IN THE
INDIANA SUPREME COURT
CAUSE NO. _____

PURDUE UNIVERSITY,	)	Interlocutory Appeal from the
	)	Tippecanoe Circuit Court
	)	
Appellant/Defendant,	)	Court of Appeals Cause No.
	)	79A02-1304-PL-342
v.	)	
	)	Trial Court Cause No.
MICHAEL A. WARTELL,	)	79C01-1205-PL-21
	)	
	)	The Honorable
Appellee/Plaintiff.	)	Donald L. Daniel, Judge

BRIEF OF *AMICUS CURIAE* OF ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF APPELLANT/DEFENDANT PURDUE UNIVERSITY

On Petition for Transfer from the Indiana Court of Appeals,
Cause No. 79A02-1304-PL-342

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

As a key part of their jobs, in-house lawyers find and fix possible legal problems at their companies. To carry out this vital task of helping their clients to follow the law, in-house lawyers routinely order or lead investigations into alleged misconduct. And to make sure that they have accurate views of the facts and the options for legal action, companies and their in-house lawyers rely on attorney-client and work-product privileges. Those privileges promote legal compliance when lawyers and clients can count on them to be strong, consistent, and predictable.

Relying on a profound misconception of the role of a lawyer in conducting an independent investigation, the Court of Appeals introduced a new doctrine with unpredictable scope into the attorney-client privilege and work product protection arena. That unpredictability has important consequences. Most significantly, doubt about the strength of the privileges harms compliance with the law. As the United States Supreme Court held in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981), "[a]n uncertain privilege . . . is little better than no privilege at all."

Further, the appellate court ignores the fact that clients, rather than lawyers, own the attorney-client privilege. If a lawyer fails to follow all relevant rules concerning privilege, courts may consider disciplining the lawyer. But courts should not revoke the client's privilege due to a lawyer's alleged mistakes.

The Association of Corporate Counsel has long advocated to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role and concerns of in-house counsel, and the legal departments where

they work. ACC is the leading global bar association that promotes the common professional and business interests of in-house counsel. The Association has over 33,000 members who are in-house lawyers employed by over 10,000 organizations in more than 75 countries. ACC's Indiana Chapter represents 371 Indiana in-house lawyers, who work for 173 organizations.

Since its creation, ACC has championed attorney-client and work-product privileges. In one filing after another – in the United States and around the world – ACC has encouraged courts and agencies to protect the scope of these privileges.[1] ACC has especially advocated to ensure that a robust privilege applies to a client's confidential communications with in-house lawyers, as the Supreme Court held in *Upjohn Co.*, 449 U.S. at 390.

In order to maintain Indiana's strong legal privileges that boost legal compliance, ACC urges this Court to grant Purdue's Petition for Transfer and reverse the opinion of the Court of Appeals.

ARGUMENT

A. COMPANIES AND THEIR IN-HOUSE LAWYERS DEPEND ON PRIVILEGES TO CONDUCT CORPORATE INVESTIGATIONS AND OTHER CRITICAL LEGAL WORK

In-house lawyers and the companies they work for depend on the attorney-client and work-product privileges. As the U.S. Supreme Court has written, the attorney-client "privilege applies when the client is a corporation." *Upjohn*, 449 U.S. at 390. *See also See* Ind. R. Prof. Cond. 1.13, Cmt. 2 (discussing privilege and corporate clients). The

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

attorney-client privilege serves the same purpose whether the client is an individual or an organization – encouraging "full and frank communication between attorneys and their clients." *Upjohn,* 449 U.S. at 389*; see also Skinner v. State*, 920 N.E. 2d 263, 266 (Ind. Ct. App. 2010) (quoting "full and frank" language from *Upjohn*). Similarly, the work-product doctrine helps "assure that an attorney is not inhibited in his representation of his client by the fear that his files will be open to scrutiny." *Am. Bldgs. Co. v. Kokomo Grain Co., Inc.*, 506 N.E.2d 56, 62 (Ind. Ct. App. 1987) (quoting *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977).[2]

Maintaining privilege does not simply help an individual client. Strong legal privilege furthers "*public interests* in the observance of law and administration of justice" and "recognizes that sound legal advice or advocacy serves *public ends*." 449 U.S. at 389 (emphasis added)*; see also Skinner*, 920 N.E.2d at 266 (same).

