IN THE SUPREME COURT OF PENNSYLVANIA

No. 10 EAP 2010

WILLIAM GILLARD,

Appellee,

vs.

AIG INSURANCE COMPANY and AIG and THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KEY AUTO INSURANCE PLAN and AIG CLAIMS SERVICES,

Appellants.

AMICI CURIAE BRIEF OF THE ASSOCIATION OF CORPORATE COUNSEL, PENNSYLVANIA BAR ASSOCIATION, PHILADELPHIA BAR ASSOCIATION, ALLEGHENY COUNTY BAR ASSOCIATION, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF REVERSAL

Appeal from the January 4, 2008 Order of the Superior Court in No. 1065 EDA 2007, Affirming the March 29, 2007 Order of the Court of Common Pleas of Philadelphia County, Civil Division, No. 864 June Term, 2005

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INTRODUCTION

In its opinion dated January 4, 2008 (the "Opinion"), the Superior Court affirmed an order of the Court of Common Pleas requiring the Appellants to produce communications containing their outside counsel's legal advice, analysis, and opinions. The Superior Court held that these documents were not protected by the attorney-client privilege because they were communications made by an attorney *to* a client. In doing so, the Superior Court followed its decision in *Nationwide Mutual Insurance Co. v. Fleming*, 924 A.2d 1259, 1264 (Pa. Super. 2007), *aff'd by an equally divided court*, No. 32 WAP 2007 (Pa. Jan. 29, 2010), which held that the privilege protects communications from an attorney to a client only to the extent such communications contain and would thus reveal confidential communications from the client. The Superior Court stressed that "[a]s a published Opinion, unless and until the Supreme Court overrules *Fleming*, it is controlling on this Court."[b] (Op. 4 n.2.)

The Superior Court's Opinion, and its decision in *Fleming*, are contrary to the overwhelming majority rule that confidential communications between lawyers and their clients made for the purpose of requesting or *providing* legal advice are privileged from disclosure, regardless of whether the communication is made by the client or the lawyer. The protection of communications from an attorney to a client that contain legal advice, analysis, or opinions is a necessary and indispensible corollary to the protection of client confidences. Indeed, it is impossible for communications providing legal advice not to reveal, implicitly or explicitly,

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[b] This Court was split evenly in affirming the Superior Court's opinion in *Fleming*, with Justices Eakin and Baer concluding that the trial court correctly found that the attorney-client privilege in *Fleming* had been waived, but declining to address the merits of the Superior Court's rationale, *see* slip op. at 15 (Eakin, J., in support of affirmance), and Chief Justice Castille and Justice Saylor rejecting the Superior Court's rationale on the scope of the attorney-client privilege and voting to reverse, *see id.* at 26-27 (Saylor, J., in support of reversal).

client confidences exchanged during the course of the professional relationship. As a result, the Superior Court's Opinion is inconsistent with the fundamental purpose of the attorney-client privilege of facilitating the highest quality legal representation and candid legal consultation. The Opinion is also grounded on an unreasonable and erroneous interpretation of applicable Pennsylvania law that ignores this Court's precedent. If it is affirmed, it would have significant adverse consequences on lawyers practicing in Pennsylvania, individuals seeking confidential legal advice, and national and international businesses with Pennsylvania operations who depend each day on receiving legal analysis and forthright opinions from counsel in order to comply with the law.

Amici curiae are organizations whose constituent members will be directly and negatively affected by the Superior Court's Opinion. They submit this brief in support of reversal of the Opinion to highlight important policy considerations that are implicated in this appeal. Accordingly, Amici urge the Court to reverse the Superior Court with a clear statement that communications made within the lawyer/client relationship are privileged when made for the very purpose of soliciting or providing legal advice.

STATEMENT OF INTEREST

The Association of Corporate Counsel, or "ACC," is a professional bar association of over 25,000 in-house counsel worldwide who practice in the legal departments of corporations and other private sector entities. As an amicus curiae, ACC presents the perspective of in-house lawyers who advise their corporate clients on the full range of legal issues that arise in the course of day-to-day business. ACC members are employed by more than 10,000 private sector corporations, including public and private companies, both large and small, and various non-profit organizations. Because ACC is a bar association, its members are individual lawyers and not companies, but ACC members work in a broad and representative cross-section of businesses and industries that make up a large portion of the corporate sector. The vast majority of ACC members work in North America for national or multinational companies that require them to engage in cross-border practices that bring them regularly in contact with interests, employees, and facilities in Pennsylvania.

ACC has over 1,450 members in Pennsylvania, most of whom are represented by one of three ACC chapters at work in the region: ACC's Central Pennsylvania Chapter has 110 members, ACC's Delaware Valley Chapter has 1,034 members, and ACC's Western Pennsylvania Chapter has over 355 members. ACC and its chapters are recognized as standard-bearers for protecting privilege in the in-house context, and thus are deeply concerned about the disturbing precedent at stake in this case for both ACC's local members and their clients in Pennsylvania, as well as its national and international membership and their clients doing business in the state. ACC members have a direct interest in the outcome of this appeal because the Superior Court's decision, unless reversed, would set a precedent that would make it more difficult for in-house counsel to provide candid legal advice to their clients and to ensure corporate compliance with the law. ACC also represents to the Court the interests of their

corporate clients in this decision, as the privilege – while maintained by lawyers – is a right conferred to clients and its limitation or erosion is their loss, dramatically impacting clients' ability to solicit and receive legal counsel in the conduct of daily business and in the defense of actions brought against them.

The Pennsylvania Bar Association ("PBA") has nearly 30,000 members and is the association that this Court, as governing authority of the Unified Judicial System, has designated under 42 Pa.C.S. § 1728(a)(3) as "most broadly representative of the members of the bar of this Commonwealth." *In Re: Recognition of the Pennsylvania Bar Association as the Association Representing Members of the Bar of this Commonwealth*, No. 198 Supreme Court Rules Docket No. 1 (June 29, 1998). The PBA Board of Governors, acting at the recommendation of the association's Amicus Curiae Brief Committee, authorizes the participation of the PBA as amicus curiae in appeals that directly affect the ability of lawyers to practice law in this Commonwealth. Therefore, the PBA is vitally interested in this important appeal involving the scope of the attorney-client privilege.

