

IN THE SUPREME COURT OF PENNSYLVANIA

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No. 32 WAP 2007

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NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL.

Appellants,

vs.

JOHN FLEMING, ET AL.,

Appellees.

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

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Appeal from the May 21, 2007 Order of the Superior Court in No. 207 WDA 2005,  
Affirming the Order Entered on January 25, 2005 in Court of Common Pleas of  
Butler County, Civil Division, No. EQ 99-50018

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## INTRODUCTION

In its opinion dated May 21, 2007 (the “Opinion”), the Superior Court affirmed on different grounds an order of the Court of Common Pleas requiring the Appellants to produce at trial a memorandum that Appellants’ in-house lawyer wrote and sent to the company’s senior executives and lawyers (“Document No. 529”). Although the courts below described this memorandum as including, among other information, counsel’s legal analysis and opinion about pending and future litigation involving the Appellants, the Superior Court held that the document was not protected by the attorney-client privilege.

The Superior Court’s Opinion is 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 Superior Court’s holding is inconsistent with the fundamental purpose of the attorney-client privilege of facilitating the highest quality legal representation and candid legal consultation. If the Superior Court’s decision were affirmed, it would have significant adverse consequences on lawyers practicing in Pennsylvania, individuals seeking confidential legal advice, and businesses that depend each day on receiving legal analysis and opinion from counsel in order to comply with the law. The Opinion is also grounded on an unreasonable and erroneous interpretation of applicable Pennsylvania law that ignores this Court’s precedent.

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. 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 purpose of soliciting or providing legal advice.

## **STATEMENT OF INTEREST**

The Association of Corporate Counsel, or “ACC,” is a professional bar association of over 23,000 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 9,000 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 1,170 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 98 members, ACC’s Delaware Valley Chapter (“DELVACCA”) has 704 members, and ACC’s Western Pennsylvania Chapter has 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.<sup>1</sup> 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

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<sup>1</sup> The general counsel of Nationwide Mutual Insurance Company, Patricia Hatler, is a member of the board of directors of the Association of Corporate Counsel. However, ACC learned of this case from outside counsel for Nationwide, Ms. Hatler has not communicated with staff or other leadership about this case, and she recused herself from ACC’s decision-making process regarding the filing of this brief.

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 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 Association's Board of Governors met and discussed the central issue in this case and unanimously approved the filing of this amicus curiae brief on behalf of the Association.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber's underlying membership includes 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.

The Pennsylvania Chamber of Business and Industry ("Pennsylvania Chamber") is the largest broad-based business advocacy group in Pennsylvania and represents over 22,000 members and customers. The Pennsylvania Chamber's membership includes businesses of all sizes and sectors of the Commonwealth's economy. Activities of the Pennsylvania Chamber include representing its members in state and federal legislative and regulatory matters as well as participating in certain matters pertaining to activities of the legal system, such as the filing of amicus curiae briefs. The Pennsylvania Chamber believes the confidentiality of the attorney-client relationship is critically important and has chosen to participate in this filing.

## 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); 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); *see also* Pa. Rule of Prof'l Conduct 1.6 cmt. [2] (2007) (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.

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 also* 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](http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf)<sup>2</sup>; Press Release, Philadelphia Bar

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<sup>2</sup> The first Resolved clause of Recommendation 111 states in full:

(Continued...)

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."). 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 "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.

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(Continued...)

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[.]

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 Machinery 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).

The attorney-client privilege is particularly important in the corporate context because “corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law.” *Upjohn*, 449 U.S. at 392 (internal citations and quotations omitted). In a business and regulatory environment that demands corporate accountability, in-house counsel must be proactive in ensuring compliance with the law and cannot simply react to communications and questions from their corporate clients, many of whom may have difficulty keeping pace with or understanding the vast number and complexity of regulations and liabilities that may impact their work.<sup>3</sup>

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<sup>3</sup> This Court recognized the importance of in-house counsel and the cross-jurisdictional nature of lawyer practices and corporate clients’ legal needs when it adopted Pa.B.A.R. 302 in 2004, granting corporate in-house lawyers not locally licensed an authority to work in the state.

A significant part of the job of any in-house lawyer is to provide confidential legal advice based on what the lawyer observes directly from within a company. Thus, society benefits greatly from the application of the attorney-client privilege in this particular context because the privilege facilitates candid legal advice to corporate clients and fosters their compliance with the law, which is “hardly an instinctive matter” in the area of business law. *Upjohn*, 449 U.S. at 392; *see also* 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-48 (2007) (noting that “corporations consult with their in-house counsel regarding compliance with the law in advance of undertaking a course of conduct much more than individual clients do”).

