IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 416 WDA 2014

RED VISION SYSTEMS, INC. and TITLEVISION TEXAS LLC,

Appellees,

v.

NATIONAL REAL ESTATE INFORMATION SERVICES, L.P., NATIONAL REAL ESTATE INFORMATION SERVICES, INC., and NREIS OF TEXAS, LLC,

APPEAL OF THOMAS K. LAMMERT, JR.

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF CORPORATE COUNSEL, DELVACCA, THE CENTRAL PENNSYLVANIA CHAPTER, AND THE WESTERN PENNSYLVANIA CHAPTER IN SUPPORT OF APPELLANT

Appeal from the February 26, 2014 Order of the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, G.D. 13-008572, denying Appellant's Motion to Quash Subpoena and for Protective Order.

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INTRODUCTION AND STATEMENT OF INTEREST

This case raises a simple but critical question for corporate entities and their attorneys: whether the attorney-client privilege survives the dissolution of the entity. The Allegheny County Court of Common Pleas answered that question in the negative, reasoning that after a corporation has ceased to exist, "[t]he corporate interests no longer need to be protected." (Trial Ct. Op., p. 3). The court's abbreviated analysis completely ignores the important purposes served by the attorney-client privilege in the corporate arena, which will be significantly eroded if the privilege's protection is lifted immediately after a corporation shuts down. In *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998), the United States Supreme Court held that the attorney-client privilege continues after the death of an individual client, because a contrary rule would be "at odds with the goals of encouraging full and frank communication" between clients and their attorneys. As the *Swidler & Berlin* Court suggested, this is no less true for business clients. Abrogation of the privilege after the death of a corporation would substantially inhibit the full and frank exchange of relevant information necessary for corporations to receive effective sound legal assistance while they are alive.

As *amicus curiae*, the Association of Corporate Counsel ("ACC") has a strong interest in the outcome of this case. The same is true for its three chapters serving members in Pennsylvania, namely, DELVACCA, the Central Pennsylvania

Chapter, and the Western Pennsylvania Chapter, all of whom join this brief.[1] ACC and its chapters represent the perspective of in-house lawyers who advise their corporate clients on the full range of legal issues that arise in the course of day-to-day business. ACC has over 33,000 members who are in-house lawyers employed by more than 10,000 organizations. The entities that ACC's members represent vary greatly in size, sector, and geographic region, and include public and private corporations, public entities, partnerships, trusts, non-profits, and other types of organizations. The vast majority of ACC members work for national or multinational companies that require them to engage in cross-border practices that bring them regularly in contact with interests, employees, and facilities in Pennsylvania. ACC has over 1,600 members located in Pennsylvania, most of whom are represented by one of three ACC chapters at work in the region.

For more than 30 years, ACC has advocated to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role of in-house counsel. In particular, ACC has worked hard to ensure that a robust privilege applies to a client's confidential communications

[1] DELVACCA serves the Greater Philadelphia region, the Lehigh Valley, Southern New Jersey and Delaware. The chapter represents the professional and business interests of over 1,300 members, who practice in the legal departments of more than 400 organizations. The Central Pennsylvania Chapter's members work for entities throughout the Central Pennsylvania region, including the cities of Harrisburg, Lancaster and York. The Western Pennsylvania Chapter primarily serves the Pittsburgh region. Through a wide range of chapter-sponsored events, these three chapters provide programming, professional development and networking opportunities for in-house attorneys located in Pennsylvania.

with in-house lawyers, as the Supreme Court recognized in *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) (citations omitted). ACC has appeared as *amicus curiae* to support the attorney-client privilege in many cases in the federal and state courts, including *Swidler & Berlin, supra,* and *Gillard v. AIG Ins. Co.*, 609 Pa. 65, 70 n.1, 15 A.3d 44, 47 n. 1 (2011).

ACC is deeply concerned about the precedent in this case for both ACC's local members and their clients in Pennsylvania, as well as its national and international membership and their clients doing business in the Commonwealth. If allowed to stand, the decision will significantly impair the ability of in-house counsel to provide the legal advice necessary to guide their clients' behavior and promote corporate compliance with the law. To ensure that business entities and their counsel are afforded the full protection of the privilege, ACC respectfully urges this Court to reverse the decision of the Court of Common Pleas and make clear that the attorney-client privilege continues to apply after the death of any client, be it human or corporate.[2]

[2] Although this brief typically refers to "corporate" clients, its analysis applies equally to any type of artificial entity, including public and private corporations, public entities, partnerships, trusts, non-profits, associations, and other types of organizations.