The Philadelphia Bar Association, founded in 1802, is America's first chartered metropolitan bar association. A voluntary association, it currently has 13,000 members representing all elements of the legal profession, including some of the nation's most prominent lawyers, judges, public servants, business, and civic and community leaders, in the city where this country was born. Its commitment to liberty and justice for all lies at the heart of the Association's mission: to serve the profession and the public by promoting justice, professional excellence, and respect for the rule of law. A key part in meeting the Philadelphia Bar Association's mission is protection of the sanctity of the attorney-client relationship and the importance of honest and open communication between attorneys and their clients. Any

impediment to such open communication hurts the profession and curbs access to justice. The Philadelphia Bar Association's Board of Governors met and discussed the central issue in this case and unanimously approved the filing of this amici curiae brief on behalf of the Association.

The Allegheny County Bar Association ("ACBA") has nearly 7,000 members and is an organization of legal professionals committed to serving its members by providing education, advocacy and professional services; promoting equality and diversity among its membership; fostering collegiality; advancing the public image of the profession and the highest standards of professional ethics; supporting and advocating for a fair and effective judicial system that is accessible to every individual regardless of economic status; and exercising leadership on a local, state, and national level so as to further these goals. As in the case of the Philadelphia Bar Association, a key part of meeting this mission is protecting the sanctity of the attorney-client relationship and open communication between attorneys and their clients. The Association's Board of Governors met and discussed the central issue in this case and unanimously approved the filing of this amici curiae brief on behalf of the ACBA.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents 300,000 direct members (including over 4,500 in Pennsylvania) and indirectly represents the interests of an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the nation's business community.

ARGUMENT

I. THE ATTORNEY-CLIENT PRIVILEGE IS SOCIALLY BENEFICIAL AND CRITICAL TO OUR SYSTEM OF JUSTICE

The attorney-client privilege is the oldest and most revered of the privileges for confidential communications known to the common law. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *United States v. Bauer*, 132 F.3d 504, 512 (9th Cir. 1997); *Estate of Kofsky,* 487 Pa. 473, 481, 409 A.2d 1358, 1362 (1979); 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2290 (McNaughton rev. 1961). The privilege is "rooted in the imperative need for confidence and trust" within the attorney-client relationship. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996); *Kofsky*, 487 Pa. at 482, 409 A.2d at 1362; *see also* Pa. Rule of Prof'l Conduct 1.6 cmt. [2] (2008) (noting that the "fundamental principle" that communications between lawyers and clients are confidential underpins the "trust that is the hallmark of the client-lawyer relationship"). The privilege is "inextricably linked to the very integrity and accuracy of the fact finding process," *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978), and is "essential to the just and orderly operation of our legal system," *Bauer*, 132 F.3d at 510. *See also Alexander v. Queen*, 253 Pa. 195, 202, 97 A. 1063, 1065 (1916) ("Without such a privilege the confidence between client and advocate, so essential to the administration of justice would be at an end.")

Fundamentally, the attorney-client privilege exists to facilitate "*the giving of professional advice* to those who can act on it." *Upjohn*, 449 U.S. at 390 (emphasis added). The attorney-client privilege facilitates this objective by "encourag[ing] full and frank communication *between* attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice." *Id.* at 389 (emphasis added); *see Castellani v. Scranton Times, L.P.,* 598 Pa. 283, 306, 956 A.2d 937, 951 (2008); American Bar Association

Task Force on the Attorney-Client Privilege, Recommendation 111 (adopted by ABA House of Delegates, Aug. 2005), *available at* http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf[c]; Press Release, Philadelphia Bar Association, *Bar Chancellor to Lawmakers: Support Attorney-Client Privilege Protection Act* (Dec. 7, 2007), *available at* http://www.philadelphiabar.org/page/NewsItem?appNum=3&newsItemID=1000736&wosid=b8xMIjn7gfHludHy6hXL8w (arguing that the Justice Department's practice of pressuring corporations to waive the attorney-client privilege "seriously weaken[s] the confidential attorney-client relationship between companies and their lawyers and undermin[es] companies' internal compliance programs").

"Full and frank communication" within the attorney-client relationship is necessarily a "two-way street." *Bauer*, 132 F.3d at 507; *see also Levy*, 577 F.2d at 209 ("Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the Sixth Amendment is to be meaningful."); *Alexander*, 253 Pa. at 203, 97 A. at 1065 ("The general rule is, that all professional communications are sacred."). On the one hand, the privilege encourages clients to provide candid information on even the most sensitive of matters to their attorneys so that their attorneys may provide the most effective legal services. *See* Restatement (Third) of the Law Governing Lawyers § 68 cmt. c (2000) (stating that the privilege

[c] The first Resolved clause of Recommendation 111 states in full:

> RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice[.]

"enhances the value of client-lawyer communications and hence the efficacy of legal services"). "The privilege recognizes that sound legal advice or advocacy . . . depends upon the lawyer's being fully informed by the client." *Upjohn*, 449 U.S. at 389; *see also Trammel v. United States*, 445 U.S. 40, 51 (1980) (noting that the attorney-client privilege "rests on the need for the [attorney] to know all that relates to the client's reasons for seeking representation").

On the other hand, the privilege also shields from disclosure communications from lawyers to their clients made for the purpose of rendering legal advice. "In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential." *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) (internal quotations omitted). However, professional legal assistance "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). Thus, the common law has long recognized the "necessity" of placing a "seal of secrecy upon communications *between* client and attorney," not just communications *from* a client *to* an attorney. *Id.* (emphasis added).