Privileges are especially important to in-house counsel in the context of corporate investigations. A lawyer's ability to provide candid "advice . . . depends upon the lawyer's being fully informed by the client." *Upjohn*, 449 U.S. at 389. As *Upjohn* recognizes, "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." 449 U.S. at 390-391. "[T]he privilege exists to protect . . . the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390*; see also Sandra T.E., et al. v. S. Berwyn Sch. Dist.*, 600 F.3d 612, 620 (7th Cir. 2009) (stating

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[2] When interpreting the scope of Indiana privileges that track federal privileges, Indiana state courts should look to federal authorities. *See Am. Bldgs. Co.*, 506 N.E. 2d at 59.

"investigation of the factual circumstances . . . was an integral part of the package of legal services . . . and a necessary pre-requisite to the provision of legal advice about how the [client] should respond"). And the work-product privilege, no less than the attorney-client privilege, "goes to the heart of the attorney-client relationship." *Am. Bldgs. Co.*, 506 N.E. 2d at 62.

Privileges matter so much in corporate investigations because companies that task their lawyers with digging up possible legal violations are engaging in an especially delicate and high-stakes endeavor. Determining how to find the relevant information, and then deciding how to proceed, take enormous amounts of work and judgment. Those qualities require discretion and deep trust in the relationship between the in-house attorney and the client, which the attorney-client and work-product privileges both bolster.

Sources inside and outside the company might not want to talk. They sometimes open up only if the company's lawyers can credibly promise that their testimony will be protected by privilege. The privileges play an equally important role once a company and its lawyers have gathered their facts. At that point, they need to decide how to proceed. Deciding how to fix the problem can require sensitive talks with several parts of the company. Unless a company can ensure that the discussions revolving around legal advice will remain confidential, it may well hesitate to take actions that the law requires. When the company does act, that the path it decides to follow can itself trigger repercussions.

Again, *Upjohn* is instructive. There, after the company and its in-house lawyers consulted, the client decided to start an investigation in the company about bribing foreign officials, to gauge the legal risk. After completing the investigation, the company and its lawyers again consulted, and decided to submit reports to the Securities and Exchange Commission, and to the Internal Revenue Service. This, of course, exposed the company to potential legal liability (and, as it happens, triggered the litigation that led to the Supreme Court's decision). To make such momentous decisions, companies need to know that they can trust their lawyers. Strong privileges buttress that trust, and so promote compliance with the law.

Of course, privilege is vital to in-house counsel for a wide range of other assignments involving legal advice. Their jobs cover every imaginable legal project, many of them extremely sensitive. These include litigating bet-the-company cases, writing and enforcing contracts that ensure necessary revenue and resources, and restructuring their businesses to better serve consumers and shareholders, to name just a few. For all of these tasks and others, companies need to know that their legal communications with their in-house lawyers will stay confidential. Only strong, reliable, and predictable privileges can make that happen.

B. NO FREE-FORM "EQUITABLE" EXCEPTION TO THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES EXISTS IN INDIANA

In its opinion, the Court of Appeals knew that it was creating a novel exception to the attorney-client and work product privileges. It stated flatly that "the attorney-client privilege and the work-product doctrine have few recognized exceptions, and that

equitable estoppel is *not* one of them." *Purdue Univ. v. Wartell*, 5 N.E.3d 797, 806 (Ind. Ct. App.2014) (emphasis added). Unfortunately, that legal limit did not stop the court. Instead, it created a new doctrine from whole cloth, holding "Purdue should be equitably estopped from invoking the attorney-client privilege and the work-product doctrine." *Purdue Univ.*, 5 N.E.3d at 809.

In fact, Indiana's laws and rules do not recognize a shapeless equity exception to either the attorney-client privilege or to the work-product privilege. Indiana Rule of Professional Conduct 1.6(b) lists half a dozen recognized exceptions to the attorney-client privilege in Indiana. Indiana Trial Rule 26(B)(3) allows work product to be breached only on strong showings of "substantial need" and "undue hardship" (and even then, the exception does not include mental impressions). None of these in any way supports the boundless "equity" exception to the privileges that the Court of Appeals created.

The Court of Appeals' citation to *Madden v. Ind. Dep't of Transp.*, 832 N.E.2d 1122, 1128 (Ind. Ct. App. 2005) is not to the contrary. That case concerned the traditional "at issue" doctrine of waiver, where a party uses some part of ostensibly-privileged communications to make its case, but refuses to disclose the balance of those communications. Here, Purdue has not relied on any of the privileged communications to make its case.

