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RFF FAMILY PARTNERSHIP, LP v. BURNS & LEVINSON, LLP:
 MASSACHUSETTS CONSTRUCTS A FUNCTIONAL FRAMEWORK FOR
 IN-FIRM PRIVILEGE AND EXPOSES OTHER STATES' NEED FOR
 RENOVATION

KELSEY HUGHES-BLAUM*

“In law, as in architecture, form should follow function, and we prefer a formulation of the attorney-client privilege that encourages attorneys faced with the threat of legal action by a client to seek the legal advice of in-house ethics counsel”¹

I. LAYING THE FOUNDATION: AN INTRODUCTION TO IN-FIRM COUNSEL AND THE “CURRENT-CLIENT” ISSUE

Lawyers make mistakes just like everyone else.² Yet, the unique world of legal practice, with its emphasis on protecting client confidences, raises the question: Who can lawyers turn to if they make a mistake?³ Because a lawyer's most innocent error can have devastating consequences, professional liability insurers are increasingly urging firms to hire in-house ethics counsel to advise attorneys on preventing and responding to malpractice claims.⁴ A 2005 survey

* J.D. Candidate 2015, Villanova University School of Law. This Note is dedicated to my father, James Blaum, who has served as a role model and constant source of encouragement throughout my law school career. I would like to thank my family and friends for their endless support, and the editorial staff of the *Villanova Law Review* for their valuable input and assistance throughout the writing process.

1. RFF Family P'ship, LP v. Burns & Levinson, LLP, 991 N.E.2d 1066, 1080 (Mass. 2013) (preserving attorney-client privilege for in-firm communications).

2. See Corinne Cooper, *Teaching Associates to Make Mistakes*, L. PRAC. MGMT. (July/Aug. 1993), available at http://www.professionalpresence.com/html/articles/mistake_management.php (“It's time we admitted frankly that attorneys make mistakes. No matter how hard you work, nor how carefully you prepare, you are going to fumble. Mistakes don't end with experience or partnership. Attorneys are only human, and to err is, after all, our most human characteristic.”).

3. See Ronald D. Rotunda, *Why Lawyers Are Different and Why We Are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior—In-House Ethics Counsel, Bill Padding, and In-House Ethics Training*, 44 AKRON L. REV. 679, 703 (2011) (describing ethical challenges unique to law firms and inquiring “[t]o whom, then, should the lawyer raise questions?”); see also Carolyn Elefant, *When Lawyers Make Mistakes*, LAW.COM (Feb. 7, 2005), http://www.law.com/jsp/article.jsp?id=900005542170&When_Lawyers_Make_Mistakes&slreturn=20130822180835 (noting that attorneys' obligation to protect client confidentiality forces many lawyers to conceal their errors).

4. See Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1758–59 (2005) (“[L]iability insurers increasingly are encouraging law firms to appoint in-house counsel.”); Jeremy A. Gogel, *An Exception to the Attorney-Client Privilege: Intra-Firm Communications About Potential Legal Malpractice Claims*, 54 FOR DEF., No. 4, Apr. 2012, at 66, 66, available at <http://dritoday.org/ftd/2012-04F.pdf> (“With the number of legal malpractice and ethics inquiries on the rise, law firms have sought to lessen the potential impact from these actions by appointing one or more members of their firms as general counsel.”). The Attorneys' Liability Assurance Society (ALAS) is a risk retention group that insures approximately 58,000 attorneys in over forty-five states. See *About the ALAS*

revealed that seventy percent of the nation's largest firms appoint in-house counsel.⁵ The accessibility of law firm in-house counsel affords attorneys the opportunity to address and rectify their mistakes before it is too late.⁶

While the availability of in-house counsel may answer questions concerning a lawyer's ability to seek advice, it also warrants further inquiry.⁷ Prior to engaging in candid communication with in-house counsel, the thoughtful lawyer will hesitate, wondering: Well, are these communications protected under the attorney-client privilege?⁸ Generally, communications between a firm's attorneys and its in-house counsel are protected under the privilege.⁹ Nevertheless, several courts have refused to extend the privilege where the in-firm communications involved a current client.¹⁰ These decisions

Companies, ALAS, <http://www.alas.com/public/about.aspx> (last visited Feb. 10, 2014) (describing scope of business and services provided). ALAS's most recent report illustrates that professional liability claims are an unfortunate yet inevitable byproduct of modern legal practice. See ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2012 ANNUAL REPORT 14 (2012), available at <http://www.alas.com/public/AnnualReport2012.pdf> (discussing prevalence of professional liability claims). In 2012 alone, ALAS saw 8.5 malpractice claims reported per every 1,000 lawyers. See *id.*

5. See Rotunda, *supra* note 3, at 705 (describing results reported by 2005 survey). The 2005 survey results reflected a sixty-three percent increase in firms appointing in-house counsel from 2004. See *id.* (noting increase from prior year). Additionally, ninety-two percent of lawyers serving as in-house counsel were also partners at their respective firms. See *id.*

6. See *id.* at 705–06 (“[O]ne study showed that, over a five-year period, law firms that employ general counsel . . . spend \$1 million less on defense costs and indemnity payments in connection with malpractice claims. Because these firms are more ethical, they have fewer malpractice claims.” (citing Anthony E. Davis, *The Emergence of Law Firm General Counsel and the Challenges Ahead*, 20 PROF. LAW., NO. 2, 2010, at 1)).

7. See Chambliss, *supra* note 4, at 1766 (admitting use of firm in-house counsel raises ethical questions).

8. See Gogel, *supra* note 4 (cautioning attorneys and in-house counsel to become familiar with their jurisdiction's case law before seeking or giving advice). See generally Allison D. Rhodes & Peter Tran, *The Attorney-Client Privilege May Not Protect Communications Between Firm In-House Counsel and Firm Lawyers*, ABA CTR. FOR PROF'L RESP., http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/39th_conf_session11_atty_client_privilege_between_in_house_counsel_and_firm_lawyers.authcheckdam.pdf (last visited Feb. 10, 2014) (“In light of recent court decisions, lawyers need to be aware that communications with in-house counsel about a potential legal malpractice claim may not be protected by the attorney-client privilege.”).

9. See, e.g., *United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996) (recognizing in-firm privilege for associates assigned to internal investigation); *Hertzog, Calamari & Gleason v. Prudential Ins. Co.*, 850 F. Supp. 255, 255 (S.D.N.Y. 1994) (holding privileged communications between firm's attorneys and its in-house counsel); *Lama Holding Co. v. Shearman & Sterling*, No. 89 Civ. 3639, 1991 WL 115052 (S.D.N.Y. June 17, 1991) (holding privilege attaches to in-firm communication so long as in-house counsel is designated as such).

10. See, e.g., *Asset Funding Grp., LLC v. Adams & Reese, LLP*, Civil Action No. 07-2965, 2008 WL 4948835 (E.D. La. Nov. 17, 2008) (declining to apply privilege due to conflict between firm's fiduciary duties to itself and to client); *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 WL 578989 (N.D. Cal. Feb. 21, 2007) (rejecting in-firm privilege based on fiduciary relationship and conflicting interest between client and lawyer); *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 287 (S.D.N.Y. 2002) (rejecting in-firm privilege); *Koen Book Distributions v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 284–85 (E.D. Pa. 2002) (rejecting in-firm

abrogating privilege in the current-client context rely on Pennsylvania precedent, the foundation of which has since been highly criticized.¹¹

The Supreme Judicial Court of Massachusetts was the first state supreme court to address in-firm privilege in *RFF Family Partnership, LP v. Burns & Levinson, LLP*.¹² In this landmark ruling, the court rejected prior precedent and held that the attorneys' communications with in-house counsel were protected by the attorney-client privilege.¹³

While many have applauded the Massachusetts Supreme Judicial Court's ruling in *RFF Family Partnership*, some have expressed concern that it "protects the interests of lawyers over those of the clients."¹⁴ This Note disagrees with critics and argues that this Massachusetts ruling provides a functional framework for in-firm privilege from which the interests of both lawyers and their clients are served.¹⁵ Part II provides an overview of in-firm

privilege); *In re Sunrise Sec. Litig.*, 130 F.R.D. 595, 598 (E.D. Pa. 1989) (denying in-firm privilege in current-client context); *SonicBlue Inc. v. Portside Growth & Opportunity Fund*, Bankr. Nos. 03-51775, 03-51776, 03-51777, 03-51778-MM, 2008 WL 170562 (Bankr. N.D. Cal. Jan. 18, 2008) (holding law firms cannot assert privilege against client when communications arise out of self-representation on conflict of interests grounds).

11. See, e.g., *Asset Funding Grp.*, 2008 WL 4948835 (declining to apply privilege due to conflict between firm's fiduciary duties to itself and to client); *Thelen Reid & Priest*, 2007 WL 578989 (rejecting in-firm privilege based on fiduciary relationship and conflicting interest between client and lawyer); *Bank Brussels Lambert*, 220 F. Supp. at 287 (rejecting in-firm privilege); *Koen Book Distribs.*, 212 F.R.D. at 284-85 (relying on *Sunrise* in rejecting in-firm privilege); *In re Sunrise*, 130 F.R.D. at 595-96 (refusing attorney-client privilege protection in case involving current client); *SonicBlue*, 2008 WL 170562 (holding law firm could not assert privilege against client when communications arise out of self-representation on conflict of interests grounds). In *Sunrise*, the United States District Court for the Eastern District of Pennsylvania was the first court to analyze the issue of in-firm privilege. See Chambliss, *supra* note 4, at 1728 ("The first case to consider a claim of in-firm privilege was *In re Sunrise* . . ."). After *Sunrise*, several courts adopted Pennsylvania's reasoning to circumvent the attorney-client privilege in current-client cases. See *id.*

12. See *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1070 (Mass. 2013) ("Neither this court nor any other court of last resort in the United States appears to have addressed the applicability of the attorney-client privilege to a law firm's in-house communications concerning a current client.").

13. See *id.* at 1080-81 (recognizing privilege for in-firm communications relating to current client's malpractice claim).

14. Joan C. Rogers, *ABA Formally Backs Privilege in Consults with Inside Counsel*, CORP. L. DAILY, Aug. 23, 2013, at 1 [hereinafter Rogers, *ABA Formally Backs Privilege*] (noting Association of Corporate Counsel's opposition to in-firm privilege in current-client context). The Association of Corporate Counsel (ACC) has argued "clients pay law firms to serve them as advocates, not fight them as adversaries." *Id.* at 2 (describing ACC's stance that law firms' duty of loyalty should prohibit firms from claiming privilege to hide information from current clients). For further discussion of the ACC's stance on in-firm privilege, see *infra* note 132 and accompanying text. See generally Richard Zitrin, *Viewpoint: Law Firms Gain Secrecy at the Expense of Client Loyalty*, THE RECORDER (July 19, 2013), http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202611391549&Viewpoint_Law_Firms_Gain_Secrecy_at_the_Expense_of_Client_Loyalty ("I have to conclude that courts ruling this way are simply protecting the interests of lawyers over those of clients, and that is inexcusable.").