II. THE SUPERIOR COURT'S OPINIONS HAVE NARROWED THE SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE AND MADE PENNSYLVANIA AN OUTLIER JURISDICTION

Because of the important public benefits that result from candid communication *between* attorneys and clients, it has traditionally been assumed and "seldom been brought into question" that an attorney's communications to the client are within the privilege. 8 Wigmore, *Evidence* § 2320; *see also* Restatement (Third) of the Law Governing Lawyers § 69 cmt. i, reporter's note. "The reason for [this] is not any design of securing the attorney's freedom of expression, but the necessity of preventing the use of his statements as admissions of the client, or as leading to inferences of the tenor of the client's communications." 8 Wigmore, *Evidence* § 2320. Given the privilege's purpose of facilitating "the giving of professional advice," *Upjohn*, 449 U.S. at

390, it is as important for society to ensure that lawyers can communicate freely with their clients as it is to ensure that clients can communicate freely with their lawyers. *See* 1 Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 9 (5th ed. 2007).

Today, it remains the overwhelmingly majority rule that a lawyer's communications to a client made in the course of providing legal advice are privileged. *Fleming*, slip op. at 27 (Saylor, J., in support of reversal); *United States v. Amerada Hess Corp.*, 619 F.2d 980, 986 (3d Cir. 1980) ("Legal advice or opinion from an attorney to his client, individual or corporate, has consistently been held by the federal courts to be within the protection of the attorney-client privilege."); Paul F. Rothstein & Susan W. Crump, *Federal Testimonial Privileges: Evidentiary Privileges Relating to Witnesses & Documents in Federal Law Cases* § 2:13 (2d ed. 2007) (noting the majority position that "all communications from an attorney to a client are protected if made during the course of giving legal advice"); Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 9.7 (3d ed. Supp. 2004-2) ("[M]ost decisional law and recent evidence codes protect . . . oral or written communications from lawyer *to* client."); Sarah M. Bricknell & Christina E. Norland Audigier, *In-House Corporate Counsel and the Attorney-Client Privilege*, Bureau of National Affairs 87 C.P.S. A-47, A-47 (2007) ("Courts generally have held that the privilege protects all attorney advice, opinions, or other communications without regard to the context of client confidences.").[d] In fact, the American Law Institute's Restatement of the Law

[d] For examples of opinions in which courts have applied the rule that communications from attorneys to clients are privileged when made in the course of providing legal advice, *see In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007); *Bauer*, 132 F.3d at 509; *In re Grand Jury Subpoena*, 341 F.3d 331, 335 (4th Cir. 2003); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1370 (10th Cir. 1997); *In re Grand Jury Proceeding*, 68 F.3d, 193, 197 (7th Cir. 1995); *United States v. Bartone*, 400 F.2d 459, 461 (6th Cir. 1968); *Natta v. Hogan*, 392 F.2d 686, 692-93 (10th Cir. 1968); *Andritz Sprout-Bauer v. Beazer East*, 174 F.R.D. 609, 633 (M.D. Pa. 1997); *Jules Jurgensen/Rhapsody, Inc. v. Rolex Watch U.S.A., Inc.*, 1989 WL 6210, at *1 (E.D. Pa. Jan. 19,

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Governing Lawyers takes the position that the attorney-client privilege protects all communications between attorneys and their clients for the purpose of obtaining or providing legal advice, regardless of the content of the communications. *See* Restatement (Third) of the Law Governing Lawyers §§ 68-70 & § 69 cmt. i.[e]

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1989); *In re LTV Secs. Litig.*, 89 F.R.D. 595, 603 (N.D. Tex. 1981); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 37 (D. Md. 1974); *Stengart v. Loving Care Agency, Inc.*, No. A-16 Sept. Term 2009, 2010 N.J. LEXIS 241, at *16, *39 (N.J. Mar. 30, 2010); *Costco Wholesale Corp. v. Super. Ct.*, 47 Cal. 4th 725, 733 (Cal. 2009); *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 442 (Minn. 1998); *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 581 N.E.2d 1055, 1061 (N.Y. 1991); *Rossi v. Blue Cross & Blue Shield of Greater New York*, 540 N.E.2d 703, 706 (N.Y. 1989); *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 384-85 (Mo. 1979). This majority rule is also followed in other common law jurisdictions such as the United Kingdom and Australia. *See Three Rivers Dist. Council v. Governor & Company of the Bank of England*, [2004] A.C. 610, ¶ 10 (H.L.); *Esso Australia Resources Ltd v. Comm'r of Taxation* (1999) 201 CLR 49 (Austl.); Epstein, *supra*, at 762; Richard S. Pike, *The English Law of Legal Professional Privilege*, 4 Loy. Int'l L. Rev. 51, 71 (2006) (discussing English law). *But se In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (an attorney's communication to a client is privileged when it transmits legal advice and "rest[s] on confidential information obtained from the client"); *Wisconsin Newspress, Inc. v. School Dist. Sheboygan Falls*, 546 N.W.2d 143, 149 (Wisc. 1996) ("where disclosure of the communication would indirectly reveal the substance of the [client's] confidential communications to its lawyer"); *Combined Commc'ns, Inc. v. Solid Waste Region Bd.*, No. 01A01-9310-CH00441, 1993 WL 476668, at *4 (Tenn. Ct. App. Nov. 17, 1993) (holding, in unpublished decision of intermediate appellate court, that attorney communication to client is not privileged if it does not disclose or suggest the content of confidential client communications). However, this authority is clearly outside of the mainstream of the traditional view of the attorney-client privilege. *See* 8 Wigmore, *Evidence* § 2320.

