

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Docket No. SJC - 11371

RFF FAMILY PARTNERSHIP, LP,

Plaintiff-Appellant,

v.

BURNS & LEVINSON, LLP, MICHAEL D. MACCLARY,
FRANCIS E. PERKINS, JR. and
CERTAIN UNDERWRITERS AT LLOYD'S,

Defendants-Appellees.

ON APPEAL FROM AN INTERLOCUTORY ORDER
OF THE SUFFOLK SUPERIOR COURT

BRIEF OF THE BOSTON BAR ASSOCIATION, AMICUS CURIAE

Robert M. Buchanan, Jr. (BBO #545910)
CHOATE, HALL & STEWART LLP
Two International Place
Boston, Massachusetts 02110
(617) 248-5000
rbuchanan@choate.com

Of Counsel:

Harold William Potter, Jr.
BBO #404240
HOLLAND & KNIGHT LLP
10 St. James Avenue
Boston, MA 02116
(617) 523-2700
harold.potter@hklaw.com

William G. Southard
BBO #473675
BINGHAM MCCUTCHEN LLP
One Federal Street
Boston, MA 02110
(617) 951-8000
william.southard@bingham.com

TABLE OF CONTENTS

	<u>Page</u>
ISSUE PRESENTED	1
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
ARGUMENT	4
I. THIS COURT SHOULD STATE A CLEAR RULE APPLYING THE ATTORNEY-CLIENT PRIVILEGE WHEN A LAWYER CONSULTS WITH IN-HOUSE ETHICS COUNSEL	4
II. CLIENTS BENEFIT WHEN A LAWYER PROMPTLY CONSULTS WITH IN-HOUSE ETHICS COUNSEL.	5
III. THERE IS A SOUND EXISTING BASIS FOR APPLYING THE ATTORNEY-CLIENT PRIVILEGE WHEN A LAWYER CONSULTS WITH IN-HOUSE ETHICS COUNSEL.	11
IV. THERE IS NO BASIS FOR CARVING OUT A "FIDUCIARY EXCEPTION" TO THE PRIVILEGE.	14
CONCLUSION	18

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES</u>	
<u>Bank Brussels Lambert v. Credit Lyonnais (Suisse),</u> 220 F. Supp. 2d 283 (S.D.N.Y. 2002)	8
<u>Burns v. Hale and Dorr LLP,</u> 242 F.R.D. 170 (D. Mass. 2007)	14
<u>Chambers v. Gold Medal Bakery, Inc.,</u> 464 Mass. 383 (2013)	6, 12
<u>Cold Spring Harbor Lab. v. Ropes & Gray LLP,</u> Civil Action No. 11-10128-RGS, 2011 U.S. Dist. LEXIS 77824 (D. Mass. July 19, 2011)	15
<u>Garvy v. Seyfarth Shaw LLP,</u> 966 N.E.2d 523 (Ill. App. Ct. 2012)	13, 14
<u>In re SonicBlue, Inc.,</u> No. 07-5082, 2008 Bankr. LEXIS 181 (Bankr. N.D. Cal. Jan. 18, 2008)	17
<u>In re Sunrise Sec. Litig.,</u> 130 F.R.D. 560 (E.D. Pa. 1989)	17
<u>Koen Book Distrib. v. Powell, Trachtman, Logan,</u> <u>Carrle, Bowman & Lombardo,</u> 212 F.R.D. 283 (E.D. Pa. 2002)	16
<u>Spinner v. Nutt,</u> 417 Mass. 549 (1994)	14
<u>TattleTale Alarm Sys., Inc. v. Calfee, Halter &</u> <u>Griswold, LLP,</u> Case No. 2:10-cv-226, 2011 U.S. Dist. LEXIS 10412 (S.D. Ohio Feb. 3, 2011)	13
<u>United States v. Jicarilla Apache Nation,</u> 131 S. Ct. 2313 (2011)	14
<u>Upjohn Co. v. United States,</u> 449 U.S. 383 (1981)	6, 12, 16

OTHER AUTHORITIES

ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion No. 08-453 (2008)	5, 17
BBA Ethics Committee, Opinion No. 2004-1	9
Elizabeth Chambliss, <u>The Scope of In-Firm Privilege</u> , 80 Notre Dame L. Rev. 1721, 1756 (2005)	6, 7, 15
Mass. Rules of Professional Conduct, Rule 1.4	12
Mass. Rules of Professional Conduct, Rule 1.7	16
Mass. Rules of Professional Conduct, Rule 5.1(a)	7
N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Opinion No. 789 (2005)	17, 18
Restatement (Third) of the Law Governing Lawyers § 46(2) cmt. c (2000)	12, 13

ISSUE PRESENTED

Whether the attorney-client privilege applies when a lawyer, who practices in a law firm, consults with the firm's in-house ethics counsel.

