supreme Court, "[t]he Board and the Supreme Court consider these opinions as rule interpretations that guide attorneys' professional conduct." Opinion No. 1 (Oct. 27. 1972) (*available at* https://www.revisor.mn.gov/court_rules/rule.php?type=pr&subtype=lawy&id=1).

by a lawyer's responsibilities to another client . . . *or by a personal interest of the lawyer*." (emphasis added). That potential conflict explicitly includes the lawyers' own interests.

This same prohibition on conflicts between the client's interests and the lawyer's interests exists in the ABA's Model Rules of Professional Conduct (*see* ABA MODEL RULE 1.7(a)(2)). It also exists in the RESTATEMENT. *See* RESTATEMENT at § 121 ("a lawyer may not represent a client if the representation would involve a conflict of interest."); § 125 ("a lawyer may not represent a client if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests.").

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

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

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

Put another way, the law firm here simply never had the authority to treat itself as a client. Its loyalty duty demanded that the firm place its client's interest above its own. Given that ironclad duty, and given the brewing conflict between itself and its client, the firm simply could not hire itself.

The California Supreme Court came to a similar conclusion in another case involving conflicting clients, though one that involved a law firm trying to serve two external clients in conflict. The Court held that the law firm simply had no obligation whatsoever to the second client that hired it. According to the Court, "the requirement of *undivided* loyalty to the first

client negates any duty on the part of the attorney to inform the second client" of even harmful legal issues. *Flatt v. Superior Court*, 9 Cal. 4th 275, 279, 885 P.2d 950 (Cal. 1994) (emphasis added). *See also Valente v. Pepsico, Inc.*, 68 F.R.D. 361, 368 (D. Del .1975) ("in situations which involve other obligations of attorneys . . . , the applicability of the privilege must be determined in light of the obligations.").

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

3. Many other courts have rejected calls for a special law firm privilege.

The firm here is not the first to ask for special treatment and an exemption from its duty of loyalty. But a long line of cases have rejected those pleas. *See, e.g.*, *Bank Brussels*, 220 F. Supp. 2d at 286 ("[t]herefore, while [the firm] was still in the employ of [the existing client], [the firm] was still obligated to maintain a fiduciary duty to [the existing client], even in performing its internal conflict review."); *In re: SonicBlue, Inc.*, Adv. No. 07-5082, 2008 Bankr. LEXIS 181, at *28-*29 (Bankr N.D. Cal. Jan. 18, 2008) ("[a]ttorneys are governed by an ethical code that requires the utmost loyalty on the part of the attorney, including the duty not to represent another client if it would create a conflict of interest with the first client."); *Koen Books Distribs. v. Powell, Trachman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 286 (E.D. Pa. 2002) ("the firm still owed a fiduciary duty to plaintiffs while they remained clients. This duty is paramount to its own interests."); *Cold Spring Harbor Lab v. Ropes & Gray LLP,* No. 11-10128-RGS, 2011 U.S. Dist. LEXIS 77824, at *5 (D. Mass. 2011), (in patent case, "[the firm's] fiduciary duty to [the existing client] overrides any claim of privilege."); *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 U.S. Dist. LEXIS 17482 at *19-*20 (N.D. Cal. 2007), ("[the law firm's] fiduciary relationship with . . . a client lifts the lid on these communications."); *In re: Sunrise Sec. Lit.*, 130 F.R.D. 560, 597 (E.D. Penn. 1989) ("law firm's communication with in-house counsel is not protected by the attorney client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication.").

Similarly, no internal law firm privilege that would harm the firm's real client should apply here.

III. Nothing in Minnesota's privilege statute weakens law firms' duties to their real clients.

The law firm and the court below brushed aside the profound obligations that lawyers owe to their real clients, by claiming that internal law firm privilege falls within the technical terms of Minnesota's privilege statute. That reasoning is wrong, for at least three reasons.

First, the discussion above of Minnesota's ethical rules does indeed guide courts interpreting Minnesota's privilege statute. General law and ethics provisions do not exist in separate legal worlds. Rather, according to the RESTATEMENT (THIRD) OF THE LAW OF GOVERNING LAWYERS, "[t]he lawyer codes and much general law remain complementary." Section 1, cmt. b. The background ethics law of course informs the closely related question of when a privilege applies for evidence purposes.

Second, as discussed above, lawyers' obligations to their real clients prevent them from forming an internal law firm attorney-client relationship in the first place. In light of the firm's failure to become its own client, the language of Minn. Stat. 595.02(b) is telling. That legislation speaks repeatedly of the "client" and the "attorney's client."[4] Here, of course, the background ethical rules prohibit the law firm from taking itself on as a client. Therefore, the law firm cannot assert any rights under Section 595.02(b).[5]

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[4] Minn. Stat. 595.02(b) states: "An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent."

[5] There is also no significant difference between the privilege regimes in different jurisdictions. As one court has stated, "[t]he attorney-client privilege is not complex on its face. Whatever formulation is used . . . the elements of the privilege are substantially the same." *Valente*, 68 F.R.D. at 366-367. There is no good reason to follow the law of one court and not another on the basis that one interpreted a statute while the other interpreted the common law, when the elements all so closely follow each other in this manner.