## **II. THE SUPERIOR COURT’S OPINION NARROWS THE SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE AND MAKES 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 (internal citations omitted). 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. See *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."); Bricknell & Audigier, *supra*, at A-47 ("Courts generally have held that the privilege protects all attorney advice, opinions, or other communications without regard to the context of client confidences.").<sup>4</sup> In fact, the American Law Institute's Restatement of the Law Governing Lawyers takes the position that the attorney-client privilege protects all communications between

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<sup>4</sup> 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; *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1370 (10th Cir. 1997) (construing Kansas law); *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); *Jules Jurgensen/Rhapsody, Inc. v. Rolex Watch U.S.A., Inc.*, 1989 WL 6210, at \*1 (E.D. Pa. Jan. 19, 1989); *In re LTV Secs. Litig.*, 89 F.R.D. 595, 603 (N.D. Tex. 1981); *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 and Company of the Bank of England*, [2004] A.C. 610, ¶ 10 (H.L.); *Esso Australia Resources Ltd v. Commissioner 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).

attorneys and their clients for the purpose of obtaining or providing legal assistance, regardless of the content of the communications. *See* Restatement (Third) of the Law Governing Lawyers §§ 68-70 & § 69 cmt. i.<sup>5</sup>

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 communicate with clients confidentially.

The Superior Court’s Opinion is an unjustified and dangerous restriction 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 they actually reveal confidential communications made by the client, the Superior Court departed from the seldom-

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<sup>5</sup> Amici do not contend that communications by a lawyer not related to 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 in-house or outside 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 discovery. There is nothing in the Superior Court’s Opinion or the record to suggest that this is what happened here.

questioned view that confidential communications from counsel conveying legal advice are privileged. 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, without regard to whether the communication is made by the client or the lawyer. *See supra* at 10 & n.4.<sup>6</sup> This Court should adopt the majority rule and keep Pennsylvania law in line with the majority position on this issue. *See 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).

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

The Superior Court's approach not only removes Pennsylvania from the mainstream of the common law and other jurisdictions on attorney-client privilege, it also does considerable harm to the privilege itself, and particularly to the privilege's application in the corporate context. If this Court were to adopt the Superior Court's position as the law of this

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<sup>6</sup> There is some limited authority that is arguably to the contrary. For example, in the District of Columbia Circuit, an attorney's communication to a client is privileged when it transmits legal advice and "rest[s] on confidential information obtained from the client." *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984). In Wisconsin, an attorney's communication is privileged "where disclosure of the communication would indirectly reveal the substance of the [client's] confidential communications to its lawyer." *Wisconsin Newspress, Inc. v. School Dist. Sheboygan Falls*, 546 N.W.2d 143, 149 (Wisc. 1996). *See also Combined Commc'ns, Inc. v. Solid Waste Region Bd.*, 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, such authority is clearly outside of the mainstream of the traditional view of the attorney client privilege. *See* 8 Wigmore, *Evidence* § 2320.

Commonwealth, it would sacrifice important social benefits generated by the attorney-client privilege.

**A. The Superior Court's Opinion Significantly Undermines the Confidential Nature of the Attorney-Client Relationship**

The Superior Court's decision is premised on the erroneous assumption that a lawyer 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. 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. 595, 603 (N.D. Tex. 1981).

This is particularly true in the corporate context, in which companies increasingly rely on in-house counsel for legal services. 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). Such familiarity is the cumulative effect of consistent, ongoing communications from the corporate client to the in-house lawyer. In providing professional legal services to the corporation, in-house lawyers necessarily rely on and refer to these privileged

client communications. *See In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (“In a given case, advice prompted by the client’s disclosures may be further and inseparably informed by other knowledge and encounters.”).

Unlike lawyers in private practice, whom clients generally retain for a specific engagement or to provide legal advice on a specific question that the client initially communicates to the lawyer, in-house lawyers for businesses or government agencies work full time for the client. An essential part of an in-house lawyer’s “engagement” is not merely to wait around for a specific assignment, but instead proactively to communicate 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 . . . ,” that the Superior Court’s Opinion appears 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.

Thus, the Superior Court failed to appreciate that the nature of the relationship between in-house counsel and corporate clients makes it all but impossible for communications related to the provision of legal advice *not* to reveal, implicitly or explicitly, client confidences exchanged during the course of the professional relationship. The legal services provided by in-house counsel are particularly valuable to businesses precisely because they draw on counsel’s experience, observations, and ongoing communications with a corporate client. Although the Superior Court recognized that the document it required the Appellants to produce, Document 529, provided an in-house counsel’s legal opinion regarding pending litigation, the court

somehow concluded that this opinion did not reflect client confidences imparted to counsel. In fact, such legal opinion from in-house counsel, like the legal advice provided in any lawyer-client relationship, invariably flows from previous confidential client communications.

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

To the extent that one indulges the Superior Court's doubtful premise that communications from a lawyer that have the purpose of providing legal assistance do not necessarily reflect and reveal confidential client communications, the Superior Court's holding "poses inordinate practical difficulties" that make it administratively and judicially unworkable. *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 581 N.E.2d 1055, 1061 (N.Y. 1991). Because the Superior Court's holding rests on an unrealistic dichotomy between confidential client communications and a lawyer's providing 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:

In practice . . . advice does not spring from lawyers' heads as Athena did from the brow of Zeus. Inevitably, attorneys' opinions reflect an accumulation of education and experience in the law and the large society law serves. In a given case, advice prompted by the client's disclosures may be further and inseparably informed by other knowledge and encounters.