15. See *ABA Resolution 103* (adopted June 2013) ("[T]he American Bar Association

privilege and discusses how courts had analyzed its application to in-firm communications leading up to *RFF Family Partnership*.¹⁶ Part III details the facts, procedural history, and holding of the decision.¹⁷ Part IV analyzes the court's holding and argues that *RFF Family Partnership* provides a practical approach to in-firm privilege that is limited enough to benefit firms, lawyers, and their clients.¹⁸ Part V concludes by asserting that many jurisdictions will need to rethink their approaches to in-firm privilege in light of Massachusetts's improved framework.¹⁹

II. THE NUTS AND BOLTS OF IN-FIRM PRIVILEGE: AN OVERVIEW OF EVIDENCE, ETHICS, AND APPLICATIONS

The issue of in-firm privilege arises out of a complex interplay between the evidentiary and ethical rules governing today's legal profession.²⁰ While the attorney-client privilege functions to promote candor between attorneys and their clients by protecting certain communications from discovery in litigation, the Model Rules of Professional Conduct complicate the privilege's application to in-firm communications.²¹ Moreover, because law firm in-house counsel was and still remains a fairly new development, the first court to interpret in-firm privilege relied on questionable case law, which resulted in poorly reasoned analysis.²² More than two decades after the seminal case of *In re Sunrise Securities Litigation*,²³ courts and critics are beginning to recognize the weak foundation upon which in-firm privilege has been rejected in the past and the need for a reconstructed framework in the future.²⁴

recognizes that client representation will be advanced by permitting [in-firm] confidential consultation"); see also Justin Fields, *Viewpoint: Attorney-Client Privilege Is for Lawyers, Too*, THE RECORDER (Aug. 16, 2013), http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202615401043&Viewpoint_AtorneyClient_Privilege_Is_for_Lawyers_Too&slretur n=20130903063815 (recognizing advantages of *RFF Family Partnership* to lawyers and clients).

16. For a further discussion of the attorney-client privilege and how courts have applied it in the past, see *infra* notes 20–84 and accompanying text.

17. For a further discussion of the facts, holding, and rationale of *RFF Family Partnership*, see *infra* notes 85–122 and accompanying text.

18. For a further discussion of the public reaction to *RFF Family Partnership* and how Massachusetts's framework serves the interests of firms and clients, see *infra* notes 123–63 and accompanying text.

19. For a further discussion of how *RFF Family Partnership* will impact other jurisdictions, see *infra* notes 164–69 and accompanying text.

20. See Chambliss, *supra* note 4, at 1767 ("Law firms' reliance on in-house counsel carries responsibilities as well as privileges").

21. See *infra* notes 25–46 and accompanying text (discussing evidentiary and ethical complexities surrounding in-firm privilege).

22. See Chambliss, *supra* note 4, at 1728 ("The first case to consider a claim of in-firm privilege was *In re Sunrise*" (citing *In re Sunrise Sec. Litig.*, 130 F.R.D 560, 597 (E.D. Pa. 1989))); see also Douglas R. Richmond, *Essential Principles for Law Firm General Counsel*, 53 U. KAN. L. REV. 806, 832 (2005) [hereinafter Richmond, *Essential Principles*] (describing *Sunrise* as "wrongly decided").

23. 130 F.R.D 560 (E.D. Pa. 1989).

24. See *TattleTale Alarm Sys., Inc. v. Calfee, Halter & Griswold, LLP*, No. 2:10-cv-226, 2011 WL 382627, at *4–10 (S.D. Ohio Feb. 3, 2011) (noting that any decision relying on

A. *An Evidentiary Infrastructure with Ethical Implications*

The attorney-client privilege is the oldest of the common law privileges protecting confidential communications.²⁵ The privilege exists to encourage “full and frank communication” between attorney and client.²⁶ To achieve this level of candor, the privilege shields attorney-client communications from discovery in litigation.²⁷

In *Upjohn Co. v. United States*,²⁸ the United States Supreme Court held that the attorney-client privilege extends to communications between a corporation’s in-house counsel and its employees.²⁹ Furthermore, courts have recognized that when a government entity hires an attorney as in-house counsel, the legal advice that in-house counsel provides is protected under the attorney-client privilege.³⁰ Like these other entities, law firms generally enjoy the

Sunrise’s line of reasoning “merits a closer look”); see also William T. Barker, *Law Firm In-House Attorney-Client Privilege Vis-à-Vis Current Clients: Courts Should Reconsider and Limit the Rule that In-House Communications Are Not Protected Against Current Clients*, 70 DEF. COUNS. J. 467, 471 (2003) (noting that flawed *Sunrise* reasoning has become foundation for in-firm cases and urging courts to reconsider its application).

25. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)); see also Douglas R. Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 SYRACUSE L. REV. 69, 71 (2004) [hereinafter Richmond, *Internal Investigations*] (describing attorney-client privilege as oldest of common law privileges and noting that it has now been widely codified).

26. See *Upjohn*, 449 U.S. at 389 (discussing purpose of privilege).

27. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000) (“[T]he attorney-client privilege may be invoked . . . with respect to (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.”).

28. 449 U.S. 383 (1981).

29. See *id.* at 403–04 (holding that communications by corporation’s employees to counsel were privileged). In *Upjohn*, the communications at issue were made by employees to in-house counsel in order to secure legal advice. See *id.* at 394 (discussing communications sought in discovery). The Court reasoned that it was consistent with the purposes underlying the attorney-client privilege that these communications be “protected against compelled exposure.” *Id.* at 395 (providing rationale for protecting communications); see also Brendan F. Quigley, *The Need to Know: Law Firm Internal Investigations and the Intra-Firm Dissemination of Privileged Communications*, 20 GEO. J. LEGAL ETHICS 889, 891 (2007) (citing *Upjohn*, 449 U.S. at 396) (discussing holding of *Upjohn*).

Furthermore, as within corporations, the attorney-client privilege preserves partnerships’ communications with in-house counsel. See *In re Beiter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (holding that attorney-client privilege framework for corporations also applies to partnerships); see also Richmond, *Internal Investigations*, *supra* note 25, at 74 (“With respect to partnerships, it is generally the rule that all partners are considered ‘to be the “client” in all attorney-client communications that involve the partnership.’” (quoting PAUL R. RICE ET AL., ATTORNEY CLIENT PRIVILEGE IN THE UNITED STATES § 4:49, at 266 (2d ed. 1999))).

30. See *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 38–39 (Mass. 2007) (finding legal advice from in-house counsel to government entity and its employees was protected “under the normal rules of the attorney-client privilege”); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 cmt. b, 573–74 (1998) (“The privilege aids government entities and employees in obtaining legal advice founded on a complete and accurate factual picture.”); Anthony B. Joyce, *The Massachusetts Approach to the Intersection of Governmental Attorney-Client Privilege and Open Government Laws*, 42

attorney-client privilege protection for communications with in-house counsel.³¹ Yet, whether application of the privilege to in-firm consultations regarding a current client complies with the Model Rules of Professional Conduct has been a topic of much debate.³²

Lawyers' ethical obligations are outlined in various state adaptations of the American Bar Association's Model Rules of Professional Conduct.³³ Unlike the attorney-client privilege, which applies only the context of litigation, Rules of Professional Conduct apply to all lawyers in all contexts.³⁴ The emergence of in-house counsel in law firms warrants particular focus on Model Rules 1.6, 1.7, and 1.10.³⁵

Model Rule 1.6 details an attorney's ethical obligation of confidentiality.³⁶

SUFFOLK U. L. REV. 957, 960 (2009) ("The SJC's ruling [in *Suffolk Constr. Co.*] solidified the governmental attorney-client privilege in Massachusetts . . .").

31. See, e.g., *United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996) (recognizing in-firm privilege for associates assigned to internal investigation); *Hertzog, Calamari & Gleason v. Prudential Ins. Co.*, 850 F. Supp. 255, 255 (S.D.N.Y. 1994) (preserving privilege for communications between firm's attorneys and its in-house counsel); *Lama Holding Co. v. Shearman & Sterling*, No. 89-Civ-3639(KTD), 1991 WL 115052 (S.D.N.Y. 1991) (holding privilege attaches to in-firm communication so long as in-house counsel is designated as such).

32. *Compare Asset Funding Grp., LLC v. Adams & Reese, LLP*, Civil Action No. 07-2965, 2008 WL 4948835, at *4 (E.D. La. Nov. 17, 2008) (denying in-firm privilege in current-client context), *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 WL 578989, at *7 (N.D. Cal. Feb. 21, 2007) (denying in-firm privilege in current-client context), *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 287 (S.D.N.Y. 2002) (denying in-firm privilege in current-client context), *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 284-85 (E.D. Pa. 2002) (denying in-firm privilege in current-client context), *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 598 (E.D. Pa. 1989) (denying in-firm privilege in current-client context), and *SonicBlue Inc. v. Portside Growth & Opportunity Fund, Bankr. Nos. 03-51775, 03-51776, 03-51777, 03-51778-MM*, 2008 WL 170562, at *10 (Bankr. N.D. Cal. Jan. 18, 2008) (denying in-firm privilege in current-client context), *with TattleTale Alarm Sys. v. Calfee, Halter & Griswold, LLP*, No. 2:10-cv-226, 2011 WL 382627, at *4-10 (S.D. Ohio Feb. 3, 2011) (preserving privilege in current-client context), *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 108 (Ga. 2013) (preserving privilege in current-client context), *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 536 (Ill. App. Ct. 2012) (preserving privilege in current-client context), *MLA City Apartments LLC v. DLA Piper LLP (US)*, 967 N.E.2d 424, 433 (Ill. App. Ct. 2012) (preserving privilege in current-client context), and *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1080 (Mass. 2013) (preserving privilege in current-client context).

33. See MODEL RULES OF PROF'L CONDUCT Preamble (2012) (identifying purpose of rules).

34. See *id.* at R. 1.6 cmt. 3 ("The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client."); see also Leonard Packel, *Confidentiality Under the Pennsylvania Attorney-Client Privilege Statutes and the New Pennsylvania Rules of Professional Conduct*, 34 VILL. L. REV. 91, 92 (1989) ("[T]he Privileges and Rules are aimed at different audiences.").

35. See *RFF Family P'ship*, 991 N.E.2d at 1077-80 (discussing these three rules in context of in-firm privilege). For further discussion on the Massachusetts Supreme Judicial Court's analysis of these rules in relation to in-firm privilege, see *infra* notes 110-16 and accompanying text.

36. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (outlining lawyers' confidentiality obligations).