INTEREST OF AMICUS CURIAE

The Boston Bar Association ("BBA") has long maintained that the attorney-client privilege is integral to the professional practice of law and to the administration of justice. The BBA includes large law firms, which typically make a formal designation of in-house ethics counsel. In addition, the BBA includes many smaller law firms, where one partner may consult with another partner for the purpose of seeking advice about professional ethics. Recognition of the attorney-client privilege in these settings will encourage attorneys to obtain legal and ethical advice to ensure adherence to the rules of professional conduct and to best serve their clients.

The mission of the BBA, which traces its origins to John Adams, is "to advance the highest standards of excellence for the legal profession, facilitate access to justice, and serve the community at large." Calling on the substantial legal expertise of its

members, the BBA serves as a resource for the judiciary, as well as the legislative and executive branches of government. From its beginning, the BBA and its members have played active roles in government and public service, and have participated in legal and policy discussions and debates.

The BBA takes no position on the merits of the claim underlying this appeal, but agrees with the ruling of the Superior Court on the central issue.

The issue presented by this appeal is important for all of the BBA's members who practice their profession in law firms, large or small, and for their clients. The BBA therefore supports the adoption by this Court of a clear rule providing that the attorney-client privilege applies when a lawyer consults with in-house ethics counsel.

STATEMENT OF THE CASE

This case is before the Court on interlocutory appeal of an Order of the Superior Court's Business Litigation Session (Billings, J.) dated November 20, 2012 (hereinafter, the "BLS Order"). The BLS Order allowed in part and denied in part the motion of plaintiff-appellant RFF Family Partnership, LP ("RFF") to compel discovery from defendant-appellee Burns & Levinson, LLP ("B&L").

ARGUMENT

I. THIS COURT SHOULD STATE A CLEAR RULE APPLYING THE ATTORNEY-CLIENT PRIVILEGE WHEN A LAWYER CONSULTS WITH IN-HOUSE ETHICS COUNSEL.

This Court has an opportunity to establish a clear statement of the rule applying the attorney-client privilege to in-house counsel in law firms. The issue presented by this case has not been decided by the highest appellate court in any jurisdiction. Some trial or intermediate appellate courts in other jurisdictions have considered the question and muddled their analysis. Here, the Superior Court reached the correct result with the correct analysis. This Court should affirm the Superior Court's legal conclusion, and should take the occasion to establish the governing rule applicable to all law firms.

The attorney-client privilege is well-established. It should apply to in-house ethics counsel in law firms, just as it applies to in-house counsel in other organizations, pursuant to the precedents of this Court. Nothing in the history of the profession or in this Commonwealth suggests otherwise.

Indeed, clients benefit when their lawyers are encouraged to consult freely with in-house ethics

counsel in a privileged communication.¹ The attorney-client privilege should apply to these consultations so long as:

(1) in-house counsel has been formally or informally designated to provide advice to the law firm, along with the counsel's other work; (2) in-house counsel does not work on the particular client matter that presents an issue; and (3) the time spent by in-house counsel on advising the law firm is absorbed by the law firm and is not billed or charged to any client.

When advice is rendered by in-house counsel in these circumstances, the attorney-client privilege should be triggered immediately -- there is no requirement for the client to be informed or to give consent for such a consultation.²

II. CLIENTS BENEFIT WHEN A LAWYER PROMPTLY CONSULTS WITH IN-HOUSE ETHICS COUNSEL.

This Court has repeatedly emphasized the importance of the attorney-client privilege for organizations. Most recently, on February 8, 2013,

¹ Different law firms designate in-house counsel by different titles, such as "ethics counsel," "loss prevention counsel," "general counsel," and so on. In some law firms, in-house counsel are appointed by a formal designation. In other law firms, these designations are informal. All of these designations should be recognized, because all of them promote high standards of professional ethics in the service of clients.

² "Consent of the client is not required before a lawyer consults with in-house ethics counsel, nor must the client be informed of the consultation after the fact." ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion No. 08-453, at 8 (2008). See page 10, *infra*.

this Court decided Chambers v. Gold Medal Bakery, Inc., 464 Mass. 383, 395 (2013), on the basis of

the policy rationale underlying the attorney-client privilege: it promotes candid communications between attorneys and organizational clients. See Upjohn Co. v. United States, 449 U.S. 383, 389-390 (1981).