ARGUMENT

I. The Attorney-Client Privilege Serves Important Societal Interests In The Corporate Context

As the Pennsylvania Supreme Court has repeatedly observed, the attorney-client privilege "is deeply rooted in our common law" and is "the most revered of our common law privileges." *Levy v. Senate of Pa.*, 65 A.3d 361, 368 (Pa. 2013) (citation omitted). The privilege is "rooted in the imperative need for confidence and trust" within the attorney-client relationship. *Jaffee v. Redmond,* 518 U.S. 1, 10 (1996) (citation omitted); *Estate of Kofsky,* 487 Pa. 473, 481, 409 A.2d 1358, 1362 (1979). The privilege is "inextricably linked to the very integrity and accuracy of the fact finding process," *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978), and is "essential to the just and orderly operation of our legal system," *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997); *see also Alexander v. Queen,* 253 Pa. 195, 202, 97 A. 1063, 1064 (1916) ("Without such a privilege the confidence between client and advocate, so essential to the administration of justice, would be at an end.") (citation omitted).

At its core, the privilege is based on the recognition that "sound legal advice or advocacy . . . depends upon the lawyer's being fully informed by the client." *Upjohn,* 449 U.S. at 389. "The central principle is that a client may be reluctant to disclose to his lawyer all facts necessary to obtain informed legal advice, if the communication may later be exposed to public scrutiny." *In re Thirty–Third*

Statewide Investigating Grand Jury, 86 A.3d 204, 216 (Pa. 2014) (citation omitted). By ensuring confidentiality, the privilege enables clients to provide the information necessary for their attorneys effectively to represent them. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) ("the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation") (citing *Upjohn*, 449 U.S. at 389); *In re Search Warrant B–21778*, 513 Pa. 429, 441, 521 A.2d 422, 428 (1987) ("Its necessity obtains in the objective of promoting the most open disclosure in order to enhance the attorney's effectiveness in protecting and advancing his client's interests."); *National Railroad Passenger Corp. v. Fowler*, 788 A.2d 1053, 1064 (Pa. Cmwlth. 2001) (The privilege is intended "to foster candid communications between legal counsel and the client so that counsel can provide legal advice based upon the most complete information possible from the client.") (citation omitted); *Maiden Creek T.V. Appliance, Inc. v. General Casualty Ins. Co.*, No. 05–667, 2005 WL 1712304, at *2 (E.D. Pa. July 21, 2005) ("The attorney-client privilege protects disclosure of professional advice by an attorney to a client or of communications by a client to an attorney to enable the attorney to render sound professional advice.") (citing *Upjohn*, 449 U.S. at 390).

The privilege not only helps clients obtain higher quality legal assistance, but "promote[s] broader public interests in the observance of law and

administration of justice." *Upjohn*, 449 U.S. at 389; *accord Gillard,* 609 Pa. at 70 n.1; *Investigating Grand Jury of Philadelphia County No. 88-00-3503*, 527 Pa. 432, 440, 593 A.2d 402, 406 (1991) (the beneficiary of the privilege "is not the individual client so much as the systematic administration of justice which depends on frank and open client-attorney communication") (internal citations omitted). "In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential." *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) (internal quotations omitted). Thus, the privilege serves society as a whole by promoting compliance with the law through effective counseling. *See Sandra T.E. v. S. Berwyn Sch. Dist. 100,* 600 F.3d 612, 621 (7th Cir. 2009) ("Confidential legal advising promotes the public interest 'by advising clients to conform their conduct to the law and by addressing legal concerns that may inhibit clients from engaging in otherwise lawful and socially beneficial activities.'") (citation omitted); *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036–37 (2d Cir.1984) ("The availability of sound legal advice inures to the benefit not only of the client who wishes to know his options and responsibilities in given circumstances, but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law.").