Rule 1.6(a) requires that, “[a] lawyer shall not reveal information relating to the representation of a client”³⁷ Where the attorney-client privilege protects only confidential *communication* made for the purpose of procuring legal advice, Rule 1.6 protects all *information* “relating to representation.”³⁸ Thus, Rule 1.6 also “protects knowledge which the lawyer has acquired from sources other than communications.”³⁹ Rule 1.6(b) grants exceptions to the rule, however, when lawyers seek legal advice for purposes of ensuring their compliance with the Model Rules, or defending themselves against a client’s claim.⁴⁰

The exceptions that Rule 1.6(b) provides, which ultimately allow a lawyer to reveal client information when seeking certain legal advice, become controversial when the lawyer seeks such advice from a law firm’s in-house counsel.⁴¹ Rule 1.7 provides that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”⁴² The rule states that a conflict of interest exists if “(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s

37. *Id.* at R. 1.6(a) (precluding lawyers from revealing client information related to representation); *see also* Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, ABA CTR. FOR PROF’L RESP. (May 2007), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney_authcheckdam.pdf (“A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship.” (alteration in original) (quoting MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 2)).

38. *See* Packel, *supra* note 34, at 95 (discussing “communications” as narrower than “information”).

39. *Id.* at 97 (illustrating difference between communication protected by privilege versus communication protected by Rule 1.6). Professor Packel provides a thoughtful example of this distinction:

[A]ssume that the client had been released on bail and that the lawyer were to suggest to the client that she would like to see his records relating to the incidents involved in the case. The client suggests that he will pick up the lawyer and drive her to the place where he has the records. The lawyer is picked up and sees that the client has driven her to a home in New Jersey. It is obvious when they arrive that the client is living at the home. The lawyer’s observations would give her “information,” but that information would not be learned through “communications” and, therefore, would not be protected by the attorney-client privilege. The Rules, however, would protect that information.

Id. (providing example of Rule 1.6’s broad protection over all information relating to representation).

40. *See* MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(4)–(5) (providing exceptions to Rule 1.6(a), which precludes attorneys from revealing information related to client’s representation).

41. *See* Richmond, *Essential Principles*, *supra* note 22, at 821 (“[C]ourts have essentially fashioned a conflict of interest exception to the attorney-client privilege . . . in the law firm context.”).

42. MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (describing ethical duty to avoid conflict of interest).

responsibilities to another client . . . or by a personal interest of the lawyer.”⁴³

Rule 1.7 becomes especially relevant to in-firm privilege cases through imputation under Rule 1.10.⁴⁴ Rule 1.10(a) states, “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7”⁴⁵ Under this analysis, when a client threatens malpractice and the accused attorney consults in-house counsel on the matter, the law firm violates Rule 1.7 because it is representing both the outside client and itself as a client, and these two “clients” possess adverse interests.⁴⁶

B. *Off to a Shaky Start: Early Applications of In-Firm Privilege Point Towards a Need for Reconstruction*

The question of in-firm privilege first surfaced in the late 1980s.⁴⁷ The United States District Court for the Eastern District of Pennsylvania was the first court to decide a claim of in-firm privilege in *Sunrise*.⁴⁸ In *Sunrise*, the law firm of Blank Rome represented Sunrise Savings and Loan Association.⁴⁹ Because Sunrise was insolvent, the Federal Savings and Loan Insurance Corporation and Sunrise depositors sued Blank Rome.⁵⁰ During discovery, Blank Rome claimed the attorney-client privilege for internal communications between the firm and its in-house counsel.⁵¹ While the court in *Sunrise*

43. *Id.* at R. 1.7(a)(1)–(2) (defining conflict of interest).

44. *See* RFF Family P’ship, LP v. Burns & Levinson, LLP, 991 N.E.2d 1066, 1078 n.8 (Mass. 2013) (noting that courts implicitly apply Rule 1.10 in abrogating privilege under conflict of interest theory).

45. MODEL RULES OF PROF’L CONDUCT R. 1.10(a) (describing imputation rule); *see also* Chambliss, *supra* note 4 at 1747–48 (“The primary reasons for imputation are to ‘[give] effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm’ and to prevent the misuse of confidential information by lawyers in the same firm.” (alteration in original) (quoting MODEL RULES OF PROF’L CONDUCT R. 1.10 cmt. 2)).

46. *See* RFF Family P’ship, 991 N.E.2d at 1078–79 (explaining traditional invocation of imputation through Model Rules in current-client cases).

47. *See* Richmond, *Internal Investigations*, *supra* note 25, at 77–78 (“Law firms’ ability to invoke the attorney-client privilege . . . to protect the results of their internal investigations has been an issue since the 1980s, when firms that represented failed financial institutions found themselves embroiled in litigation resulting from those institutions’ demise.”).

48. *See In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 569 (E.D. Pa. 1989) (analyzing in-firm privilege claim); *see also* Chambliss, *supra* note 4, at 1728 (recognizing *Sunrise* as first decision analyzing claim of in-firm privilege).

49. *See In re Sunrise*, 130 F.R.D. at 562 (describing nature of Blank Rome’s representation).

50. *See id.* (explaining initial source of litigation).

51. *See id.* at 594 (“Blank Rome withholds 31 documents on the basis that they reflect requests for legal advice made by Blank Rome to Blank Rome attorneys or outside counsel.” (footnote omitted)). Moreover, Blank Rome divided the documents it sought to withhold into four categories: (1) “post-suit documents” where the firm acted as its own counsel; (2) “post-suit documents” where the firm was relying on outside counsel; (3) “post-suit documents” concerning the firm’s “continued representation of savings & loan associations generally”; and (4) documents pertaining to the firm’s representation of Sunrise Savings. *See id.* (listing four categories of documents).

recognized the possibility of in-firm privilege “in some instances,” it hesitated to extend protection to Blank Rome’s communications because of a potential conflict of interest between the firm’s two clients, i.e., the original client and the firm itself.⁵²

The court eventually concluded that the interest “in protecting clients who may be harmed by such a conflict of interest” outweighed the interest in preserving the privilege for the law firm’s communications with in-house counsel.⁵³ Relying on *Valente v. PepsiCo*,⁵⁴ the *Sunrise* court held that a law firm’s communications with in-house counsel are not protected by the attorney-client privilege “if the communication implicates or creates a conflict of interest between a law firm’s fiduciary duties to itself and its client seeking to discover the communication.”⁵⁵

After the *Sunrise* decision, several courts adopted its reasoning, citing it as the “seminal case” for in-firm privilege.⁵⁶ The *Sunrise* court’s mere recognition that a law firm may, in some instances, protect its internal

52. *See id.* at 595 (“I am now persuaded that it is possible in some instances for a law firm, like other business or professional associations, to receive the benefit of the attorney-client privilege when seeking legal advice from in house counsel.”). For a discussion of how other courts have interpreted the *Sunrise* court’s acknowledgment of the “possibility” of in-firm privilege, see *infra* note 57 and accompanying text.

53. *In re Sunrise*, 130 F.R.D. at 595–96 (framing question as balancing of interests). *But see* RFF Family P’ship, LP v. Burns & Levinson, LLP, 991 N.E.2d 1066, 1080–81 (Mass. 2013) (preserving attorney-client privilege for in-firm communications).

54. 68 F.R.D. 361, 368–69 (D. Del. 1975) (denying privilege in conflict between majority and minority shareholders). In *Valente*, the minority shareholders of Wilson Sporting Goods brought a class action suit arising from Wilson’s merger with PepsiCo. *See id.* at 364. At the time of the merger, PepsiCo owned seventy-four percent of Wilson’s stock and Peter DeLuca, PepsiCo’s general counsel, sat on Wilson’s board of directors. *See id.* Through DeLuca, PepsiCo conducted research analyzing the financial and tax consequences of various merger strategies. *See id.* at 365.

When Wilson’s minority shareholders sought to discover this information, PepsiCo resisted on attorney-client privilege grounds. *See id.* at 366. Yet, the *Valente* court rejected PepsiCo’s claim to privilege and declared the information discoverable, stating that, “[i]t is a common, universally recognized exception to the attorney-client privilege, that where an attorney serves two clients having common interests and each party communicates to the attorney, the communications are not privileged in a subsequent controversy between the two.” *Id.* at 368 (citations omitted) (invoking “common interest” exception).

55. *In re Sunrise*, 130 F.R.D. at 596–97 (“Because I find that the *Valente* Court’s well-reasoned analysis accommodates the interest of both the . . . attorney and the . . . client, I will adopt it as the controlling rule in this case.”). *But see* RFF Family P’ship, 991 N.E.2d at 1081 (“[C]ompelled disclosure of . . . 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.” (alterations in original) (internal quotation marks omitted)).

56. *See* Chambliss, *supra* note 4, at 1721 (“*In re Sunrise* is the leading case on the current-client issue.”); *see also* Roy Simon, *In-House Ethics Consultations and the Attorney-Client Privilege: Case Law*, N.Y. PROF’L RESP. REP., Jan. 2009, at 1 (referring to *Sunrise* as “Granddaddy Case” of in-firm privilege and providing descriptions of cases following its holding).

communications has led several courts to uphold in-firm privilege outside of the current-client context.⁵⁷ However, seizing on the conflict of interest concerns articulated in the decision, the majority of courts have instead utilized *Sunrise* to circumvent the privilege in current-client cases.⁵⁸ The two most widely cited cases reinforcing *Sunrise* are *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*⁵⁹ and *Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*⁶⁰

In 2002, the United States District Court for the Southern District of New York addressed the current-client issue in *Bank Brussels*.⁶¹ In *Bank Brussels*, the law firm of Roger & Wells consulted the chair of its ethics committee after its client, Credit Lyonnais (Suisse) (CLS), threatened to sue the firm.⁶² The ethics committee conducted an “internal review” of the firm’s representation of CLS.⁶³ CLS eventually filed suit and sought discovery of these internal communications; however, the firm resisted, claiming the attorney-client privilege.⁶⁴ The *Bank Brussels* court rejected the firm’s claim to privilege, reasoning that “[a]sserting the privilege against a current client seems to create an inherent conflict against that client.”⁶⁵ The court cited *Sunrise* favorably in holding that the firm could not invoke the privilege against a current client for

57. See, e.g., *United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996) (recognizing in-firm privilege for associates assigned to internal investigation); *Hertzog, Calamari & Gleason v. Prudential Ins. Co.*, 850 F. Supp. 255, 255 (S.D.N.Y. 1994) (holding privileged communications between firm’s attorneys and its in-house counsel); *Lama Holding Co. v. Shearman & Sterling*, No. 89 Civ. 3639 (KTD), 1991 WL 115052, at *1 (S.D.N.Y. June 17, 1991) (holding privilege attaches to in-firm communication so long as in-house counsel is designated as such); see also *Chambliss*, *supra* note 4, at 1732 (discussing broad protection for in-firm communication in non-client cases).