[e] Amici do not contend that the attorney-client privilege can protect a client from an investigation of the *facts* in a given matter, only *communications* for the purpose of obtaining or providing legal advice made within the client/lawyer relationship. *See Upjohn*, 449 U.S. at 395; Hazard, *supra*, § 9.7. Amici also do not contend that communications by a lawyer not related to the provision of legal advice should be privileged under the attorney-client privilege. For example, a communication in which an in-house attorney provides only business advice to a client, without also providing any legal advice, may be confidential under Pennsylvania Rule of Professional Conduct 1.6 but would not fall within the attorney-client privilege. Nothing in this brief should be construed as an endorsement of any practice, either by outside or in-house counsel, of failing to provide legitimate discovery through an overbroad interpretation of the privilege or of failing to timely or adequately identify claimed privileged documents that have been withheld from

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Thus, it is clearly established that the attorney-client privilege not only is, but must be, a "two-way street" that protects not only "confidential disclosures made by a client to an attorney in order to obtain legal advice," but also "an attorney's advice in response to such disclosures." *Bauer*, 132 F.3d at 507; *Amerada Hess Corp.*, 619 F.2d at 986 (adopting the "two-way application of the privilege," under which "[l]egal advice or opinion from an attorney to his client" is privileged). Protection of so-called "downstream communications" from a lawyer to a client is a fundamental component of the attorney-client privilege that is overwhelmingly the preferred view today. Hazard & Hodes, *supra*, § 9.7; *see also National Bank of West Grove v. Earle*, 196 Pa. 217, 221, 46 A. 268, 269 (1900). The right of clients to communicate to their lawyers in confidence would be all but meaningless if lawyers could not in turn respond to those communications without apprehension that the communication would lack any protection. Nothing should discourage lawyers from placing in writing to clients their confidential legal analysis and guidance, as written communications underline the significance of the determination to be made. It would be a great disservice to the legal profession and their clients to yield a rule encouraging important client decisions to be based only on legal advice communicated orally to clients simply because counsel could not trust that their opinion letters would be protected from disclosure to their clients' adversaries.

The Superior Court's Opinion, and its opinion in *Fleming*, are unjustified and dangerous restrictions on the traditional scope of the attorney-client privilege. By holding that communications of legal advice from a lawyer to a client are privileged only to the extent that

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discovery. There is nothing in the Superior Court's Opinion or the record to suggest that this is what happened here.

they actually reveal confidential communications made by the client, the Superior Court departed from the seldom-questioned view that confidential communications from counsel conveying legal advice are privileged.[f] In so doing, the Superior Court has made Pennsylvania an outlier jurisdiction on this important issue. Nearly every jurisdiction in the United States and other common law countries has adopted the view that the attorney-client privilege applies to confidential communications between lawyers and clients relating to legal advice, without regard to whether the communication is made by the client or the lawyer. *See supra* at 9 & n.3. As advocated by Justice Saylor in his Opinion in Support of Reversal in *Fleming*, this Court should adopt the majority rule and keep Pennsylvania law in line with the majority position on this issue. Slip op. at 26-27. *See also Commonwealth v. Edmunds*, 526 Pa. 374, 400, 586 A.2d 887, 900 (1991) (relying in part on the law of other jurisdictions to resolve state constitutional question).

[f] In *Gillard*, the Court of Common Pleas' ruling was more hostile to the attorney-client privilege. The Court of Common Pleas committed reversible error when it specifically held that *all* lawyer-to-client communications were discoverable without reference to the derivative rule annunciated in *Fleming*. (Op. 3 ("According to the Pennsylvania statute, the attorney-client privilege only applies to communications made by the client. That's my ruling.").) The Superior Court then affirmed based on the derivative rule in *Fleming*, stating that "given the fact that the insurance companies do not assert that the attorney communications to the client would reveal confidential communications *from the client*, they are not entitled to relief." (*Id.* at 6 (emphasis in original).) However, neither of these holdings are consistent with the traditional scope of or policies behind the privilege, or with Pennsylvania law. *See infra* Sections III and IV.

III. THE SUPERIOR COURT ERRONEOUSLY INTERPRETED 42 Pa.C.S. § 5928 TO EXCLUDE FROM THE ATTORNEY-CLIENT PRIVILEGE ATTORNEY COMMUNICATIONS MADE FOR THE PURPOSE OF PROVIDING LEGAL ADVICE

A. The General Assembly Did Not Restrict the Scope of the Attorney-Client Privilege to Exclude Attorney Communications Made for the Purpose of Providing Legal Advice

The Superior Court based its Opinion on its interpretation of 42 Pa.C.S. § 5928 in *Fleming*. (Op. 4.) 42 Pa.C.S. § 5928 states:

> In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.[g]

It was unreasonable for the Superior Court to conclude based on § 5928 that the attorney-client privilege is so restrictive as to exclude from its scope attorney communications made for the purpose of providing confidential legal advice to a client. Most glaringly, the Superior Court erred by failing to discuss or *even cite* a precedential decision in which this Court held that the advice given by counsel is privileged from discovery. In *National Bank of West Grove v. Earle*, 196 Pa 217, 46 A. 268 (1900), this Court stated:

> As to the other defendant, Mr. Johnson, from whom a discovery is sought, because he was of counsel for the trustees in this and other proceedings, he has demurred, because "*a bill of discovery is not the proper method, if there be any proper method, to compel counsel to disclose the advice given to his clients*." *It is not necessary for us to elaborate on this averment. It is a complete answer to plaintiff's prayer*. If it were not, then a man about to become involved in complicated business affairs, whereby he would incur grave responsibilities, should run away from a lawyer rather than consult him. If the secrets of the professional relation can be extorted from counsel in open court by the antagonist of his

[g] Section 5916 is the identical statute governing criminal proceedings. *See* 42 Pa.C.S. § 5916; *see also Commonwealth v. Baumhammers*, 599 Pa. 1, 37, 960 A.2d 59, 81 (2008) ("A criminal defendant is protected by the benefits of an attorney-client privilege.").

> client, the client will exercise common prudence by avoiding counsel.