It is well settled that the privilege extends not only to natural persons, but also to corporate and other organizational entities. *See Upjohn*, 449 U.S. at 390 (the attorney-client "privilege applies when the client is a corporation"); *Custom Designs & Mfg. Co. v. Sherwin-Williams Co.*, 2012 Pa. Super. 33, 39, 39 A.3d 372, 376-77 (2012); *Maleski v. Corporate Life Ins. Co.*, 163 Pa. Cmwlth. 36, 40, 641 A.2d 1, 3 (1994). As the Supreme Court observed in *Upjohn*, the privilege's goal of fostering compliance with the law is particularly important for corporate clients. "In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law,' particularly since compliance with the law in this area is hardly an instinctive matter." 449 U.S. at 392 (*quoting* Bryson P. Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 Bus. Law. 901, 913 (1969)). Thus, corporate clients routinely seek advice regarding their legal obligations from their attorneys, who in turn regularly counsel and successfully persuade their corporate clients not to embark upon or persist in wrongful conduct. A narrow construction of the privilege would not only "make[] it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392.

The need to protect open communication between corporations and their counsel is more critical for corporations now than ever before. We are at a time when legislatures and regulators, not to mention the public generally, place increasing emphasis on corporate accountability, transparency, and compliance with both the letter and the spirit of the law. Corporations are subject to an ever-increasing array of securities, tax, labor, financial, health care, environmental, trade and other regulations. Publicly traded companies are also required to comply with the complex corporate governance and reporting standards imposed by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). In order to comply with all of these regulations, corporations must be able to communicate fully and candidly with their attorneys.

That is equally if not more true for a company's in-house attorneys. One of the most important functions served by in-house counsel today is ensuring that their clients understand and comply with complex laws and regulations. In-house counsel are often better equipped than outside counsel to advise corporate clients on their legal obligations and encourage compliance with the law given their intimate knowledge of the business and familiarity with its practices, culture, and employees. Confidentiality ensures that companies can receive the advice they need to follow the law without risking unwarranted repercussions from

competitors, the government, or the public. *See In re Teleglobe Communications Corp.*, 493 F.3d 345, 369 (3rd Cir. 2007).

In sum, a robust privilege is necessary to allow corporations and other organizations to obtain the legal assistance they need to guide future actions or to rectify or ameliorate the consequences of past actions. The existence and integrity of the attorney-client privilege does not obstruct the truth-finding process. To the contrary, it promotes disclosure of the truth to lawyers and fosters actions available under the law to redress wrongs that might otherwise be left undiscovered and unaddressed and to prevent other wrongs from being committed in the first place. For this reason, the privilege is crucial to the administration of justice in today's society.

II. Failing To Protect Privileged Communications After The Demise Of A Corporate Entity Would Significantly Erode The Benefits Provided By The Attorney-Client Privilege

In holding that the attorney-client privilege does not apply to dissolved entities, the Court of Common Pleas asserted that after a corporate entity has ceased to exist, "[t]he corporate interests no longer need to be protected." (Trial Ct. Op., p. 3). The court's analysis completely misapprehends the purpose of the privilege. As explained, the fundamental goal of the privilege is to encourage candid communication between the client (in the case of a business client, its human agents) and the client's attorney. Thus, one must look *ex ante* — at the time

the communications are made — to determine whether the privilege serves the interests of the corporation, not *ex post* after a corporation has dissolved. The lower court's exclusive focus on the post-dissolution period disregards the fact that abolishing the privilege *after* an entity's death will affect its interests *before* its death by interfering with its ability to obtain sound legal advice and effective representation.

The U.S. Supreme Court relied on that precise fact in concluding that the privilege survives the death of an individual client. The Court thus explained that "[k]nowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel." *Swidler & Berlin,* 524 U.S. at 407. That same rationale applies with equal if not greater force to business clients. While it is true that the privilege is for the benefit of the corporation and not the corporation's officers, directors, and employees, at the same time it must be acknowledged that organizations can act only through their human agents. Those individuals must feel safe in the knowledge that their communications will remain confidential. The less secure they feel, the less incentive they have to be candid. Given that a corporation's agents are still living after the entity's dissolution, posthumous abrogation of the privilege is likely to have a greater chilling effect on business clients than individual clients.

The risk of chilling attorney-client communications is particularly acute in today's economy in which corporate bankruptcies are commonplace. *See* http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=66471 (noting that there were more than 40,000 corporate bankruptcies in 2012). Notably, the lower court's ruling does not only affect large, profitable businesses, but also smaller, less well-to-do ones, including closely-held corporations, partnerships, and sole proprietorships, as well as non-profit associations. The risk of bankruptcy or failure is often quite high for such entities, especially for the myriad start-up companies that sprout up daily in today's business world. Given the ever-present risk of failure faced by these entities, a rule eliminating the privilege after corporate dissolution would severely hamper the ability of the owners and employees of such enterprises to obtain legal advice.