58. See, e.g., *Asset Funding Grp., LLC v. Adams & Reese, LLP*, Civil Action No. 07-2965, 2008 WL 4948835, at *4 (E.D. La. Nov. 17, 2008) (declining to apply privilege due to conflict between firm’s fiduciary duties to itself and to client); *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 WL 578989, at *7 (N.D. Cal. Feb. 21, 2007) (rejecting in-firm privilege based on fiduciary relationship and conflicting interest between client and lawyer); *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 287 (S.D.N.Y. 2002) (rejecting in-firm privilege); *Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 284–85 (E.D. Pa. 2002) (rejecting in-firm privilege); *SonicBlue Inc. v. Portside Growth & Opportunity Fund, Bankr. Nos. 03-51775, 03-51776, 03-51777, 03-51778-MM*, 2008 WL 170562, at *9 (Bankr. N.D. Cal. Jan. 18, 2008) (holding law firms cannot assert privilege against client when communications arise out of self-representation on conflict of interest grounds).

59. 220 F. Supp. 2d 283 (S.D.N.Y. 2002).

60. 212 F.R.D. 283 (E.D. Pa. 2002).

61. See *Chambliss*, *supra* note 4, at 1736 (explaining that *Bank Brussels* was first case to decide current-client issue after *Sunrise*).

62. See *Bank Brussels*, 220 F. Supp. 2d at 284 (noting that CLS’s vice president threatened “that if CLS were found liable to the RCA Banks, R & W would be liable to CLS”).

63. See *id.* (describing internal review process).

64. See *id.* at 285 (explaining early stages of litigation).

65. *Id.* at 287 (finding Roger & Wells had ethical duty to disclose results of its internal investigations to CLS and thus, Roger & Wells was in no position to claim privilege).

internal communications made during representation.⁶⁶

Only a few months after *Bank Brussels*, the in-firm privilege issue made its way back to Pennsylvania in *Koen Book*.⁶⁷ In *Koen Book*, the client, Koen Book Distributors, informed its attorneys at Powell Trachtman that it was considering filing a malpractice suit against the firm.⁶⁸ Yet, despite expressing its dissatisfaction with Powell Trachtman, Koen Book Distributors continued to employ the firm for well over a month.⁶⁹ During this time, the accused attorneys consulted with another lawyer at the firm about the legal and ethical implications of their client's threatened malpractice action.⁷⁰ When Koen Book Distributors eventually sued the firm and sought to compel discovery of Powell Trachtman's internal communications, the firm resisted on attorney-client privilege grounds.⁷¹ The court relied on the reasoning of *Sunrise* and *Valente* in holding that the firm "owed a fiduciary duty to [the] plaintiffs while they remained clients" and that "[t]his duty is paramount to [the firm's] own interests."⁷²

66. *See id.* at 287–88 (ordering Roger & Wells to produce documents related to its internal review of representation of CLS).

67. *See generally* *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283 (E.D. Pa. 2002) (addressing in-firm privilege).

68. *See id.* at 284 (describing client's threat of malpractice). Notably, the court does not disclose reasons why the client became dissatisfied with the firm. *See id.* (stating only that Koen Book Distributors was "dissatisfied"). It is clear, however, that Koen Book Distributors retained Powell Trachtman for advice concerning a security interest from one of its customers, Crown Books Corporation. *See id.* (explaining nature of representation). Furthermore, when Crown Books went bankrupt, Powell Trachtman represented Koen Book Distributors in the bankruptcy proceedings. *See id.* (noting representation extended to bankruptcy proceedings).

69. *See id.* (acknowledging Koen Book Distributors' continued reliance on Powell Trachtman's services after threatening malpractice). In addition to retaining Powell Trachtman from July 9, 2001 (the date malpractice was threatened) to August 13, 2001 (the date representation was terminated), Koen Book Distributors also consulted with another law firm concerning the quality of Powell Trachtman's services. *See id.* (noting that client retained other counsel).

70. *See id.* (describing Powell Trachtman's internal communications from July 9, 2001 to August 13, 2001).

71. *See id.* at 283 (declaring firm withheld documents under attorney-client privilege and work product doctrines).

72. *Id.* at 286 (rejecting privilege for Powell Trachtman's in-firm communications). The court employed the reasoning of *Sunrise*, declaring "to the extent that the seeking or obtaining of legal advice by one lawyer from another lawyer inside the firm 'implicates or creates a conflict of interest,' the attorney-client privilege between the lawyers in the firm is vitiated." *Id.* at 285 (quoting *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 597 (E.D. Pa. 2002)).

Despite its discussion endorsing *Sunrise*, the *Koen Book* court named *Valente* as the "seminal case." *See id.* (citing *Valente v. PepsiCo*, 68 F.R.D. 361 (D. Del. 1975)). Relying on *Valente*, the court determined the proper analysis to be whether Powell Trachtman created a conflict of interest when it conducted its internal communications while representing Koen Book Distributors. *See id.* ("It is a common, universally recognized exception to the attorney-client privilege, that where an attorney serves two clients having common interest and each party communicates to the attorney, the communications are not privileged in a subsequent controversy between the two" (quoting *Valente*, 68 F.R.D. at 368)).

Despite the fact that the firm was threatened with malpractice only two weeks before the client's bankruptcy hearing, the court in *Koen Book* stated that the firm could have withdrawn as counsel to "[a]void or minimize the predicament in which it found itself."⁷³ The court further suggested that the firm could have sought the client's consent to continue representation "after full disclosure and consultation."⁷⁴ Nevertheless, because neither "alternative" was pursued, the court ordered production of the firm's internal communications.⁷⁵

Koen Book and *Bank Brussels* are only two of several current-client cases where courts have relied upon the reasoning of *Sunrise* to abrogate in-firm privilege.⁷⁶ Courts in other states—including Washington, California, and Louisiana—have also employed exceptions to the attorney-client privilege based on *Sunrise*.⁷⁷ Yet, as the influence of *Sunrise* expanded, critics began to question the decision's foundation: *Valente*.⁷⁸ These critics have asserted several different theories as to why these decisions constitute an inappropriate basis for deciding in-firm privilege.⁷⁹ Some commentators have argued that *Valente* is factually distinguishable, so its reasoning is inapplicable to in-firm privilege cases.⁸⁰ Other commentators have contended that *Sunrise*, as an

73. *Id.* at 286 (indicating that Powell Trachtman could have withdrawn from representation). The court expressed some sympathy for Powell Trachtman, acknowledging the firm was threatened with malpractice just one week before *Koen Book* Distributors' bankruptcy hearing. *See id.* (recognizing Powell Trachtman's "unenviable situation").

74. *Id.* (citing MODEL RULES OF PROF'L CONDUCT R. 1.7(b)).

75. *See id.* (rejecting privilege for firm's communications).

76. *See* Simon, *supra* note 56 (discussing *Sunrise*'s expansive influence). For a further discussion of cases relying on *Sunrise*, see *supra* note 58 and accompanying text.

77. *See* Simon, *supra* note 56 (illustrating cases from different jurisdictions relying on *Sunrise*). For a further discussion of approaches adopted by courts in these jurisdictions, see *supra* note 10 and accompanying text.

The Supreme Court of the United States recently analyzed the fiduciary exception to the attorney-client privilege, explaining that, "English courts first developed the fiduciary exception as a principle of trust law in the 19th century." *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2321 (2011) (discussing trust law origins of fiduciary exception). Moreover, the Court described the exception's traditional application, stating that, "[t]he rule was that when a trustee obtained legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice." *Id.* For a discussion of how the fiduciary exception has been applied to law firm in-house counsel, see *infra* notes 106–09 and accompanying text.

78. *See* Chambliss, *supra* note 4, at 1736 ("[W]riters have criticized *Valente* as the foundation for *In re Sunrise*. Yet despite the problems with *Valente* and *Sunrise*, *Sunrise* has become the touchstone for the current-client analysis." (footnotes omitted)); *see also* Richmond, *Essential Principles*, *supra* note 22, at 829 ("In the end, *Valente* simply does not support abrogating the attorney-client privilege . . . in law firm internal investigations. Cases relying on *Valente* are therefore inapposite.").

79. For a further discussion of commentators criticizing *Sunrise* and *Valente*, see *infra* notes 80–82 and accompanying text.

80. *See* Richmond, *Essential Principles*, *supra* note 22, at 829 ("*Valente* is irrelevant to privilege disputes involving law firms' internal communications because of the context in which that case arose."). Richmond emphasizes that, for the *Valente* court, a "key factor" in finding DeLuca's memorandum discoverable was that his "knowledge as PepsiCo's general counsel could not be separated from his knowledge as a Wilson board member." *Id.* at 828 (citing *Valente v. Pepsico*, 68 F.R.D. 361, 368 (D. Del. 1975)). Richmond argues that this "key factor" has nothing to do with the current-client cases because "[t]here was no showing

application of *Valente*, neglects to consider in-house counsel's duty to the firm, which ultimately undermines the value of in-firm counsel.⁸¹

Given the recent exposure of *Sunrise*'s weak foundation, courts and critics alike are advocating for a reconstruction of the in-firm privilege analysis.⁸² In a positive development, a handful of recent district and appellate court decisions have declined to follow *Sunrise* by preserving the privilege for in-firm communications concerning a current client's threat of malpractice.⁸³ Ultimately, with several jurisdictions at odds on the issue of in-firm privilege, the legal profession has long anticipated direction from higher courts.⁸⁴

III. STRAYING FROM THE BLUEPRINT: THE MASSACHUSETTS SUPREME JUDICIAL COURT CHOOSES FUNCTION OVER FORM IN *RFF FAMILY PARTNERSHIP*

The Supreme Judicial Court of Massachusetts was the first court of ultimate jurisdiction to consider the issue of in-firm privilege.⁸⁵ The court rejected commonly invoked exceptions to the attorney-client privilege by protecting a law firm's communications with in-house counsel regarding a

in any of those cases that the law firms' counsel had the same sort of relationships with their clients that DeLuca had with Wilson." *Id.*

81. See Chambliss, *supra* note 4, at 1744 (asserting that *Sunrise* disposes of privilege based on firm's duty to client alone without considering in-house counsel's duty to its law firm). Professor Chambliss argues that *Sunrise* as an application of *Valente* results in an approach that is inconsistent with the Supreme Court's decision in *Upjohn*, which "emphasizes the role of in-house counsel in promoting organizational compliance with law." *Id.* at 1743 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981)).

82. See *TattleTale Alarm Sys. v. Calfee, Halter & Griswold, LLP*, No. 2:10-cv-226, 2011 WL 382627, at *8 (S.D. Ohio Feb. 3, 2011) ("[G]iven the fact that *Valente* has been questioned by other courts as well, it seems reasonable to conclude that any decision which relied upon *Valente* . . . which appears to be the way that *Koen Book Distributors* interpreted it—merits a closer look."); see also Chambliss, *supra* note 4, at 1740 (arguing for approach to in-firm privilege that balances interests of firms and clients).