The same well-recognized policy rationale applies here: the attorney-client privilege promotes candid communications between the in-house counsel of a law firm and the lawyers who practice their profession at the firm.

The principles of professional ethics are complicated. Compliance with these complex principles requires substantial attention. As a leading commentator explains:

Law firms, like corporations, face a vast and complicated array of regulatory legislation, where the line between permissible and prohibited conduct is not always an instinctive matter. In addition to state and federal law, including civil liability for legal malpractice, lawyers also are subject to an elaborate web of professional regulation, including state-by-state ethics rules, formal and informal bar opinions, judicial regulation, and federal agency regulation.

Elizabeth Chambliss, The Scope of In-Firm Privilege, 80 Notre Dame L. Rev. 1721, 1756 (2005) (internal quotations omitted).

Under the rules promulgated by this Court, law firms are required to take steps to ensure that all lawyers of the firm meet their obligations under the rules of professional ethics.

A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

Mass. Rules of Professional Conduct, Rule 5.1(a).

Increasingly often, law firms designate in-house ethics counsel who address these issues.

From a regulatory standpoint, the emergence of law firm in-house counsel is a pivotal development. First, the ready availability of counsel encourages lawyers to raise questions that they otherwise might ignore. The firm counsel in our study report that lawyers come to them with urgent questions throughout the day.

Chambliss, *supra*, at 1757-58 (footnotes omitted).

The following are three examples of the types of questions that arise every day in Boston law firms.

1. Example 1

Law Firm represents Client A and also represents Client B. Client B calls Lawyer asking for urgent advice about an affiliate of Client A. Does Lawyer have a conflict of interest?

Client B needs to obtain advice promptly; and, at the same time, Client A deserves to have the Law Firm

conduct a correct analysis of its potential conflict. The Law Firm will run a conflict check. The Firm's database will identify a series of past and current engagements that may or may not be relevant. The Lawyer will need to analyze whether Client A is a current client of the Firm; whether the affiliate of Client A also should be considered a client for the purposes of this analysis; and whether the Firm's relationship with any client may be harmed by undertaking the new engagement for Client B. The most practical approach would be to have In-House Counsel speak with the Lawyer who represents Client B, and speak separately with the partner who represents Client A. Typically, there is no time for the Firm to consult outside counsel. Rather, the Lawyer should be encouraged to have a candid discussion with In-House Ethics Counsel, who likely will be in a position to respond within hours. Their attorney-client communication should be privileged and should not be disclosed to either Client A or Client B.³

³ RFF suggests that the attorney-client privilege might not apply to the discussion of such an "internal conflicts review." See Brief of Appellant, RFF Family Partnership, p. 18 [hereinafter "RFF's Brief"] (quoting Bank Brussels Lambert v. Credit Lyonnais (Suisse), 220 F. Supp. 2d 283 (S.D.N.Y. 2002)). That would be an unsound result. The attorney-client privilege should apply to any legal advice rendered by In-House Counsel on this subject. The rules of professional ethics clearly require checking for

2. Example 2

Lawyer is preparing for a strategy discussion with Client, which is scheduled to begin in a few hours. Suddenly Lawyer realizes that he may have made a mistake. What should he do? Does he need to disclose something to the Client?

The Lawyer needs to analyze whether he has made a mistake; whether the mistake may be corrected; and what options are available to the Client. It would not be in the Client's interest for the Lawyer to rely solely on his own individual judgment, which may be clouded.⁴ If the Lawyer were required to consult outside counsel in order to preserve the attorney-client privilege, the Lawyer might be frozen in uncertainty for a few days, and this would not benefit the Client. There is no time to consult outside counsel in an urgent situation. Instead, the Lawyer should be encouraged to consult In-House Ethics Counsel right away. The privilege will protect advice, not facts given to in-house counsel. Indeed,

conflicts. The Law Firm's analysis of these checks should remain confidential. See e.g., BBA Ethics Committee, Opinion No. 2004-1. The need for confidential analysis may arise at intake (as in Example 1) or may arise during the course of the representation, such as when Client A or Client B changes its corporate affiliation.

⁴ As the Superior Court Judge aptly stated: "Before the first attorney can make a fully informed decision concerning the appropriate course ... s/he may be well advised to consult counsel who may be better schooled in ethical rules, and will almost certainly be better capable of dispassionate analysis of the problem at hand." BLS Order, p. 9.