196 Pa. at 221, 46 A. at 269 (emphasis added); *see also Alexander*, 153 Pa. at 203, 97 A. at 1065 ("The general rule is, that all professional communications are sacred."). The Court's holding in *National Bank of West Grove* is consistent with the traditional view of the attorney-client privilege, *see* Wigmore, *Evidence* § 2320, and the decisional and statutory authority of the overwhelming majority of jurisdictions today, *see* Hazard & Hodes, *supra*, § 9.7; *Upjohn*, 449 U.S. at 389-90.

National Bank of West Grove was decided thirteen years *after* the General Assembly enacted the predecessor statute to § 5928, which is substantially identical to § 5928. *See* Act of May 23, 1887, P.L. 158, § 5(d) (formerly 28 P.S. § 321); *see also* 42 Pa.C.S.A. § 5928, cmt. The *National Bank of West Grove* opinion evidences this Court's contemporaneous understanding that, by enacting the predecessor to § 5928, the General Assembly did not intend to alter the "seldom questioned" common law view that communications from an attorney to a client for the provision of legal advice are privileged. *See also Cohen v. Jenkintown Cab Co.*, 239 Pa. Super. 456, 462 n.2, 357 A.2d 689, 692 n.2 (1976) (noting that the original statute "has been treated as a restatement of the principle of attorney-client privilege as it existed at common law").

In addition, in 1976, the General Assembly enacted § 5928, which is an essentially identical statutory provision as the one in effect at the time this Court decided *National Bank of West Grove*, without making any substantive changes that would have limited the scope of the attorney-client privilege to exclude attorney communications. *See* 42 Pa.C.S.A. § 5928, cmt. That the General Assembly did not alter the language of this statutory provision creates a strong presumption that it agreed with the scope of the attorney-client privilege that this Court announced in *National Bank of West Grove*. As stated by Justice Saylor in *Fleming*:

> While I acknowledge that the core concern underlying the attorney-client privilege is the protection of client communications, due to the unavoidable intertwining of such communication and responsive advice, I would remain with the pragmatic approach reflected in [*National Bank of West Grove*]. Although this may inevitably extend some degree of overprotection, I find it consistent with the policies underlying the privilege and the relevant legislative direction, particularly in light of the principle of statutory construction pertaining to legislative reenactments. *See* 1 Pa.C.S. § 1922 ("[W]hen a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.").

Slip op. at 26. Had the General Assembly wished to restrict the scope of the attorney-client privilege to exclude communications from lawyer to client, or to limit the privilege to communications from client to lawyer, it would have done so when it enacted § 5928. As stated by Justice Saylor, it was error for the Superior Court to ignore this Court's holding in *National Bank of West Grove* and narrow the scope of the attorney-client privilege based on its own novel reading of § 5928.

B. This Court Has the Authority Under the Pennsylvania Constitution to Establish Principles of Evidence, Including the Scope of the Attorney-Client Privilege

Apart from the Superior Court's erroneous interpretation of 42 Pa.C.S. § 5928, this Court is not bound by that statute in determining the scope of the attorney-client privilege.

In Pennsylvania, there has been for many years a dual system of common law principles of evidence coexisting with statutory principles. This system existed before the 1968 Pennsylvania Constitution gave this Court primacy with respect to practice and procedure, including the power to suspend statutes. Pa. Const. Art. V, § 10(c). For example, the hearsay rule was found at common law, while the business records exception appeared in a statute. *See* 42 Pa.C.S. § 6108 (Uniform Business Records as Evidence Act). After the adoption of the 1968 Constitution, this Court directed that the statutes governing practice and procedure, including

evidence, in force on December 31, 1968 would continue in force until this Court suspended, revoked, or modified them pursuant to this power under Pa. Const. Art. V, §10(c). *See* 204 Pa. Code § 29.1 ("Continuation of Pre-1969 Statutes and Rules").

When this Court adopted the Pennsylvania Rules of Evidence in 1998, it referred to Pa. Const. Art. V, § 10(c) as the source of its authority to do so. Pa.R.E. 101(b). Although the Rules codified many of the common law principles of evidence, this Court chose to leave in place the statutory scheme of evidentiary privileges. *See* Pa.R.E. 501. When this Court adopted Pa.R.E. 501, the Court presumably did so with an awareness of its own precedent concerning the scope of the attorney-client privilege, just as the General Assembly is presumed to have been aware of this Court's precedent when it reenacted the attorney-client privilege statute using the same language that this Court previously construed.

Because this Court's power under the Pennsylvania Constitution transcends the ability of the General Assembly to regulate such issues by statute, no statute can preempt or cabin this Court's power to determine the scope of the attorney-client privilege in Pennsylvania. Therefore, in the event this Court should determine that the Superior Court properly construed 42 Pa.C.S. § 5928, this Court, for the reasons expressed above, nevertheless should hold under its constitutional authority that the attorney-client privilege extends in both directions and reverse the Superior Court's decision to the contrary in this case.

IV. FAILING TO PROTECT CONFIDENTIAL COMMUNICATIONS OF LEGAL ADVICE FROM A LAWYER TO A CLIENT WOULD SIGNIFICANTLY HARM THE ATTORNEY-CLIENT PRIVILEGE

As Justice Saylor explained in *Fleming*, the Superior Court's approach not only removes Pennsylvania from the mainstream of the common law and other jurisdictions on attorney-client privilege, it would also do considerable harm to the privilege itself, and particularly to the privilege's application in the corporate context. *See* slip op. at 19-27 (Saylor, J., in support of

reversal). If this Court were to adopt the Superior Court's position as the law of this Commonwealth, it would sacrifice important social benefits generated by the attorney-client privilege. *Id.* at 26.