83. See, e.g., *TattleTale Alarm Sys.*, 2011 WL 382267, at *4-10 (rejecting older case law abrogating privilege and holding in-firm communications protected); *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 536 (Ill. App. Ct. 2012) (preserving privilege for in-firm communications); *MDA City Apartments LLC v. DLA Piper LLP (US)*, 967 N.E.2d 424, 429-31 (Ill. App. Ct. 2012) (relying on *Garvy* and upholding in-firm privilege).

84. See generally Rhodes & Tran, *supra* note 8 (discussing "great debate" concerning in-firm privilege and warning lawyers to take caution regarding in-firm communications while such uncertainty exists).

85. See Joan C. Rogers, *Massachusetts High Court Backs Privilege for Consults with Firm's In-House Counsel*, 82 U.S. L. WK. 121, 121 (2013) ("The opinion marks the first decision by any state's top court recognizing the in-firm privilege"). Although the Massachusetts Supreme Judicial Court was the first U.S. court of last resort to recognize the in-firm privilege, Georgia followed suit the next day. See *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 108 (Ga. 2013) (holding attorney-client privilege and work product protection attached to law firm communications regarding client's possible malpractice claims).

current client's threat of malpractice.⁸⁶ The Massachusetts Supreme Judicial Court's decision will impact the ethical and evidentiary standards governing lawyers and the legal profession.⁸⁷

A. Facts and Procedure

In *RFF Family Partnership*, plaintiff RFF Family Partnership (RFF) made a \$1.4 million commercial loan to Link Development.⁸⁸ To ensure the loan was secured by Link Development's real property, RFF retained defendant Burns & Levinson to investigate the title.⁸⁹ When Link Development defaulted on its payments, Burns & Levinson initiated foreclosure proceedings in land court on behalf of RFF.⁹⁰

One day before the foreclosure sale, another assignee emerged seeking to enjoin the foreclosure on the theory of superior title.⁹¹ Although the judge denied the assignee's motion to enjoin, the assignee persisted in the claim.⁹² RFF's title insurer hired the law firm of Prince Lobel Tye (Prince Lobel) to represent RFF in the land court proceedings, while Burns & Levinson continued to represent RFF in connection with the post-foreclosure sale.⁹³

One year later, while Burns & Levinson was still actively representing RFF in negotiations for sale of the foreclosed property, Prince Lobel sent Burns & Levinson a notice of claim alleging legal malpractice for the firm's failure to identify the existing mortgage on Link Development's property.⁹⁴ Prince Lobel

86. See *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1080 (Mass. 2013) (refusing to apply fiduciary and current-client exceptions). For a discussion of the court's reasoning on this topic, see *infra* notes 106–16 and accompanying text.

87. See generally Debra Squires-Lee & R. Victora Fuller, *Measures to Take Following 'RFF Family Partnership'*, MASS. LAW. WKLY. (July 18, 2013), <http://masslawyersweekly.com/2013/07/18/measures-to-take-following-rff-family-partnership/> (discussing implications for attorneys following *RFF Family Partnership*).

88. See *RFF Family P'ship*, 991 N.E.2d at 1068 (discussing nature of relationship between RFF and Link Development).

89. See *id.* (explaining scope of legal services Burns & Levinson provided to RFF).

90. See *id.* (noting that representation continued throughout foreclosure proceedings).

91. See *id.* (describing assignee's motion to enjoin foreclosure); see also 33 MASSACHUSETTS PRACTICE, LANDLORD AND TENANT LAW § 8:20 (3d ed. 2012) (explaining theory of superior title under Massachusetts law).

92. See *RFF Family P'ship*, 991 N.E.2d at 1068 (“[T]he assignee continued to press its claim in the Land Court that its lien was superior to RFF's and that the foreclosure was therefore invalid.”).

93. See *id.* (illustrating that RFF was represented by Prince Lobel and Burns & Levinson for separate issues).

94. See *id.* (recounting contents of notice of claim sent by Prince Lobel). The notice of claim alleged that Burns & Levinson “breached its obligations to RFF by . . . failing to identify and payoff an existing mortgage of record in favor of another lender, failing to record a subordination agreement for another existing mortgage of record, and failing to inform RFF of . . . outstanding liens.” *Id.* (internal quotation marks omitted). Prince Lobel further alleged that RFF “suffered and continues to suffer damages [because of] B & L's legal malpractice and breach of contract” and insisted Burns & Levinson reimburse RFF for such losses. *Id.* (internal quotation marks omitted). Prince Lobel attached to the notice of claim a draft of a complaint alleging two counts of liability against Burns & Levinson and two against the attorneys who had worked with RFF. See *id.* (describing draft of complaint).

demanded that Burns & Levinson respond to its notice of claim within six days.⁹⁵ Two days after receiving the notice of claim, the accused attorneys sought advice from Burns & Levinson's in-house ethics advisor.⁹⁶ Following this consultation, the attorneys sent a letter to RFF providing notice of intent to withdraw representation.⁹⁷ Upon receiving this letter, RFF contacted Burns & Levinson, insisting that Prince Lobel's notice of claim was unauthorized and that RFF still desired Burns & Levinson's representation in the foreclosure negotiations.⁹⁸ Prior to continuing representation, Burns & Levinson demanded and later received written confirmation from RFF that it did not engage Prince Lobel to bring a malpractice claim against Burns & Levinson.⁹⁹

Nonetheless, once representation concluded, RFF sued Burns & Levinson alleging malpractice, negligent misrepresentation, and intentional misrepresentation.¹⁰⁰ Burns & Levinson subsequently moved for a protective order to keep privileged its communications with in-house counsel regarding the notice of claim from Prince Lobel.¹⁰¹ The Superior Court granted the defendants' motion for a protective order, whereupon RFF appealed.¹⁰²

95. *See id.* (providing that RFF had from March 2, 2011 to March 8, 2011 to respond to Prince Lobel).

96. *See id.* at 1068–69 (describing in-house counsel's purpose "to respond to ethical questions and risk management issues on behalf of B & L"). The court emphasized that David Rosenblatt, a partner at Burns & Levinson, was specifically designated as in-house counsel. *See id.* at 1070, 1080 (implementing condition for in-firm privilege that in-house counsel must be formally or informally designated as such). The court also recognized that Rosenblatt had never worked on RFF's case and that the firm did not bill RFF for the firm's risk management communications. *See id.* at 1069 (discussing scope of Rosenblatt's position and lack involvement with RFF's case).

97. *See id.* at 1068–69 (implying Burns & Levinson's in-house counsel recommended withdrawing as counsel). The letter, sent by Michael MacClary, one of the attorneys accused of malpractice, to Robert F. Freedman, RFF's principal, read:

As I am sure you are aware, we have received [the notice of claim] from your counsel . . . contemplating a law suit against our firm. Additionally, you have significant unpaid legal fees and have not made a payment to us for several months. Under these circumstances, we cannot continue representing you. Accordingly, we are withdrawing from further representation effective immediately.

Id. at 1069 (quoting letter sent to RFF).

98. *See id.* at 1069 (acknowledging that Freedman reached out to Burns & Levinson for further representation despite Prince Lobel's notice of claim).

99. *See id.* (noting that RFF's principal provided written confirmation requested by Burns & Levinson).

100. *See id.* (explaining that action filed by RFF in Superior Court was against Burns & Levinson and its two individual attorneys that had represented RFF).

101. *See id.* (summarizing Burns & Levinson's argument for preserving attorney-client privilege for internal communications).

102. *See id.* ("The judge allowed the B & L defendants' motion for a protective order to the extent that he allowed B & L's attorney to instruct Davidson, MacClary, Perkins, and Rosenblatt not to answer questions that would reveal the content of the privileged communications among them regarding the notice of claim."). The Supreme Judicial Court of Massachusetts also emphasized that it transferred RFF's appeal to its court on its own motion. *See id.* at 1069–70.

B. *The Court's Decision in RFF Family Partnership: A "Form Follows Function" Approach to In-Firm Privilege*

The Supreme Judicial Court of Massachusetts affirmed the lower court's order protecting the attorneys' communications with in-house counsel from discovery.¹⁰³ In preserving the attorney-client privilege for Burns & Levinson's internal communications, the court rejected "dysfunctional" exceptions to the privilege.¹⁰⁴ Additionally, the court limited its holding by imposing four conditions on the applicability of the in-firm privilege.¹⁰⁵

1. *Refusing to Follow Form: The Court Rejects the Fiduciary and Current-Client Exceptions to Privilege*

The state supreme court began its analysis of the "fiduciary" and "current-client" exceptions to privilege by acknowledging that neither exception had previously been recognized in Massachusetts.¹⁰⁶ After a thorough analysis of the fiduciary exception's origins in trust law, the court declined to decide whether Massachusetts should adopt the exception on the grounds that it would not apply in the current matter.¹⁰⁷ According to its traditional usage, the fiduciary exception does not apply in cases where the trustee obtains legal advice at the trustee's own expense and for the trustee's own protection.¹⁰⁸ Because Burns & Levinson's internal communications were for the firm's own defense in litigation and were billed to the firm, rather than to RFF, the court

103. *See id.* at 1081 (affirming Superior Court).

104. *See id.* at 1075, 1080 (refusing to apply fiduciary and current-client exceptions). For a discussion of the court's reasoning on this topic, see *infra* notes 106–16 and accompanying text.

105. *See RFF Family P'ship*, 991 N.E.2d at 1080–81 (imposing four conditions for privilege to apply). The court recognized that not *all* communications made in the law firm environment are protected by the attorney-client privilege. *See id.* at 1080 (declaring in-firm privilege "is not without its limits"). For further discussion on the four conditions, see *infra* notes 117–22 and accompanying text.

106. *See RFF Family P'ship*, 991 N.E.2d at 1074 ("Although Massachusetts law recognizes several exceptions to the attorney-client privilege . . . the law of the Commonwealth has not yet recognized either of the proposed exceptions." (citation omitted)). Massachusetts recognizes six exceptions to privilege: (1) Furtherance of Crime or Fraud; (2) Claimants Through Same Deceased Client; (3) Breach of Duty or Obligation; (4) Document Attested by an Attorney; (5) Joint Clients; and (6) Public Officer or Agency. *See* MASS. R. EVID. § 502(d)(1)–(6) (listing situations when attorney-client privilege does not apply).

107. *See RFF Family P'ship*, 991 N.E.2d at 1075 (holding fiduciary exception does not apply). For a discussion of the fiduciary exception's origins and traditional applications, see *supra* note 77.