In-House Ethics Counsel may advise the Lawyer that he must disclose certain facts to the Client.⁵ The Client will benefit if this advice is obtained promptly.

3. Example 3

A real estate developer Client sends a letter accusing Law Firm of malpractice, and at the same time insists that Law Firm continue performing work for the developer. Should Law Firm continue performing work for this Client?

The Law Firm needs to analyze its ethical obligations promptly. The Lawyer who receives the demand letter will bring it to In-House Ethics Counsel. In-House Counsel will ask the Lawyer to explain the facts, will review the allegations, and will consider the request to continue the representation. In-House Counsel will then advise on whether the Law Firm should withdraw, or should continue performing work for the Client; and on whether the Firm should retain outside counsel in its defense. The sooner this advice is obtained, the sooner the Client will know whether the Client needs to retain substitute counsel. It would not be practical to seek consent of the Client for this

⁵ The Lawyer is not required, however, to inform the Client that the Lawyer has consulted In-House Counsel. If this were required, the Lawyer would be less likely to consult. See page 5, note 2, *supra*.

consultation, as RFF has advocated, because the Law Firm needs to understand the situation before it can decide what to say to the Client.

* * *

In each of these three examples, both the Client and the Law Firm will benefit when the Lawyer promptly seeks advice from In-House Ethics Counsel.

III. THERE IS A SOUND EXISTING BASIS FOR APPLYING THE ATTORNEY-CLIENT PRIVILEGE WHEN A LAWYER CONSULTS WITH IN-HOUSE ETHICS COUNSEL.

The Superior Court analyzed the central question in this appeal as follows:

I accept that law firms are subject to the Upjohn principle, in that its members' private communications with the firm's "ethics counsel" or other in-house attorney, in his or her capacity as such, for the purpose of obtaining legal advice on a matter of common concern to the member and the firm, are subject to the attorney-client privilege.

. . . .

Compelled disclosure of the first attorney's communications with ethics counsel ... does little to advance the interests of the client (who is owed disclosure of material facts whether or not the first attorney has consulted counsel), but does much to undermine the important societal goals served by the attorney-client privilege.

BLS Order, pp. 6, 10 (footnotes omitted). The Superior Court's analysis is correct.

Sometimes the law firm will have an obligation to disclose to the client certain facts that are pertinent to the engagement. See Mass. Rules of Professional Conduct, Rule 1.4. Even where this obligation arises, however, the law firm does not have an obligation to disclose the communication in which the lawyer sought ethics advice. "A fact is one thing and a communication concerning that fact is an entirely different thing." Chambers, 464 Mass. at 392 (quoting Upjohn, 449 U.S. at 395-96).⁶

The Restatement (Third) of the Law Governing Lawyers recognizes the same distinction:

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

Restatement (Third) of the Law Governing Lawyers § 46(2) cmt. c (2000) (emphasis added). The Restatement, issued in 2000, synthesizes decades of

⁶ "The [Lawyer] cannot be compelled to answer the question, 'What did you say or write to the [In-House Counsel]?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his [In-House Counsel]." Upjohn, 449 U.S. at 396 (internal quotations omitted).

work to codify the complex body of law that governs the legal profession. As the Restatement observes, honoring the attorney-client privilege for lawyers helps them "to assure effective and appropriate representation" for their clients.

Thus, the better reasoned authorities support the result reached by the Superior Court below, which applies the time-honored attorney-client privilege. "There is nothing exceptional about the proposition that individual attorneys within a law firm may seek legal advice from their colleagues about either personal matters or matters relating to the firm's interests, and that when they do so, they stand in a client relationship to the attorney whose advice has been sought." TattleTale Alarm Sys., Inc. v. Calfee, Halter & Griswold, LLP, Case No. 2:10-cv-226, 2011 U.S. Dist. LEXIS 10412, at *9 (S.D. Ohio Feb. 3, 2011). See also Garvy v. Seyfarth Shaw LLP, 966 N.E.2d 523, 537 (Ill. App. Ct. 2012) (attorney-client privilege applies to lawyer's consultation with in-house counsel).