Failure to honor the privilege after the demise of a corporation would also have the perverse result of stripping away the privilege at a time when it is needed the most. It is precisely when a company starts to have financial difficulties that the need for legal advice and communication is often at its apex. At such a time, corporate officers need to know what the law is and how to satisfy the corporation's many obligations to the government, creditors, investors, affiliates, and other parties. If corporate officers know that their communications will be

subject to automatic disclosure as soon as the company closes its doors, their efforts to get the company on its feet again, or alternatively, to wind the company down, will be severely hobbled. As a result, the interests of the corporation's employees, customers, creditors, and shareholders will be substantially jeopardized.

In abolishing the privilege for dissolved corporations, the Court of Common Pleas did not (and could not) deny that such a rule would inhibit communications between corporate employees and their counsel. It merely speculated that any chilling effect would be *de minimis* because employees already know that their communications might be "disclosed by new management or a trustee in bankruptcy." (Trial Ct. Op., p. 3). The degree to which attorney-client confidences may be discouraged by the creation of another exception to the privilege, however, cannot be measured, and courts have never demanded proof that disclosure will have a quantifiable adverse effect. To the contrary, the mere possibility of chilling justifies application of the privilege. *See Swidler & Berlin*, 524 U.S. at 410 (refusing to abrogate privilege based on mere "speculation . . . as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney"); *id.* at 407 ("[w]hile the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to

assume that it vanishes altogether."); *cf. Com. v. Harris*, 612 Pa. 576, 586, 32 A.3d 243, 249 (2011) ("respectfully disagree[ing] with the United States Supreme Court that disallowing immediate appeals will not chill [privileged communications]").

To be sure, continuing the privilege after the demise of a business may result in the loss of some evidence. But that loss is likely to be less significant than in the case of an individual client. Unlike an individual, who is not available to testify as a witness after his death, a corporation's former officers, directors, and employees are available to testify after the death of a corporation. Thus, there is less need for posthumous disclosure of attorney-client communications in the corporate context than in the individual context. Moreover, courts have made clear that "the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place." *Swidler & Berlin*, 524 U.S. at 408. "This is true of disclosure before and after the client's death. Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real." *Id.*[3]

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[3] *See also Gillard,* 609 Pa. at 86 (noting that "it would be imprudent to establish a general rule to require the disclosure of communications which likely would not exist (at least in their present form) but for the participants' understanding that the interchange was to remain private"); *Levy,* 65 A.3d at 367 ("[t]he privileged communications kept from the court do not really represent a 'loss' of evidence since the client would not have written or uttered the words absent the safeguards of the attorney-client privilege'") (citation omitted); *National Railroad Passenger Corp.,* 788 A.2d at 1064 (explaining that attorney-client privilege "protects those disclosures that

In any event, any marginal unavailability of evidence is a price worth paying for the overriding benefits of the privilege to the legal system. As courts long ago concluded, "[t]he social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases." *United Shoe Mach. Corp.*, 89 F. Supp. at 358 (citation omitted).

III. Continuation Of The Privilege After The Demise Of A Corporation Is Necessary To Protect The Interests Of Organizational Stakeholders

In concluding that the privilege does not survive the dissolution of a corporation because "[t]he corporate interests no longer need to be protected," the Court of Common Pleas also stressed that unlike an individual, "a corporation that has ceased to exist is not concerned about reputation, civil liability, or harm to friends or family." (Trial Ct. Op., p. 3). That observation is both irrelevant and wrong. To begin with, as discussed above, the court misconstrues the privilege by ignoring the deleterious chilling effects that its rule would have on businesses while they are still operating.

Furthermore, contrary to the court's view, corporate entities have interests that can and should be subject to protection after their dissolution. As the Supreme

are necessary to obtain informed legal advice that might not be made absent the privilege") (citation omitted).

Court observed in *Swidler & Berlin*, communications between clients and attorneys often reveal confidences about third parties. Thus, the Court explained:

> Clients consult attorneys for a wide variety of reasons . . . . Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. *The same is true of owners of small businesses* who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may . . . be matters which the client would not wish divulged.