108. *See RFF Family P'ship*, 991 N.E.2d at 1074 (citing *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2321 (2011)) (noting that fiduciary exception does not apply where trustee procures legal advice for its own protection). Additionally, the United States Supreme Court recently emphasized the probative value of determining who incurred expenses in fiduciary exception cases. *See Jicarilla*, 131 S. Ct. at 2322 ("That the advice was obtained at the beneficiaries' expense was not only a 'significant factor' entitling the beneficiaries to see the document but also 'a strong indication of precisely who the real clients were.'" (quoting *Riggs Nat'l Bank of Wash., D.C. v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976))). For a further discussion of *Jicarilla*, see *supra* note 77.

declared the fiduciary exception inapplicable.¹⁰⁹

Next, the court refused to adopt the current-client exception, deeming it a “flawed interpretation of the rules of professional conduct that yields a dysfunctional result.”¹¹⁰ The court rejected the *Sunrise* line of authority on the grounds that its reasoning contained two “fundamental flaws.”¹¹¹ First, the court noted that most decisions employing the current-client exception do so by implicitly applying the conflict of interest rules through imputation under Model Rule 1.10(a).¹¹² While imputation generally precludes attorneys in the same firm from representing outside clients that are adverse to one another, the court found no evidence to support the assertion that Rule 1.10 prohibits in-house counsel from providing legal advice to its own firm regarding a current-client matter.¹¹³ Second, “black-letter law” provides that even when an

109. See *RFF Family P’ship*, 991 N.E.2d at 1076 (“[A] client is not entitled to . . . communications [that] were conducted for the law firm’s own defense against the client’s adverse claims.”). Moreover, the Massachusetts Supreme Judicial Court dismissed RFF’s proposition that the fiduciary exception excluded from the attorney-client privilege not only confidential communications between the attorneys and in-house counsel but also their confidential communications with outside counsel. See *id.* at 1075–76 (“This proposed rule would be the most dysfunctional of all because it would deny a law firm and its attorneys any protection provided by the attorney-client privilege . . .”). Furthermore, the court deemed the fiduciary exception “draconian” and unnecessary “to protect the interests of clients.” *Id.* at 1076 (explaining that preserving privilege does not affect lawyer’s duty to provide client full and fair disclosure of facts relevant to representation).

110. *Id.* at 1080 (“We do not believe that the conflicts rules . . . were intended to prohibit ethics consultation when it is most helpful: during client representation.” (alteration in original) (quoting N.Y. Bar Ass’n Comm. on Prof’l Ethics, Op. 789 (2005)) (internal quotation marks omitted)).

111. See *id.* at 1078 (rejecting reasoning of current-client exception).

112. See *id.* at 1078 n.8 (“Although none of the courts that have applied the ‘current client’ exception explicitly acknowledges that it is relying on the rule of imputation, most implicitly do so . . .”); see also *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 288 (S.D.N.Y. 2002) (“[I]t is common knowledge that a conflict as to one attorney at a firm is a conflict as to all.”); Chambliss, *supra* note 4, at 1745 (“According to the logic of *In re Sunrise et al.*, a conflict of interest must be imputed to firm in-house counsel regardless of the structure of the in-house position or the facts of the representation at issue.”). In *RFF Family Partnership*, the court explained that, under the imputation analysis, Burns & Levinson’s in-house counsel represented the firm in defending RFF’s threatened malpractice claim; however, applying Rule 1.10(a), in-house counsel would also be deemed to represent RFF. See *RFF Family P’ship*, 991 N.E.2d at 1077 (applying imputation to Burns & Levinson).

113. See *RFF Family P’ship*, 991 N.E.2d at 1078 (highlighting imputation rule’s lack of reference to advice from in-house counsel). Moreover, the court states that it would be nonsensical to apply the rule of imputation in the current-client context because the rule’s rationales would not be furthered in doing so. See *id.* (“The primary reasons for imputation are to [give] effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm and to prevent the misuse of confidential information by lawyers in the same firm.” (alteration in original) (quoting Chambliss, *supra* note 4, at 1747–48) (internal quotation marks omitted)). But see Zitrin, *supra* note 14 (“It is obviously counterintuitive that a law firm has more protection in representing itself adversely to its own client than it would representing a third party, and in fact Rule 1.10 says nothing of the sort.”).

attorney fails to avoid a conflict of interest under Rule 1.7, the communications remain privileged notwithstanding the attorney's misconduct.¹¹⁴ The court declared that this law applies even when the "client" is a law firm and the "attorney" is the firm's in-house counsel.¹¹⁵ The court also noted that the Restatement (Third) of the Law Governing Lawyers identifies thirteen possible sanctions for a law firm's breach of Rule 1.7, none of which mention disclosure of otherwise privileged communications.¹¹⁶

2. *Design with Necessary Limitations: The Court Imposes Four Conditions for In-Firm Privilege to Apply*

Although the Supreme Judicial Court of Massachusetts held that the attorney-client privilege protects confidential communications between a firm's attorneys and its in-house counsel, the court limited its ruling by imposing four conditions to be met before the privilege can apply.¹¹⁷ First, the firm must designate a lawyer or lawyers within the firm to represent the firm as in-house or ethics counsel.¹¹⁸ Second, in the event that a current client threatens litigation against the firm, the in-house counsel must not have worked on that that client's case or any "substantially related matter."¹¹⁹ Third, the time dedicated to consultation with in-house or ethics counsel cannot be billed to the client.¹²⁰ Fourth, as with all client consultations, the in-firm communications

114. See *RFF Family P'ship*, 991 N.E.2d at 1079 ("[T]he black-letter law is that when an attorney (improperly) represents two clients whose interests are adverse, the communications are privileged against each other notwithstanding the lawyer's misconduct." (alteration in original) (quoting *Teleglobe Commc'ns Corp. v. BCE Inc.*, 493 F.3d 345, 369 (3d Cir. 2007))).

115. See *id.* (finding that disclosure of attorney-client communications would be inappropriate sanction for *Burns & Levinson*).

116. See *id.* (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6, at 65–66 (2000)). The court noted that "[w]ith the exception of the final catch-all remedy of entering an 'other sanction,' none of these remedies includes disclosure of otherwise privileged communications." *Id.* at 1079; see also *id.* at 1079 n.11 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6, at 65–66 (2000)) (listing remedies under Restatement).

117. See *id.* at 1080–81 ("Such a rule . . . is not without its limits . . ."); see also Barbara S. Gillers, *Preserving the Attorney-Client Privilege for the Advice of a Law Firm's In-House Counsel*, 2000 PROF. LAW. SYMP. ISSUES 107, 111 (recommending that firms take precautionary measures to preserve in-firm privilege).

118. See *RFF Family P'ship*, 991 N.E.2d at 1080 (providing that designation of in-house or ethics counsel can be either formal or informal); see also Gillers, *supra* note 117, at 111 (urging firm managers to "[i]dentify specifically the lawyers in the firm who will give the firm legal advice in the matter").

119. See *RFF Family P'ship*, 991 N.E.2d at 1080 (explaining second condition for privilege to apply); see also Gillers, *supra* note 117, at 111 ("Distinguish between the firm lawyers who are the clients and the firm lawyers who are the counsel. Those who are counsel to the firm should have no involvement in the underlying matters.").

120. See *RFF Family P'ship*, 991 N.E.2d at 1080 ("Because the law firm is the client with respect to such communications, their cost must be borne by the law firm."); see also Gillers, *supra* note 117, at 111 ("Set up a separate billing number for the matter in which the in-house lawyer acts as the firm's lawyer. Time should be billed to that number as it would be to a client.").

must remain confidential.¹²¹ Because each of these four conditions was “either properly found . . . or undisputed,” the Massachusetts Supreme Judicial Court affirmed the lower court’s ruling allowing Burns & Levinson to preserve the confidentiality of its communications with in-house counsel.¹²²

IV. CRITICAL ANALYSIS: THE COURT IN *RFF FAMILY PARTNERSHIP* PROVIDES A FUNCTIONAL FRAMEWORK THAT BENEFITS LAWYERS AND CLIENTS ALIKE

By preserving the attorney-client privilege for in-firm communications concerning current clients, the *RFF Family Partnership* court provided the functional framework the legal profession had been waiting for.¹²³ The Massachusetts Supreme Judicial Court’s decision has elicited approval from courts, commentators, and even the American Bar Association.¹²⁴ Unlike the previous in-firm privilege decisions, the court provided a clear analysis and considered real world implications throughout its decision.¹²⁵ Moreover, the court limited its holding to ensure the privilege applies only where

121. See *RFF Family P’ship*, 991 N.E.2d at 1080 (“[A]s with all attorney-client communications, they must be made in confidence and kept confidential.”); see also Gillers, *supra* note 117, at 111 (“Inform partners and employees who are interviewed by the designated counsel that their cooperation is necessary to assist counsel in giving legal advice to the firm, that their communications with the designated attorneys are confidential, and that the communications should be kept confidential.” (emphasis added)).

122. See *RFF Family P’ship*, 991 N.E.2d at 1080–81 (affirming lower court’s ruling because four conditions were satisfied). Compare *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 108 (Ga. 2013) (imposing four elements for in-firm privilege), with *RFF Family P’ship*, 991 N.E.2d at 1080–81 (imposing four conditions for privilege to apply). In *St. Simons Waterfront*, the Supreme Court of Georgia held that the attorney-client privilege applies to communications between a law firm’s attorneys and its in-house counsel regarding a client’s threatened malpractice where:

(1) [T]here is a genuine attorney-client relationship between the firm’s lawyers and in-house counsel; (2) the communications in question were intended to advance the firm’s interests in limiting exposure to liability rather than the client’s interests in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence, and (4) no exception to the privilege applies.

St. Simons Waterfront, 746 S.E.2d at 108 (requiring all four elements be satisfied for privilege to apply).

123. See *Squires-Lee & Fuller*, *supra* note 87, at 1 (discussing Massachusetts Supreme Judicial Court’s clear guidance).

124. See, e.g., *St. Simons Waterfront*, 746 S.E.2d at 108 (recognizing in-firm privilege after *RFF Family Partnership*); see also *ABA Resolution 103*, *supra* note 15, at 15 (“It is in the public interest for the law to encourage and facilitate the use of law firm in-house counsel and, by this resolution, the American Bar Association recognizes that client representation will be advanced by permitting confidential consultation in this manner.”); Fields, *supra* note 15 (applauding Massachusetts’s decision).