IV. THERE IS NO BASIS FOR CARVING OUT A "FIDUCIARY EXCEPTION" TO THE PRIVILEGE.

Some courts have ruled that a fiduciary does not have the protection of attorney-client privilege; and that therefore a law firm, like a fiduciary, does not have the protection of attorney-client privilege. See RFF's Brief, pp. 14-18. These rulings rest on a false premise, as the Superior Court judge correctly explained. See BLS Order, pp. 8-9 (citing United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2321 (2011)). Contrary to what these rulings assume, a trustee does indeed have the right to consult an attorney for guidance as to his own conduct and potential liability -- see Spinner v. Nutt, 417 Mass. 549, 553 (1994) ("A trustee's attorney guides the trustee in [the] decision-making process.") -- and a trustee may indeed invoke the attorney-client privilege where the trustee has sought legal advice for his own benefit.⁷ See Garvy, 966 N.E.2d at 534

⁷ Judge Gorton incorrectly applied the supposed "fiduciary exception" in his 2007 decision in Burns v. Hale and Dorr LLP, 242 F.R.D. 170 (D. Mass. 2007). Judge Gorton correctly stated that a trustee has a duty to disclose certain information to the beneficiaries of the trust; but he went on to state, incorrectly, that the trustee must disclose privileged communications regarding that information. Id. at 173 ("Because the firm owed a fiduciary duty to Alexis Burns as the trust beneficiary, there is no policy reason why H&D should be allowed to withhold disclosure of information relevant to her claim."). Judge Gorton's 2007 opinion was the sole basis, in turn, for a subsequent ruling by

("The fiduciary-duty exception does not ... apply to legal advice rendered concerning the personal liability of the fiduciary or in anticipation of adversarial legal proceedings against the fiduciary."). A lawyer, too, has the right to consult an attorney for guidance. "A law firm, like any fiduciary, maintains the right to seek legal advice regarding its duties to clients, and there is nothing about the firm's duty to the client per se that prevents the privilege from attaching." Chambliss, *supra*, at 1744.

Building on the unsound "fiduciary exception," the courts cited by RFF have ruled that the attorney-client privilege does not apply where the law firm needs to analyze an issue involving "a current client." See RFF's Brief, pp. 17-21. These rulings are poor public policy. They have never been endorsed by this Court, and they have no sound conceptual basis. These rulings assume (i) that the law firm has a conflict of interest when a lawyer consults with his in-house ethics counsel, and (ii) that "[a]s a result"

Judge Stearns, which did not state any further analysis. See Cold Spring Harbor Lab. v. Ropes & Gray LLP, Civil Action No. 11-10128-RGS, 2011 U.S. Dist. LEXIS 77824 (D. Mass. July 19, 2011). Both rulings are incorrect.

the attorney-client privilege is "vitiated." See RFF's Brief, p. 21 (quoting Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, 212 F.R.D. 283, 286 (E.D. Pa. 2002)). This result does not follow.

A Rule 1.7 conflict of interest is not relevant to the analysis of the privilege. The attorney-client privilege comes into existence at the moment when an organization consults with in-house counsel for the purpose of seeking legal advice. Upjohn, 449 U.S. at 389-90. In many instances the client and the law firm do not have conflicting interests. Even in those instances where they do have conflicting interests, it does not follow that the law firm's attorney-client privilege is "vitiated." So far as we are aware, there is no authority, in any other context, for forfeiting the attorney-client privilege as the result of a conflict of interest. RFF does not cite any such authority.

Instead, RFF quotes the muddled decision of one Bankruptcy Court, which concludes that "where conflicting duties exist, the law firm's right to claim privilege ... must give way to the interest in protecting current clients who may be harmed by the

conflict." RFF's Brief at 17 (quoting In re SonicBlue, Inc., No. 07-5082, 2008 Bankr. LEXIS 181, at *26 (Bankr. N.D. Cal. Jan. 18, 2008)). This opinion rests on a point of confusion. It is not correct to assume that "clients ... may be harmed" by honoring the attorney-client privilege. Harm does not arise when the lawyer consults in-house ethics counsel. See N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Opinion No. 789 (2005); ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion No. 08-453 (2008). In some instances, the client may claim that he has been harmed by an action or omission of the lawyer, and if their dispute goes on to litigation, then the assertion of attorney-client privilege will be subject to the usual rules.⁸

Finally, some courts have suggested that the attorney-client privilege does not apply when a lawyer consults with in-house counsel, but does apply when a lawyer consults with outside counsel. See e.g., In re Sunrise Sec. Litig., 130 F.R.D. 560, 597 n. 12 (E.D. Pa. 1989). This suggested rule would inhibit lawyers

⁸ The party asserting the privilege will often be required to prepare a privilege log. The privilege log will allow the client to explore whether the requisites for the attorney-client privilege have been established.

from seeking prompt advice on their ethical obligations.