*In re Sealed Case*, 737 F.2d at 99.

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. In the corporate context, where in-house counsel accumulates a body of knowledge about a company from a great number of confidential client communications, 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.

The 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." *Id.* 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.

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 requires 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 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, it will also 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 to proceed. The practical impact of the Superior Court’s decision is to discourage the best practice of confirming such legal advice in writing.

The attorney-client privilege properly functions to ensure that, “independent of the content of any client communication, legal advice given to the client should remain confidential.” *Amerada Hess Corp.*, 619 F.2d at 986. A lawyer’s “traditional function” is to counsel clients regarding their conduct. *Rossi v. Blue Cross & Blue Shield of Greater New York*, 540 N.E.2d 703, 706 (N.Y. 1989). If the Court were to affirm the Superior Court’s Opinion and require the disclosure of lawyer communications that were made for the purpose of providing legal advice, the result would be to undermine the ability and willingness of lawyers to perform this function effectively. This is contrary to the purpose of the attorney-client privilege.

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 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 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.

Document 529 is typical of the communications that in-house attorneys routinely make to corporate clients in the course of providing legal services. According to the Superior Court, the memorandum in question discussed "counsel's opinion as to the likely outcome of current and

pending litigation” and described “what is likely achievable via litigation.” (Op. ¶ 29.) Based on this description, the communication clearly was made for the purpose of providing legal advice and necessarily draws on, and cannot be separated from, the Appellants’ communications with counsel. If analysis and legal opinion such as that expressed by counsel in Document 529 were not deemed privileged, in-house counsel would be prevented from effectively performing the professional duties for which they were hired and their clients would not be afforded the protection of lawyer-client confidentiality that they have a right to expect.

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). 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* 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.<sup>7</sup> By making Pennsylvania an outlier jurisdiction on the critical issue of the scope of the attorney-client privilege with respect to communications from in-house counsel, the Superior Court decision 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

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<sup>7</sup> 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.

jurisdictions.<sup>8</sup> The heightened need for consistency in the corporate context is yet another reason why this Court should reverse the Superior Court's decision.

**IV. 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 Services**

The Superior Court based its Opinion on its interpretation of Pennsylvania's "statutory and decisional law." First, it relied on 42 Pa.C.S. § 5928, which 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.

Second, the Superior Court pointed to intermediate appellate court decisions for the proposition that the attorney-client privilege "protects confidential communications from an attorney to his or her client only to the extent that such communications contain and would thus reveal confidential communications from the client." (Op. ¶ 13.) Based on these decisions, the Superior Court held that § 5928 did not cover communications if they did not "reveal confidential communications previously made by the client to counsel for the purpose of obtaining legal advice." (Op. ¶ 27.)

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 clearly confidential legal advice to a client. Most glaringly, the

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<sup>8</sup> 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).

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

196 Pa. at 221, 46 A. at 269 (emphasis added).

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. It is also in keeping with the modern understanding of the purpose of the attorney-client privilege to encourage candid communication *between* attorneys and their clients and facilitate the giving of professional advice in order to promote compliance with the law. *See Upjohn*, 449 U.S. at 389-90. As this Court has held, if the advice of counsel can be “extorted . . . in open court . . . , the client will exercise common prudence by avoiding counsel,” to the detriment of society and the legal system as a whole. *National Bank of West Grove*, 196 Pa. at 221, 46 A. at 269.

*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*. *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."). 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. 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 having erroneously interpreted 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 actually did properly construe 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.

**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 believe 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.**

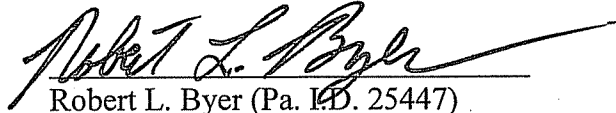
*See Upjohn*, 449 U.S. at 389-90; *In re County of Erie*, 473 F.3d at 418; *Bauer*, 132 F.3d at 509; *Jules Jurgensen/Rhapsody, Inc.*, 1989 WL 6210, at \*1; *In re LTV Secs. Litig.*, 89 F.R.D. at 603; *Spectrum Sys. Int'l Corp.*, 581 N.E.2d at 1061; *Great Am. Ins. Co.*, 574 S.W.2d at 384-85; Restatement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

CONCLUSION

For all the foregoing reasons, amici curiae urge this Court to reverse the Superior Court.

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**PROOF OF SERVICE**

I certify that I am today serving copies of the Amici Curiae Brief of the Association of Corporate Counsel, Pennsylvania Bar Association, Philadelphia Bar Association, Chamber of Commerce of the United States of America, and Pennsylvania Chamber of Business and Industry in Support of Reversal by first class mail to:

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A handwritten signature in black ink, appearing to read "Robert M. Palumbos", written over a horizontal line.

Robert M. Palumbos

December 12, 2007