125. See *Rogers*, *supra* note 85, at 121 (“[T]here was an almost solid wall of federal trial court decisions denying privilege But those decisions failed to consider important lines of authority . . . that have now been utilized in . . . *RFF Family Partnership*.” (quoting William T. Barker, Partner, Dentons)); see also *Squires-Lee & Fuller*, *supra* note 87, at 1 (“The SJC provided clear guidance to law firms about when and under what circumstances the privilege would apply.”).

appropriate.¹²⁶

By refusing to allow “legal doctrine [to] trump functionality,” Massachusetts has developed a practical analysis for in-firm privilege that improves law firm efficiency and law firm adherence to ethical rules.¹²⁷ Because these nuanced improvements ultimately benefit both lawyers and their clients, it would behoove jurisdictions following *Sunrise* to draw upon Massachusetts’s framework as a model for modernizing their in-firm privilege analyses.¹²⁸

A. *Public Reaction to the Massachusetts Supreme Judicial Court’s Holding: What About the Client?*

The Supreme Judicial Court of Massachusetts’s holding in *RFF Family Partnership* has triggered much debate about whether the decision properly reconciles the interest in preserving the privilege with the ethical obligations attorneys owe their clients.¹²⁹ Members of the legal profession have supported Massachusetts’s in-firm privilege analysis stating that the decision “will result in the provision of better legal services both to clients and the law firms that serve them.”¹³⁰ Conversely, one author on legal ethics concluded that, “courts ruling this way are simply protecting the interests of lawyers over those of clients, and that is inexcusable.”¹³¹ Moreover, the Association of Corporate Counsel (ACC) has expressed disagreement, stating “[l]aw firms owe their clients a profound duty of loyalty under the ethics rules It is this duty of loyalty that prohibits law firms from claiming a privilege to let them hide information from existing clients.”¹³²

However, the Massachusetts Supreme Judicial Court’s holding should not be interpreted as an unchecked extension of privilege that benefits law firms alone.¹³³ Rather, the *RFF Family Partnership* ruling is broad enough to

126. See *RFF Family P’ship*, 991 N.E.2d at 1080 (limiting holding to apply only if four conditions are met); see also Gillers, *supra* note 117, at 111 (recommending “careful not casual” approach for attorney communications with in-house counsel).

127. See *RFF Family P’ship*, 991 N.E.2d at 1074 (refusing to join other jurisdictions in adopting exceptions to privilege); see also *infra* notes 133–45 and accompanying text (highlighting improvements resulting from Massachusetts’s decision).

128. See Fields, *supra* note 15 (noting that decision is fair for lawyers and prudent for clients).

129. Compare Zitrin, *supra* note 14 (arguing *RFF Family Partnership* benefits lawyers over clients), with Fields, *supra* note 15 (arguing *RFF Family Partnership* is fair for lawyers and clients alike).

130. Squires-Lee & Fuller, *supra* note 87, at 1 (approving of Massachusetts’s decision in *RFF Family Partnership*).

131. Zitrin, *supra* note 14 (arguing *RFF Family Partnership* allows lawyers to be disloyal to their clients).

132. ACC Files Amicus Brief with the Oregon Supreme Court in *Crimson Trace Legal Malpractice Case*, ASS’N CORP. COUNSEL (Aug. 9, 2013), <http://www.acc.com/aboutacc/newsroom/pressreleases/acc-files-amicus-oregon-supreme-court-in-crimson.cfm> (asserting position in opposition to Massachusetts’s decision in *RFF Family Partnership*).

133. See *RFF Family P’ship, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1080 (Mass. 2013) (“[A]pplying the privilege in such contexts will often benefit the client and will likely result in increased law firm compliance with ethical obligations . . .”).

encourage law firm use of in-house counsel for current-client issues but is sufficiently limited to ensure the privilege will apply only where appropriate.¹³⁴ By achieving this balance, the court in *RFF Family Partnership* permits a more efficient and ethical legal environment that serves the interests of lawyers and clients alike.¹³⁵

First, the court's decision in *RFF Family Partnership* increases law firm efficiency.¹³⁶ The recognition of in-firm privilege eliminates the need for law firms to secure outside counsel when issues with a current client arise.¹³⁷ While it is clear this development saves firms time and money, it also ultimately results in more timely legal advice for clients.¹³⁸ Moreover, by allowing attorneys to consult with in-house counsel prior to deciding whether to withdraw from a client's case, the *RFF Family Partnership* framework mitigates potential harm to the client.¹³⁹ For example, the Burns & Levinson attorneys were in the middle of active negotiations for RFF when they received the notice of claim.¹⁴⁰ If the attorneys were required to withdraw as counsel at the first inkling of malpractice, RFF would have likely suffered from the halted foreclosure sale.¹⁴¹

134. See *Squires-Lee & Fuller*, *supra* note 87, at 2 (“The four-part formula appropriately balances the concerns of clients and attorneys . . .”).

135. See *RFF Family P’ship*, 991 N.E.2d at 1080 (discussing how framework of four-part formula benefits lawyers and clients).

136. See *id.* at 1074 (finding that attorneys are not required to retain outside counsel or withdraw unnecessarily when current-client issues arise); see also *Chambliss*, *supra* note 4, at 1747 (“Requiring the firm to obtain outside counsel or withdraw from the representation also does not serve the interests of the outside client. Certainly, the client is not better off if the firm retains outside counsel.”).

137. See *TattleTale Alarm Sys. v. Calfee, Halter & Griswold, LLP*, No. 2:10-cv-226, 2011 WL 382627, at *5 (S.D. Ohio Feb. 3, 2011) (“While consultation with outside counsel might be a fair substitute in some cases, by the time a matter has progressed to the point where outside counsel are called in, it may be too late to protect the client from damage.”); *RFF Family P’ship*, 991 N.E.2d at 1080 (rejecting RFF’s argument that outside counsel was “practical alternative” for Burns & Levinson); see also *ABA Resolution 103*, *supra* note 15, at 15 (“Any distinction between in-house and outside counsel in this regard elevates form over substance.”).

138. See *RFF Family P’ship*, 991 N.E.2d at 1074 (“[A]part from the additional cost to the law firm, [retaining outside counsel] may delay the receipt of the ethical advice because new counsel will need to be retained and the new counsel’s law firm will need to complete its own conflicts check.”).

139. See *id.* (noting that withdrawing prematurely does not adequately protect client interests); see also *Chambliss*, *supra* note 4, at 1747 (“[T]he client’s interest may be seriously harmed by encouraging the firm to withdraw at the first hint of a problem because withdrawal limits the firm’s opportunity (and incentive?) to mitigate harm to the client.” (citing Anthony E. Davis, *Professional Responsibility: Multijurisdictional Practice, Internal Discussions, Counsel’s Advice*, N.Y. L.J., July 7, 2003, at 3)).

140. See *RFF Family P’ship*, 991 N.E.2d at 1068 (noting Burns & Levinson was actively representing RFF in foreclosure sale when Burns & Levinson received Prince Lobel’s notice of claim).

141. See *Chambliss*, *supra* note 4, at 1747 (discussing potential harm to client when attorneys withdraw from representation before mitigating harm).

Second, the court's decision in *RFF Family Partnership* fosters a more ethical law firm environment.¹⁴² By assuring attorneys that their communications will remain protected, the court's decision facilitates complete candor with in-house counsel.¹⁴³ This reassurance essentially eliminates any "chilling effect," thereby encouraging lawyers to raise issues they might otherwise conceal or ignore.¹⁴⁴ This collaborative effort ultimately provides clients with better-informed advice and the reassurance that their lawyers are maintaining ethical standards in their work.¹⁴⁵

B. *Massachusetts's Framework as a Model for Jurisdictions Needing Renovation*

While many courts have simply followed the majority by adopting exceptions to the attorney-client privilege in cases where a current client is involved, the court in *RFF Family Partnership* refused to blindly rely on existing precedent.¹⁴⁶ Rather, the court constructed an innovative framework

142. See *ABA Resolution 103*, *supra* note 15, at 15 ("[T]he attorney-client privilege for consultations with in-house counsel is critical to ensuring that attorneys and other law firm personnel receive the best possible advice on complicated legal and ethical issues."); see also Peter R. Jarvis & Mark J. Fucile, *Inside an In-House Ethics Practice*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 103, 112 (2003) (noting principal effect of in-house ethics counsel is to "keep ethics issues in the forefront . . ."). Peter Jarvis and Mark Fucile further assert that the particular attention paid to ethics issues through in-house counsel influences the culture of the firm in at least three overlapping ways:

A firm that expressly devotes personnel to ethics issues is telling its lawyers that it cares about those issues and their resolution; a firm with readily available and user-friendly ethics resources makes it easier for its attorneys to comply with the rules and to avoid taking imprudent or unnecessary risks; firm morale is improved when lawyers know they can get reliable help when they need it.

Id. (describing in-house ethics counsel's influence on firm culture).

143. See *RFF Family P'ship*, 991 N.E.2d at 1074 (acknowledging that "sugar-coating" would occur if attorneys consulted in-house counsel without the guarantee of privilege); see also Chambliss, *supra* note 4, at 1754 ("[E]ven well-meaning clients need the privilege to encourage them to reveal questionable conduct and voice their fears about liability.").

144. See *TattleTale Alarm Sys. v. Calfee, Halter & Griswold, LLP*, No. 2:10-cv-226, 2011 WL 382267, at *5 (S.D. Ohio Feb. 3, 2011) (highlighting importance of reassuring attorneys that their communications will remain confidential through preservation of in-firm privilege). The court in *TattleTale* further reasoned that "[i]f . . . lawyers believe that these communications will eventually be revealed to the client in the context of a legal malpractice case, they will be much less likely to seek prompt advice from members of the same firm." *Id.*

145. See Chambliss, *supra* note 4, at 1765 (discussing benefits of in-house ethics counsel for firm and clients). Furthermore, Professor Chambliss argues that encouraged use of in-house counsel has day-to-day benefits outside the arena of malpractice litigation, stating that, "[i]n the long run, clients collectively stand to benefit far more from firms' investment in in-house counsel than from sporadic access to in-firm communication in lawyer-client disputes." *Id.*

146. See *RFF Family P'ship*, 991 N.E.2d at 1074–80 (declining to join other jurisdictions that allow "legal doctrine to trump functionality"). For a further discussion of these cases, see *infra* notes 147–51 and accompanying text; see also Barker, *supra* note 24, at 471 (noting that flawed reasoning in *Valente* has become foundation for unsound case law, and urging courts to reconsider its application).

that preserves the privilege while still respecting the Model Rules of Professional Conduct.¹⁴⁷ However, Pennsylvania's rigid approach to in-firm privilege makes achieving this balance impossible.¹⁴⁸ Under *Koen Book*, Pennsylvania firms cannot even protect their communications with outside counsel from discovery if the communications involve a current client's threatened malpractice action.¹⁴⁹ Given the unfortunate and expansive influence of *Sunrise*, this dysfunctional approach is not just isolated to Pennsylvania but exists within several other jurisdictions.¹⁵⁰ These jurisdictions relying on *Sunrise* should reconstruct their approaches to in-firm privilege in light of *RFF Family Partnership*.¹⁵¹

Massachusetts's framework provides an in-firm privilege analysis that values real world implications over existing precedent.¹⁵² Unlike the court in

147. See Chambliss, *supra* note 4, at 1740 (advocating for frameworks governed by ethical rules and traditional privilege analysis); see also Fields, *supra* note 15 (discussing Massachusetts's framework in context of Model Rules).