A. The Superior Court's Opinion Significantly Undermines the Confidential Nature of the Attorney-Client Relationship Because Attorney Advice and Client Communications Are Inextricably Intertwined

The Superior Court's Opinion, and its decision in *Fleming*, is premised on the erroneous assumption that a lawyer, whether it is outside or in-house counsel, can communicate with a client for the purpose of providing legal advice in a manner that does not reveal, reflect, or lead to inferences about confidential client communications. However, "attorney advice and client input are often inextricably intermixed." *Fleming*, slip op. at 26 (Saylor, J., in support of reversal). In fact, "it is absurd to suggest that any legal advice given does not at least implicitly incorporate or, at a minimum, give a clue as to what the content of the client communication was to which the lawyer's responsive legal advice is given." Epstein, *supra*, at 10. Under the Superior Court's approach, the only inquiry in determining whether an attorney's communication to a client is privileged is whether that communication "reveals" a previous confidential communication from the client to the attorney. "Whatever the conceptual purity of this 'rule,' it fails to deal with the reality that lifting the cover from the [legal] advice [provided by an attorney] will seldom leave covered the client's communication to his lawyer." *In re LTV Secs. Litig.*, 89 F.R.D. at 603.

Advice provided by outside counsel, such as AIG's counsel in *Gillard,* almost always has to be based on information that the client revealed or communicated to its attorney. This is because clients generally retain outside counsel either for a specific engagement or to provide legal advice on a specific question that the client initially communicates to the lawyer.

Likewise, the basis for in-house counsel's advice, such as that of Nationwide's counsel in *Fleming*, is the cumulative effect of countless observations regarding corporate practice and policies and consistent, ongoing communications between the attorney and the corporate client. *See Upjohn*, 449 U.S. at 392; Bricknell & Audigier, *supra*, at A-48. One of the primary benefits of in-house counsel is that they provide the option for "immediate advice from an attorney who is intimately familiar with the corporation's business affairs." Scott L. Olson, *The Potential Liabilities Faced By In-House Counsel*, 7 U. Miami Bus. L. Rev. 1, 2 (1998). In providing professional legal services to the corporation, in-house lawyers necessarily rely on and refer to these privileged observations and client communications. *See In re Sealed Case*, 737 F.2d at 99 ("In a given case, advice prompted by the client's disclosures may be further and inseparably informed by other knowledge and encounters."). Moreover, unlike lawyers in private practice, an essential part of an in-house lawyer's "engagement" is not merely waiting around for a specific assignment, but instead proactively communicating confidential legal advice where, based upon the in-house lawyer's observations, such advice is appropriate. Such communications of legal advice based upon the lawyer's own initiative probably would not be prefaced with a statement like "pursuant to your inquiry and based upon the following information . . . ," which the Superior Court's decisions in *Gillard* and *Fleming* appear to contemplate as a condition to the attorney-client privilege. Yet, the communication of legal advice on the lawyer's own initiative in this context cannot be divorced from the totality of the confidential information that the lawyer knows about the client. *Fleming*, slip op. at 22 (Saylor, J., in support of reversal) (citation omitted) ("To disclose the lawyer's advice is necessarily to disclose something about the operation of the client's business that was communicated to the lawyer through various media, including the lawyer's privileged observations.").

Thus, legal advice provided in any lawyer-client relationship invariably flows from previous confidential client communications. In any event, as a matter of policy, counsel should be encouraged to proactively convey legal advice to corporate clients concerning compliance with new legislation, regulations, and court rulings, whether expressly requested to do so or not, and such confidential advice should be duly protected by the privilege in the normal course, absent a waiver. *See infra* Section IV(D); *see also Burlington Indus.,* 65 F.R.D. at 37 ("While it is essential that communications between client and attorney deal with legal assistance and advice in order to be privileged, it is not essential that such requests by the client for legal advice be expressed.").

B. The Superior Court's Opinion Leaves the Scope of the Attorney-Client Privilege Uncertain and Unworkable

As stated by the United States Supreme Court, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn*, 449 U.S. at 392. To the extent that one indulges the Superior Court's doubtful premise that communications from a lawyer that have the purpose of providing legal advice do not necessarily reflect and reveal confidential client communications, the Superior Court's holding poses "substantial difficulties" that make it administratively and judicially unworkable. *Fleming*, slip op. at 20 (Saylor, J., in support of reversal) ("[The document at issue] exemplifies the substantial difficulty with a narrow approach to the attorney-client privilege rigidly centered on the identification of specific client communications, in that attorney advice and client input are often inextricably intermixed."); *see also Spectrum Sys. Int'l Corp.*, 581 N.E.2d at 1061 (such an approach "poses inordinate practical difficulties"). Because the Superior Court's holding in *Fleming* rests on an unrealistic dichotomy between confidential client communications and a lawyer's provision of

legal services, lawyers, clients, and judges will vary widely in their determinations of what attorney communications are privileged and the application of the privilege will become uncertain.

A lawyer's communications to the client are not "so easily categorized as those resting on confidential client communications and those that come from an independent source. In fact, attorney communications may be based on numerous related sources, including confidential client communications." John William Gercacz, *Attorney-Corporate Client Privilege* § 3.54 (3d ed. 2000). In noting the inherent difficulties of attempting to determine what communications are reflected in a lawyer's communication to a client, one court stated:

> A lawyer's advice to his client "does not spring from lawyers' heads as Athena did from the brow of Zeus." Rather, it is an amalgamation of education, knowledge, experience and legal wisdom which counsel may draw upon to give a frank and unconstrained opinion. That is the essence of effective legal representation.

ABB Kent-Taylor, Inc. v. Stallings & Co., 172 F.R.D. 53, 57 (W.D.N.Y. 1996) (citation omitted).

The Superior Court's constricted view of the attorney-client privilege requires lawyers, clients, and courts to make "surgical separations" of communications based on client confidences from communications based on other sources. *Spectrum Sys. Int'l Corp.*, 581 N.E.2d at 1061. In practice, drawing such distinctions "would be imprecise at best." *In re LTV Secs. Litig.*, 89 F.R.D. at 603. Determining what documents are privileged will have the practical effect of unnecessarily complicating the court's *in camera* review of claimed privilege documents and result in affidavits and depositions of attorneys to determine where they obtained the information used as a basis for their legal advice.