Indeed, the Court of Appeals' decision rests on a profound misunderstanding of the lawyer's role in this matter. In contrast to the premise underlying the decision below, the lawyer investigating this matter was, in fact, independent of both Wartell and Purdue's president. Like all lawyers representing corporate entities, his client was not the

president or another senior executive, but rather the University itself. *See* Ind. R. Prof. Cond. 1.13. Consistent with this notion of independence, the lawyer submitted his report to a panel composed of members of the University's Board of Trustees, the entity that ultimately speaks for his true client. And this view of what constitutes an "independent investigation" should not be surprising. It is how independent investigations are conducted across the corporate world. Simply put, this Court should not allow a novel and breathtaking equitable exception to be divined out of a misunderstanding of the lawyer-client relationship in the corporate context.

C. BECAUSE CLIENTS OWN THE ATTORNEY-CLIENT PRIVILEGE, IT STAYS INTACT EVEN WHEN THEIR LAWYERS DO NOT COMPLY WITH THE RULES OF PROFESSIONAL CONDUCT

The Court of Appeals also rested its holding creating the novel "equity" exception, to a significant degree, on the lawyer's alleged failure to follow Indiana's professional conduct rules. *See Purdue Univ.*, 5 N.E.3d at 807-08. ACC has no opinion on whether the lawyer here did or did not follow Indiana's ethical rules. But ACC does note more generally that a lawyer's ethical violations cannot strip the client of attorney-client privilege.

Indiana recognizes that the client owns the attorney-client privilege. As this Court has held, "the privilege belongs to the client and can only be waived by conduct attributable to the client." *Maybery v. State*, 670 N.E. 2d 1262, 1266 n.5; s*ee also Brown v. Katz*, 868 N.E. 2d 1159, 1166 (Ind. Ct. App. 2007) (same).

The client's ownership is so vital to the proper functioning of attorney-client privilege that even a lawyer's ethical misconduct cannot pierce the privilege. In a leading

case on this issue, the D.C. Circuit considered such a situation in *Eureka Invest. Corp., N.V. v. Chi. Title Ins. Corp.*, 743 F.2d 932 (D.C. Cir. 1984). There, the court considered how to treat privilege when a law firm that originally represented two parties later sued one of the clients on behalf of the other. According to the D.C. Circuit, even this potential ethical violation could not pierce the privilege. The court held that the client "should not be deprived of the privilege even if . . . the asserted attorney-client relationship should not have been created." *Id.* at 937.

Here, at worst, Purdue's lawyer allegedly failed to fulfill all of his ethical obligations. Even if that is true, there is no basis to pierce the privilege, which belongs solely to the client. Rather, the appropriate remedy would involve the lawyer alone rather than the client.

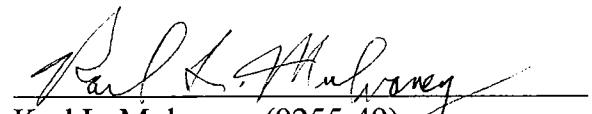
CONCLUSION

The Court of Appeals, with no basis in precedent, created a new "equity" exception to the attorney-client and work-product privileges. The new exception will introduce a massive amount of uncertainty into the scope of those privileges. Companies and their in-house lawyers, however, rely on them in order to conduct corporate investigations and conduct other vital legal business for their companies. The strong privilege allows lawyers to advise their clients, and to help them follow the law. A weak, uncertain, and unpredictable privilege, on the other hand, will make clients more hesitant to share confidences with their in-house lawyers, which could make legal compliance more difficult. Indeed, even a lawyer who violates rules of professional conduct cannot

pierce the privilege. Since the attorney-client privilege belongs to the client, only the client can waive it.

Therefore, ACC respectfully requests that this Court grant Purdue's Petition for Transfer and that it further reverse the opinion of the Court of Appeals.

Respectfully submitted,



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WORD COUNT CERTIFICATE

The undersigned hereby certifies that the foregoing *Brief of Amicus Curiae* complies with Indiana Appellate Rule 44 word limitation in that it contains 2,170 words, which does not exceed the 4,200 word limit.

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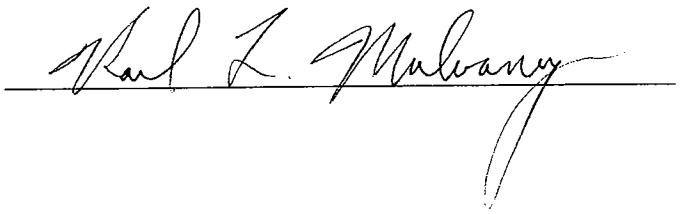

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