148. See Barker, *supra* note 24, at 470–71 (critiquing Pennsylvania's approach under *Koen Book*). Barker dissects Pennsylvania's in-firm privilege analysis in *Koen Book*, stating, "*Koen Book* suggests that the lawyers should withdraw to permit defense preparations. But a lawyer who has not been discharged cannot withdraw without taking actions necessary to prevent prejudice to the client and, if the representation is before a tribunal, without the tribunal's permission." *Id.* at 470 (citing MODEL RULES OF PROF'L CONDUCT R. 1.16 (2003)). Barker argues that, for both of these reasons, the lawyers in *Koen Book* "probably could not have withdrawn until completion of the bankruptcy hearing." *Id.*

149. See Richmond, *Essential Principles*, *supra* note 22, at 831 (criticizing *Koen Book*'s in-firm privilege analysis as flawed and rigid).

150. See Simon, *supra* note 56 (naming *Sunrise* as "seminal" in-firm privilege case and describing six cases relying on its ruling). For a further discussion of jurisdictions employing the reasoning of *Sunrise*, see *supra* note 58 and accompanying text.

151. See Fields, *supra* note 15 (expressing hope that Massachusetts's decision will influence other courts to recognize in-firm privilege). Moreover, the legal profession is projected to see wider recognition of in-firm privilege with the added support of the American Bar Association's most recent resolution. See Rogers, *ABA Formally Backs Privilege*, *supra* note 14 ("[T]he new policy will provide a strong footing for ABA advocacy on the issue [of in-firm privilege]."). The ABA Resolution provides:

The ABA 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.

ABA Resolution 103, *supra* note 15, at 3 (supplying ABA's stance on in-firm privilege).

152. See *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1073, 1080 (Mass. 2013) (providing implications for RFF's proposed alternatives). Counsel for RFF argued that attorneys faced with a malpractice claim by a client have four practical alternatives: (1) withdraw from the representation "without first consulting with better informed and more dispassionate in-house ethics counsel"; (2) advise the client of the conflict (without first consulting with in-house counsel), and ask for the client's consent to consult with in-house counsel; (3) confer with in-house counsel without pursuing the two previously listed alternatives and accept the risk the communications could be discovered; or (4) retain outside counsel. See *id.* at 1073–74 (proposing alternatives).

Koen Book, which unquestioningly relied on a colleague's opinion in *Sunrise*, the Massachusetts Supreme Judicial Court thoroughly analyzed the origins and applications of the fiduciary and current-client exceptions along with their harmful implications.¹⁵³ In doing so, the court's rejection of both exceptions aligns with that of several commentators who believe these exceptions stem from poorly reasoned case law.¹⁵⁴ By declining to follow form over function, the Massachusetts Supreme Judicial Court diminished the credibility of these older decisions and instead conveyed precisely how abrogating in-firm privilege can produce dysfunctional results for lawyers and their clients.¹⁵⁵

Moreover, the Massachusetts framework ensures that the privilege applies only in appropriate circumstances.¹⁵⁶ While attorneys deserve candid and confidential access to in-house counsel just like anyone else, the court in *RFF Family Partnership* recognizes the harm that could result from an overbroad extension of in-firm privilege.¹⁵⁷ By limiting its holding, the court essentially

The court rejected RFF's argument that its proposed courses of action constituted "practical alternatives." *See id.* at 1073. Regarding the first alternative of suggesting withdrawal, the court stated that, "[this] alternative poses the risk that a law firm, without the benefit of expert advice, may unnecessarily withdraw from a representation where the apparent conflict was illusory or reparable, or withdraw without adequately protecting the client's interests." *Id.* at 1074. The court also rejected the second alternative, stating that it "poses the risk that the law firm may advise the client about the conflict before itself obtaining the advice that would enable it better to understand the conflict." *Id.* As for the third alternative, suggesting the attorney accept the risk of discovery, the court stated that it could result in "the information provided to in-house counsel [being] withheld or 'sugar-coated' because of the risk of disclosure to the client, and the advice received will suffer from the lack of candor." *Id.* In response to RFF's fourth alternative, the court found it to be expensive and noted that it "may delay the receipt of the ethical advice because new counsel will need to be retained and the new counsel's law firm will need to complete its own conflicts check." *Id.* The court rejected each of the alternatives as "dysfunctional," because none of the options best served the interests of the client or the firm. *See id.* (justifying rejection of alternatives).

153. *See id.* at 1074–80 (analyzing origins and applications of fiduciary and current-client exceptions); *see also* *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 284–85 (E.D. Pa. 2002) ("My colleague, Judge Thomas O'Neill, faced a like issue a number of years ago in [*In re Sunrise*]." (citation omitted)).

154. *See* *Rogers*, *supra* note 85, at 121 ("[T]here was an almost solid wall of federal trial court decisions denying privilege But those decisions failed to consider important lines of authority . . . that have now been utilized in . . . *RFF Family Partnership*." (quoting William T. Barker, Partner, Dentons)). Regarding these poorly-reasoned cases, attorneys commenting on *RFF Family Partnership* have noted that "[a]nyone seeking to rely on the old federal cases must now grapple with [*RFF Family Partnership*] and the previously overlooked lines of authority on which they were based." *Id.* (predicting that it will be difficult to rely on older case law barring in-firm privilege after *RFF Family Partnership*).

155. *See RFF Family P'ship*, 991 N.E.2d at 1080 ("[F]orm should follow function, and we prefer a formulation of the attorney-client privilege that encourages attorneys faced with the threat of legal action by a client to seek the legal advice of in-house ethics counsel . . .").

156. *See id.* ("For the privilege to apply, four conditions must be met.")

157. *See* Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 HOFSTRA. L. REV. 817, 846 (1984) ("Those who have fiduciary responsibility often want legal advice concerning their responsibilities. They should have the same opportunity to consult with counsel and to speak freely and without fear of making admissions as any other clients."). *But see* *Gillers*, *supra*

minimized the risk that in-firm communication will result in ethical violations.¹⁵⁸ For example, the conditions imposed in *RFF Family Partnership* better define the attorney-client relationship between a firm's attorneys and in-house counsel, thereby lessening the likelihood of impermissible conflicts of interest under Model Rule 1.7.¹⁵⁹ Moreover, the conditions also require that all communications remain confidential thereby reinforcing the disclosure rationales articulated by Rule 1.6.¹⁶⁰

Lastly, the court in *RFF Family Partnership* reiterated the need for such conditions by acknowledging that "not every attorney in a law firm is its in-house counsel and not every communication within a law firm is privileged."¹⁶¹ By effectively isolating the application of in-firm privilege to appropriate circumstances, the court also upheld the rationale conveyed by the U.S. Supreme Court in *Upjohn*:

[I]f 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. 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.¹⁶²

By implementing four conditions for privilege, the court in *RFF Family Partnership* provides the certainty and predictability required by *Upjohn*.¹⁶³

note 117, at 108 ("A casual approach [to privilege], however, is risky: Just because lawyers consult lawyers, the privilege is not necessarily preserved.").

158. See Gillers, *supra* note 117, at 111 (urging firms to take precautionary measures for in-firm communication to ensure compliance with ethical rules).

159. See *RFF Family P'ship*, 991 N.E.2d at 1080 (requiring in-house counsel to be designated as such, to have not preformed work on client's matter, and to bill in-house communications to firm); see also MODEL RULES OF PROF'L CONDUCT R. 1.7 (2012) (outlining lawyers' obligation to avoid impermissible conflicts of interest); Squires-Lee & Fuller, *supra* note 87, at 1 (discussing four conditions and suggesting practice management pointers for ensuring privilege applies).

160. See *RFF Family P'ship*, 991 N.E.2d at 1080 ("[A]s with all attorney-client communications, they must be made in confidence and kept confidential."); see also MODEL RULES OF PROF'L CONDUCT R. 1.6 (precluding disclosure of confidential information relating to client's representation).

161. *RFF Family P'ship*, 991 N.E.2d at 1080 (justifying need for limited holding).

162. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (expressing need for clarity as to when privilege applies).

163. See *id.* (refusing to adopt privilege analysis that resulted in "disparate decisions"). The Supreme Court emphasized the importance of certainty in privilege throughout its analysis of the "control-group test" as applied within the context of a corporation's communications with in-house counsel. See *id.* The Court rejected the test because its past applications "illustrate[d] its unpredictability." See *id.*

The Massachusetts decision affirms the rationale of *Upjohn* by providing four clear conditions for in-firm privilege to apply. See *RFF Family P'ship*, 991 N.E.2d at 1080 (cautioning that "not every communication within a law firm is privileged" and implementing four conditions); see also Rogers, *supra* note 85, at 121 ("[T]he opinion imposes four

V. CONCLUSION

Fortunately for lawyers and their clients, Massachusetts's framework for in-firm privilege has already proved influential in other states.¹⁶⁴ Just one day after the Supreme Judicial Court of Massachusetts's decision in *RFF Family Partnership*, Georgia's Supreme Court followed suit by preserving the attorney-client privilege for in-firm communications concerning a current client.¹⁶⁵

While these decisions are a significant step for in-firm privilege, the reality is that they only constitute controlling authority in Massachusetts and Georgia.¹⁶⁶ In many jurisdictions, it remains unclear whether the attorney-client privilege protects discussions with in-house ethics counsel involving current-client matters.¹⁶⁷ Even worse, in Pennsylvania, and states adopting its precedent, attorneys' conversations with in-house counsel remain unprotected if they fall within the current-client context.¹⁶⁸ Nevertheless, with the American Bar Association's recent endorsement of both Massachusetts's and Georgia's decisions, the legal profession remains hopeful that in-firm privilege will soon be widely recognized.¹⁶⁹

realistic practical requirements to insure that the privilege will apply only in appropriate cases.' These four requirements 'should serve as a list of best practices for law firms that want to insure that their communications with in-house counsel remain protected'" (quoting Richard M. Zielinski, Director, Goulston & Storrs)).

164. See, e.g., *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 102 (Ga. 2013) (recognizing in-firm privilege one day after Massachusetts); see also Fields, *supra* note 15 (noting that both courts identified similar circumstances under which confidential communications between attorneys and in-house counsel are protected).

165. See *St. Simons Waterfront*, 746 S.E.2d at 108 ("[T]he attorney-client privilege applies to communications between a law firm's attorneys and its in-house counsel regarding a client's potential claims against the firm . . .").

166. See *Squires-Lee & Fuller*, *supra* note 87, at 2 (describing jurisdictional limitations).

167. See *id.* (acknowledging uncertainty in many jurisdictions).

168. See Richmond, *Essential Principles*, *supra* note 22, at 831 (criticizing Pennsylvania's approach under *Koen Book*). For a further discussion of Pennsylvania's in-firm privilege precedent, see *supra* notes 47–84 and accompanying text.

169. See *ABA Resolution 103*, *supra* note 15, at 15 ("It is in the public interest for the law to encourage and facilitate the use of law firm in-house counsel and, by this resolution, the American Bar Association recognizes that client representation will be advanced by permitting confidential consultation in this manner.").