To hold that a law firm must always seek guidance outside its halls in order to preserve an attorney-client relationship ... is simply impractical in the day-to-day life of many law firms, when issues of professional responsibility frequently require prompt responses most usefully provided by lawyers knowledgeable about the firm, its client relationships and its culture.

N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Opinion No. 789, at 3. This suggested rule therefore would run contrary to the well-established rationale for the attorney-client privilege; and, in the long run, it would tend to harm clients, as well as lawyers.⁹

CONCLUSION

This Court should affirm the decision of the Superior Court. This Court should take the opportunity to clarify that the attorney-client privilege applies, when a lawyer consults with in-house ethics counsel of a law firm, so long as:

(1) in-house counsel has been formally or informally designated to provide advice to the law firm, along with counsel's other work; (2) in-house counsel does not work on

⁹ In addition, this suggested rule presupposes that legal advice by an in-house lawyer is less worthy of protection than advice obtained from outside counsel. That presupposition is incorrect and obsolete. In-house counsel serve highly valuable roles in many organizations, including government agencies, corporations and law firms. Their advice is worthy of protection.


the particular client matter that presents an issue; and (3) the time spent by in-house counsel on advising the law firm is absorbed by the law firm and is not billed or charged to any client.

When advice is rendered by in-house counsel in these circumstances, the attorney-client privilege should be triggered immediately. There is no requirement for the client to be informed or to give consent for such a consultation.

Respectfully submitted,

THE BOSTON BAR ASSOCIATION

By its attorneys,



Robert M. Buchanan, Jr. (BBO #545910)
CHOATE, HALL & STEWART LLP
Two International Place
Boston, Massachusetts 02110
(617) 248-5000
rbuchanan@choate.com

Of Counsel:

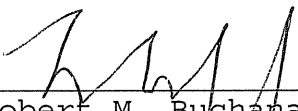
Harold William Potter, Jr. (BBO #404240)
HOLLAND & KNIGHT LLP
10 St. James Avenue
Boston, MA 02116
(617) 523-2700
harold.potter@hklaw.com

William G. Southard (BBO #473675)
BINGHAM MCCUTCHEN LLP
One Federal Street
Boston, MA 02110
(617) 951-8000
william.southard@bingham.com

Dated: March 15, 2013

CERTIFICATION PURSUANT TO
MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16

I, Robert M. Buchanan, Jr., hereby certify that, to the best of my knowledge, the brief filed herewith complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs, including, without limitation, Rule 16 and Rule 20.



Robert M. Buchanan, Jr. (BBO #545910)
CHOATE, HALL & STEWART LLP
Two International Place
Boston, Massachusetts 02110
(617) 248-5000
rbuchanan@choate.com

Dated: March 15, 2013

CERTIFICATE OF SERVICE

I, Robert M. Buchanan, Jr., Esq., under the penalties of perjury, hereby certify that copies of the foregoing Brief of the Boston Bar Association, Amicus Curiae were served by first-class mail (and also by electronic mail) on the following parties on March 15, 2013:

Counsel for the Appellant

Richard E. Briansky, Esq.
Prince Lobel Tye LLP
100 Cambridge Street, Suite 2200
Boston, MA 02114
rbiansky@princelobel.com

Counsel for the Appellees

Thomas E. Peisch, Esq.
Conn Kavanaugh Rosenthal Peisch & Ford, LLP
Ten Post Office Square
Boston, MA 02109
TPeisch@ConnKavanaugh.com

Counsel for Association of Professional
Responsibility Lawyers

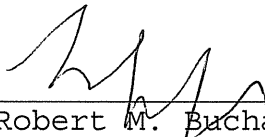
Roy A. Bourgeois, Esq.
BourgeoisWhite, LLP
One West Boylston Street, Suite 307
Worcester, MA 01605
royb@bourgeoiswhite.com

Counsel for Attorneys' Liability Assurance
Society, Inc., A Risk Retention Group

Gary M. Ronan, Esq.
Goulston & Storrs, PC
400 Atlantic Avenue
Boston, MA 02110
gronan@goulstonstorrs.com

Counsel for American Bar Association

Holly M. Polglase, Esq.
Hermes, Netburn, O'Connor & Spearing, P.C.
265 Franklin Street, Seventh Floor
Boston, MA 02110
hpolglase@hermesnetburn.com



Robert M. Buchanan, Jr. (BBO #545910)
CHOATE, HALL & STEWART LLP
Two International Place
Boston, Massachusetts 02110
(617) 248-5000
rbuchanan@choate.com

Dated: March 15, 2013