Moreover, in the corporate context, where in-house counsel accumulates a body of knowledge about a company from a great number of confidential client communications and observations, this process would be essentially impossible and would thwart the inherent value that in-house counsel provide by offering their clients real-time and practically-based legal advice. As a result,

> [t]he practical difficulties of determining when a lawyer's communications incorporate or otherwise tacitly refer to a client's communications "lead[s] to uncertainty as to when the privilege will apply." *In re LTV Secs. Litig.,* 89 F.R.D. at 603. Yet, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn*, 449 U.S. at 392. The Superior Court's holding will reduce Pennsylvania's attorneys to guessing when their own legal advice may be privileged, leaves clients uncertain as to when their lawyers' communications are confidential, and, consequently, will significantly disrupt the free and candid exchange of information between attorneys and clients. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393.

See Fleming, slip op. at 25 (Saylor, J., in support of reversal) (quoting Br. For Amici The Ass'n of Corporate Counsel, *et al.* at 16).

By contrast, the approach that amici suggest, and that has been adopted by the overwhelming majority of common law jurisdictions, avoids such uncertainty. Viewing the attorney-client privilege as a "two-way street . . . is easier for a layperson to understand and for an attorney to apply." Epstein, *supra*, at 9. It is also easier to administer judicially. *Id.* While the Superior Court's approach would frequently require a difficult and fact-intensive inquiry about the nature of previous client communications and whether those communications are reflected in the attorney's communications, the majority approach only requires lawyers, clients, and judges to determine whether a communication between a lawyer and client is made in

confidence for the purpose of rendering or soliciting legal advice. If the answer to that question is yes, then the communication is privileged.

C. The Superior Court's Holding Will Stifle the Delivery of Candid Legal Advice By Lawyers

As discussed above, the central purpose of the attorney-client privilege is to facilitate "*the giving of professional advice* to those who can act on it." *Upjohn*, 449 U.S. at 390 (emphasis added); *see also* Epstein, *supra*, at 82 ("[T]he very purpose of encouraging the client to be forthcoming is *so that* the client may receive candid legal advice."). The United States Supreme Court recognized almost 120 years ago that professional legal assistance "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). By mandating the disclosure of an attorney's legal advice and opinions where the communication that contains such advice does not explicitly reveal confidential client communications, the Superior Court's decision will chill the provision of candid legal advice:

> The Superior Court's holding [in *Fleming*], if not reversed, is likely to create unnecessary impediments to the counseling of clients and could undermine one of the important goals of the privilege: frank communication to aid in compliance with the law and otherwise to provide necessary legal representation. Because businesses must operate in an increasingly complex legal environment, a closer, rather than more formal and distant relationship should be encouraged between client and counsel. A reliably confidential relationship is needed more than ever for companies to operate as the good citizens as the people of the Commonwealth expect them to be.

Fleming, slip op. at 22-23 (Saylor, J., in support of reversal) (quotation and citation omitted).

The greatest danger that the Superior Court's Opinion creates is that a lawyer's communications made for the purpose of conveying legal advice will be treated as admissions of a client. *See* Pa.R.E. 803(25)(D) (hearsay exception for admissions offered against a party made

by party's agent or servant within the scope of the agency or employment). Lawyers will "not feel free in probing client's stories and giving advice unless assured that they would not thereby expose the client to *adverse evidentiary risk*." Restatement (Third) of the Law Governing Lawyers § 68 cmt. c (emphasis added); *see also* 8 Wigmore, *Evidence* § 2320 (noting the "necessity of preventing the use of [an attorney's] statements as admissions of the client"). In addition to this evidentiary risk, attorneys will be less likely to provide advice or opinions that could ultimately be harmful or embarrassing to their clients if they know that such advice could be disclosed. *See* Hazard & Hodes, *supra*, § 9.7 (noting that application of the privilege to "downstream communications" is justified because it "enhance[s] the lawyer's ability to communicate candidly with clients").

The Superior Court's Opinion not only discourages clients from seeking legal advice on the most sensitive issues, but it also will cause lawyers to refrain from placing their legal advice in writing out of concern that the communication will not be deemed a privileged communication. Although a great deal of lawyer-client communication is done in person and by telephone, it is fundamental as a matter of professional responsibility that important legal advice is best confirmed in writing to emphasize the significance of the advice and the accompanying client decision as to how best to proceed. The practical impact of the Superior Court's decision is to discourage the best practice of confirming such legal advice in writing. Indeed, it will instead encourage lawyers to go through the pointless exercise of first asking the client whether it wishes to receive legal advice on a certain subject, and then confirming such request at the outset of the opinion letter, or even every email, as follows: "As you requested, this will convey our advice concerning. . . ." Clearly, the entitlement of a document conveying confidential legal advice to be accorded privilege status should not turn on whether the request for legal advice was

first solicited by counsel. However, that is precisely the erroneous path the *Fleming* decision follows.

The Superior Court's constricted view of the attorney-client privilege is also contrary to "the common expectation of most clients and indeed most attorneys as to the scope of the privilege." Epstein, *supra*, at 10. From a client's perspective, although an attorney's legal opinion "may not reflect the content of any confidential communication from the client, it seems just as worthy of protection as a client's explicit request for the advice." *Id.* Indeed, this expectation is perfectly in line with the traditional scope of the attorney-client privilege and its objective of facilitating the provision of legal advice. Amici are not seeking an expansion of the attorney-client privilege but, rather, safeguards for what the privilege is clearly understood by lawyers and laypeople alike to cover.