IV. The firm points to several red herrings to justify keeping secrets from its actual client.

The firm, through its brief and the cases it cites, offers up a series of flawed arguments. None of the firm's protests justify keeping secrets from its ultimate client.

A. Law firms can solicit whatever ethics counseling they want -- so long as they tell their real clients.

A mainstay of the law firm's argument is its claim that law firms can only receive solid ethical advice if they can keep that advice secret from the ultimate client. That claim is false.

The law firm here is not alone in making this mistake. *Coloplast A/S v. Spell Pless Sauro, PC,* No. 27-CV-12-12601, 2013 Minn. Dist. LEXIS 45 at *16 (Minn. Dist. Ct. Nov. 22, 2013) states largely the same thing. *Coloplast*, in turn, relies on and quotes the case from Massachusetts, *RFF Family Partnership v. Burns & Levinson*, which states that honoring the privilege "will likely result in increased law firm compliance with ethical obligations." 991 N.E.2d 1066, 1080 (Mass 2013).

There is no good reason to suspect that is true. Lawyers must follow ethical rules no matter what -- unlike real clients, they have a license which the State can revoke. Claiming that lawyers need to keep secrets to stay ethical has no support.

Further, nothing prevents law firms from seeking all of the legal and ethical counseling they need, either from internal law firm lawyers, or from outside law firms. But they must disclose their communications -- both the fact that they are seeking advice as well as the advice they receive -- to the real client. As the court wrote in *Bank Brussels*, 220 F. Supp. 2d at 288, "[c]ontrary to [the firm's] arguments, [the firm] can still perform its responsibilities under the Code of Professional Responsibility—it just is not protected by the attorney-client privilege."

There are two points worth highlighting here. First, the law makes no distinction between seeking advice from an internal law firm lawyer and an outside law firm lawyer. The law requires a law firm that hires another law firm to disclose those communications to the real client, just as a law firm

that consults internal firm lawyers would need to disclose the communications. To make sure that there is no adverse inference based on silence, we are stating this point clearly now.

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

B. Law firms surrender rights when clients hire them.

In many ways, the firm's brief boils down to "What about us?" By repeatedly referring to themselves as "clients," the law firm and its lawyers beg the question – don't they, just like every other client, have the right to privileged communications?

No, they do not.

As this brief has emphasizes throughout, lawyers must put their real clients interests above their own. Other actors have not assumed the same duties to the actual client as law firms. Those duties to real clients make up the essence of what law firms sell, and is the reason clients hire them in the first place. Part of a lawyer's responsibility involves accepting limits, in exchange for the financial and other rewards of working as a licensed attorney to help clients.

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

As the final substantive argument here, it is worth returning to the nature of the relationship between law firms and their real clients. In discussing the attorney-client relationship, the Minnesota Supreme Court speaks in terms of fiduciary duty. *See, e.g., Rice,* 320 N.W. 2d at 408. Many of the opinions from other courts, quoted above, that have rejected an internal law firm privilege use similar phrasing as well.

As *Rice* and the Minnesota cases it quotes makes clear, viewing the duty of loyalty as a fiduciary duty captures only by analogy some of the scope of lawyers' obligations to their clients. Using that analogy is fine as far as it goes, and will indeed lead this Court to the correct conclusion. But in fact, a lawyer's obligation of loyalty stems from the lawyer's professional obligations, rather than from trust law. Any changes to or new interpretations of the law of trusts or fiduciaries should not affect how courts view lawyers' duty of loyalty.

As the Minnesota Supreme Court elaborated in *Rice*, "[t]he attorney is under a duty to represent the client with *undivided loyalty*." 320 N.W. 2d at 408 (citation omitted, emphasis added). It continued, "*[u]nquestioned fidelity* to their real interests is the duty of every attorney to his clients." *Id.* at 411 (emphasis added) (*quoting In re Estate of Lee,* 214 Minn. 448, 460 (Minn. 1943)). Clearly, the Minnesota Supreme Court imposes the highest conceivable duty on lawyers to serve their real clients.

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

However high a standard the law imposes on a fiduciary, Minnesota requires even more from a lawyer serving its existing clients. Creating an internal law firm privilege to keep secrets from that real client would not come close to meeting the duty that Minnesota imposes on lawyers.

CONCLUSION

Attorney-client privilege is vitally important. But it ultimately serves the lawyer's duty to assist the real client, and to put the real client's interests above the lawyer's interests. The privilege ensures that "the professional mission is to be carried out." *Upjohn*, 449 U.S. at 389 (*quoting Trammel v. United States*, 445 U.S. 40, 51 (1980)). The professional mission, of course, is to serve the client -- "[u]nquestioned fidelity," as the Minnesota Supreme Court has emphasized. *Rice*, 320 N.W.2d at 411 (*quoting In re Estate of Lee,* 214 Minn. at 460).

Lawyers cannot turn around to assert a privilege that exists solely to serve their real clients, in order to *interfere* with the interests of a real client. In that context, the law firm is not a client, and cannot hire itself. Its duty runs only to a real client other than the firm, which means the firm cannot assert privilege against a real client. That is especially so when the internal law firm privilege will make it less likely real clients will seek legal advice, a result that directly contradicts the purpose of attorney-client privilege.

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

Sincerely yours,

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