524 U.S. at 407-408 (emphasis added).

As the Supreme Court suggests, its rationale applies to business as well as individual clients. At bottom, corporations and other organizations are merely groups of individuals. *Cf. Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 343 (2010) ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'") (citations omitted). As such, they have numerous individual stakeholders, including employees, investors, customers, creditors, and affiliated entities. Privileged communications may involve confidences and sensitive information relating to any or all of these stakeholders that could negatively impact them upon disclosure. For example, a dissolved corporate entity may have surviving affiliates whose financial liability or reputation could be affected by disclosure of privileged communications. Similarly, disclosure of privileged communications made by

"owners of small businesses" could adversely affect the interests of third parties. *See Swidler & Berlin*, 524 U.S. at 407-408. As Appellant explains, if allowed to stand, the lower court's production order in this case will cause substantial harm by requiring him to reveal the confidences of numerous third parties, including still-existing affiliates.

While it is true that corporate management and bankruptcy trustees possess the power to waive the privilege, neither can do so willy-nilly. To the contrary, they are subject to fiduciary and other legal duties that require them to consider the interests of all of the corporation's various stakeholders, as well as the existence of any confidentiality agreements with third parties. After a corporation is dissolved, however, there is no one left to consider the interests of corporate stakeholders in making the waiver decision. Because there is no one capable of waiving the privilege, there is correspondingly no basis for lifting it.

The applicable Pennsylvania privilege statute supports that conclusion. In both criminal and civil proceedings, the General Assembly has provided that "counsel shall *not* be competent or permitted to testify to confidential communications made to him by his client, *nor* shall the client be compelled to disclose the same, *unless* in either case this privilege is *waived* upon the trial by the client." 42 Pa.C.S. §§ 5916 (criminal matters) and 5928 (civil matters) (emphasis added). Thus, the statute provides that the attorney-client privilege applies "unless"

it is "waived" by "the client." Notably, the statute does not distinguish between corporate and individual clients. Accordingly, under the plain language of the statute, the privilege must be deemed to continue after the dissolution of a business entity, since there is no "client" capable of waiving it. *See Randy Intern., Ltd. v. Automatic Compactor Corp.*, 412 N.Y.S.2d 995, 997-98 (N.Y. City Civ. Ct. 1979) (in holding that the privilege continues to exist for defunct corporations, the court noted that "[t]he privilege belongs solely to the client and can be waived only by the client," whereas the privilege "may be raised by anyone . . . and certainly by the attorney") (citations omitted).[4]

IV. The Ruling Below Will Lead To Substantial Uncertainty

As explained by the United States Supreme Court, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn,* 449 U.S. at 393; *accord Rhone–Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir.1994) ("If we intend to serve the interests of

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[4] The court's reasoning in *Gilliland v. Geramita*, No. 2:05–1059, 2006 WL 2642525, at *3–4 (W.D. Pa. Sept. 14, 2006) is directly at odds with the Pennsylvania statute. In that case, the court considered whether a law firm was required to disclose privileged documents of a corporation that had not been legally dissolved but whose chief executive officer had died, whose other officers had apparently resigned, and whose management included no remaining officer, manager, or director to exercise the privilege. *Id.* at *3. In ordering disclosure, the court reasoned that, in the absence of a person with authority to invoke the privilege on behalf of the corporation, the defendant lawyer could not meet his burden of proving that the privilege had been validly asserted. *Id.* at *4. As the Pennsylvania statute shows, however, the *Gilliland* Court had it completely backwards: in the absence of a person with authority to waive the privilege, an attorney cannot be compelled to disclose a client's privileged communications.

justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to apply the privilege in ways that are predictable and certain."). "An uncertain privilege, or one which purports to be certain, but rests in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

The lower court's ruling will result in considerable uncertainty regarding the application of the privilege in the corporate realm. When communicating with attorneys (both inside and outside), corporate directors, officers and employees will not be able to predict whether those communications will become public in the future. Thus, a rule abrogating the privilege after the death of a corporation "introduces substantial uncertainty into the privilege's application." *Swidler & Berlin*, 524 U.S. at 409.