D. Narrowing the Attorney-Client Privilege Will Have a Significant Adverse Impact on Legal Representation in the Corporate Context

Although the Superior's Court's restrictive view of the attorney-client privilege will negatively affect the ability of all attorneys in Pennsylvania to provide effective legal services to their clients, the impact of the Opinion also will be particularly significant in the corporate context. In-house counsel constantly offer legal opinions and advice that is based on and reflective of privileged client communications. *See Upjohn,* 449 at 392; Bricknell & Audigier, *supra*, at A-48; Olson, *supra*, at 2. However, in-house lawyers reading the Superior Court's Opinion will be unable to discern a clear path that allows them to predict when their communications provided for the purpose of rendering legal services will be privileged. As a result, they will be even more likely to withhold candid legal advice that could later be disclosed to the detriment of their client than lawyers outside of the corporation or lawyers representing individuals.

Because "corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law," narrowing the attorney-client privilege in a way that affects the quality of their legal representation will have a very significant impact on the ability of corporations to ensure their compliance with the law. *Upjohn*, 449 U.S. at 392 (internal citations and quotations omitted). *See also Sandra T.E. v. S. Berwyn Sch. Dist. 100*, No. 08-3344, 2009 U.S. App. LEXIS 28983, at *20 (7th Cir. Feb. 25, 2009) ("Confidential legal advising promotes the public interest 'by advising clients to conform their conduct to the law and by addressing legal concerns that may inhibit clients from engaging in otherwise lawful and socially beneficial activities.'").

At a time when legislatures and regulators, not to mention the public generally, place increasing emphasis on corporate accountability, transparency, and compliance with both the letter and the spirit of the law, the Superior Court's Opinion represents a dangerous step backward. *See generally The Wall Street Reform and Consumer Protection Act of 2009*, H.R. 4173, 111th Cong. (2009) (providing for comprehensive financial regulatory reform); *Sarbanes-Oxley Act of 2002*, Pub. L. No. 107-204, 116 Stat. 745 (2002) (imposing new corporate governance and reporting standards on public companies). It is not enough for in-house counsel merely to react to problems as they arise; instead, they must affirmatively and proactively provide advice to corporations and ensure compliance in real time based on what they see occurring within a company, even before problems arise.

Thus, the purpose of the attorney-client privilege of facilitating the provision of sound and candid legal advice is more critical for corporations now than ever before. *See In re County of Erie*, 473 F.3d at 422 (noting, in the government context, that a "lawyer's recommendation of a policy that complies (or better complies) with [a] legal obligation – or that advocates and promotes compliance, or oversees implementation of compliance – is legal advice" covered by

the attorney-client privilege). Indeed, the privilege is not a cloak that is thrown over corporate communications inappropriately to shield them from discovery in the pursuit of justice. The attorney-client privilege cannot protect a client from an investigation of the *facts* in a given matter, only *communications* made within the client/lawyer relationship. *See Upjohn*, 449 U.S. at 395; Hazard, *supra*, § 9.7. Protecting communications creates the necessary confidence that candid conversations *must* take place and encourages preventive legal counsel on important decision-making in the company.

Corporations are also far more likely than individuals to operate in multiple states and, therefore, to be subject to the laws of multiple jurisdictions.[h] By making Pennsylvania an outlier jurisdiction on the critical issue of the scope of the attorney-client privilege, the Superior Court Opinion creates particular uncertainty with respect to whether legal advice can remain confidential if fortuitous circumstances result in a transaction having some connection with the Commonwealth of Pennsylvania that could not have been contemplated at the time the lawyer gave the advice. That could possibly result in Pennsylvania courts being used to do an end-run on the attorney-client privilege by requiring production of material in Pennsylvania that would be privileged everywhere else, with the perverse result that the confidential legal advice discovered in Pennsylvania would then be used to the disadvantage of the corporation in those other jurisdictions.[i] The heightened need for consistency in the corporate context is yet another reason why this Court should reverse the Superior Court's decision. *See Fleming*, slip op. at 27.

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[h] The multi-state context in which corporations operate is one of the reasons that this Court adopted Pa. B.A.R. 302, providing for a Limited In-House Corporate Counsel License, in 2004, to accommodate the activities of in-house counsel in the multi-state corporate environment.

[i] As this Court has noted, "the disclosure of documents cannot be undone." *Ben v. Schwartz*, 556 Pa. 475, 485, 729 A.2d 547, 552 (1999).

V. THIS COURT SHOULD REAFFIRM THAT THE SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE IN PENNSYLVANIA INCLUDES A LAWYER'S CONFIDENTIAL COMMUNICATIONS TO A CLIENT IN THE COURSE OF PROVIDING LEGAL ADVICE

In order to clarify the scope of the attorney-client privilege, and thereby strengthen the certainty of its application for clients and lawyers, this Court should reverse the Superior Court with a clear statement that communications made within the lawyer/client relationship for the purpose of obtaining or providing legal advice are privileged. Amici urge that the following black letter paradigm is consistent with the traditional scope of the privilege at common law in Pennsylvania and other jurisdictions, the current majority rule, and 42 Pa.C.S. § 5928:

> **Confidential communications between lawyers and their clients are privileged from disclosure to the extent that they were made for the purpose of requesting or providing legal advice, the privilege has not been waived, and the advice of counsel was not sought in furtherance of criminal or fraudulent activity. "Legal advice" involves the expressed or implied interpretation and application of legal principles to guide future conduct or to assess past conduct.**

See Upjohn, 449 U.S. at 389-90; *In re County of Erie*, 473 F.3d at 418; *Bauer*, 132 F.3d at 509; *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*, 227 F.R.D. 382, 289 (W.D. Pa. 2005); *Jules Jurgensen/Rhapsody, Inc.*, 1989 WL 6210, at *1; *In re LTV Secs. Litig.*, 89 F.R.D. at 603; *Spectrum Sys. Int'l Corp.*, 581 N.E.2d at 1061; *Great Am. Ins. Co.*, 574 S.W.2d at 384-85; Restatement (Third) of the Law Governing Lawyers § 68.

CONCLUSION

For all the foregoing reasons, amici curiae urge this Court to reverse the Superior Court with a clear statement that communications made within the lawyer/client relationship are privileged when made for the purpose of soliciting or providing legal advice.

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