A rule eliminating the privilege after the demise of an organizational entity also leaves unanswered questions regarding when an entity has sufficiently "died" to justify the abolition of the privilege. At present, courts have different views on this question. *See Wallis v. Centennial Ins. Co.*, 2013 WL 434441, at *7-8 (E.D. Cal. Jan. 31, 2013) (noting that some courts remove the privilege only with respect "to those entities that have completely dissolved—*i.e.*, completed liquidation proceedings," while other courts abrogate the privilege for entities that have stopped operating even though not yet dissolved) (citing cases). Similarly, some

courts have established a "good cause" standard to govern claims of privilege on behalf of defunct entities. *See Gilliland v. Geramita*, 2006 WL 2642525, at *4 ("there should be a presumption that the attorney-client privilege is no longer viable after a corporate entity ceases to function, unless a party seeking to establish the privilege demonstrates authority and good cause."). A "good cause" standard would both undermine the fundamental purposes of the privilege and be inherently unpredictable and difficult to apply.

A clear and absolute rule establishing the posthumous preservation of the privilege for corporate entities will avoid uncertainty, is easier to administer judicially, and will reduce the expense and burden of ancillary litigation relating to this issue.

V. The Court of Common Pleas Erred In Denying Work-Product Protection For The Disputed Materials

The lower court's opinion is equally destructive of another critical protection afforded by the law to communications and other materials created by lawyers in the course of representing their clients: the work-product doctrine. In Pennsylvania, the attorney work-product doctrine provides, essentially, that "discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research, or legal theories." Pa.R.Civ.P. 4003.3. The protection against the discovery of opinion work-product is designed to shelter "the mental processes of

the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Lepley v. Lycoming County Court of Common Pleas*, 481 Pa. 565, 573, 393 A.2d 306, 310 (1978) (*quoting United States v. Nobles*, 422 U.S. 225, 238 (1975)). "The work-product privilege enables attorneys to prepare cases without any risk that their own work will be used against their clients." *Kolar v. Preferred Unlimited Inc.*, 14 Pa.D.&C.5th 166, 169 (Phila. Com. Pl. June 22, 2010) (citations and quotation marks omitted).

In this case, although some of the withheld materials constitute opinion work-product, the Court of Common Pleas held that the work-product doctrine did not bar their production because "they were not prepared for use in *this* litigation." (Trial Ct. Op., p. 4) (emphasis added). But it is well established that work product is subject to protection if it is generated in anticipation of *any* litigation – not just the particular litigation in which it is sought. *See In re Grand Jury (OO-2H)*, 211 F.Supp.2d 555, 560-61 (M.D. Pa. 2001) (holding that work product remains protected even after the termination of the litigation for which it was prepared); *Sedat, Inc. v. Dep't of Envtl. Res.*, 163 Pa. Cmwlth. 29, 33, 641 A.2d 1243, 1244-45 (1994) (ruling that case summaries "prepared for the use of other agency lawyers without reference to any specific anticipated litigation" is subject to the work-product protection of Pa. R. Civ. P. 4003.3). This interpretation of the work-product rule is necessary to afford attorneys the privacy they need to think, plan,

weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories without fear of disclosure to adversaries.

Although the lower court did not address the issue, there is no question that work-product protection survives the death of a corporate client. Because the work-product privilege protects the interests of the attorney as well as the client, it may be claimed by either the client or the attorney. *See In re Grand Jury Proceedings*, 604 F.2d 798, 801-02 (3d Cir. 1979). It follows, therefore, that an attorney may assert the privilege, both before and after the death of a client. Accordingly, the Court of Common Pleas erred in refusing to accord work-product protection to the materials at issue in this case.

CONCLUSION

In holding that the attorney-client-privilege survives the death of an individual client, the U.S. Supreme Court emphatically rejected the argument that "existing exceptions to the privilege, such as the crime-fraud exception and the testamentary exception, make the impact of one more exception marginal." *Swidler & Berlin*, 524 U.S. at 409. What the Court said in so doing applies with the same force to corporate clients:

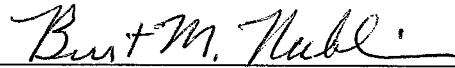
> The established exceptions are consistent with the purposes of the privilege, . . . while a posthumous exception . . . appears at odds with the goals of encouraging full and frank communication and of protecting the client's interests. A "no harm in one more exception" rationale could contribute to the general erosion of the privilege . . . .

Id. at 409-410 (internal citations omitted).

The judgment of the Court of Common Pleas should be reversed.

April 28, 2014

Respectfully submitted,



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CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the 28th day of April, 2014, two copies of the foregoing **Brief of Amicus Curiae Association of Corporate Counsel** were served via First Class Mail upon each of the following:

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