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Can We Keep a Secret?: The Attorney-Client Privilege and Work-Product Doctrine in the Internal Law-Firm Setting—*St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*

I. INTRODUCTION

Recognized at common law, the attorney-client privilege is often invoked for the purpose of fostering honest and fruitful communication between attorneys and their clients.[1] In *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*,[2] the Georgia Supreme Court ruled on an issue regarding the reach of this privilege that had never before been addressed in Georgia courts. St. Simons Waterfront, LLC (SSW) asked the court to determine the applicability of the attorney-client privilege and work-product doctrine to communication between attorneys at Hunter, Maclean, Exley & Dunn, P.C. (Hunter Maclean) and its in-house general counsel.[3] The court held that the same rules

1. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
2. 293 Ga. 419, 746 S.E.2d 98 (2013).
3. *Id.* at 419, 422, 746 S.E.2d at 102, 104.

and analysis considered in determining the attorney-client privilege and work-product doctrine for the normative attorney-client relationship apply when addressing their applicability in the law-firm in-house counsel setting.[4] Accordingly, the court held that the Georgia Rules of Professional Conduct[5] do not govern the attorney-client privilege or the work-product doctrine in this unique relationship and that no fiduciary exception can trump these privileges in the state of Georgia.[6] Only a day prior to this decision, the Massachusetts Supreme Court issued a similar holding regarding this intra-firm communication issue.[7] The Georgia Supreme Court's ruling has caught the attention of the press and the American Bar Association, providing opinions on the court's decisions and speculating what will result from such a ruling.[8] This approach for analyzing a seldom-addressed issue[9] could prove most favorable for firms handling adversarial clients. The only trouble could be determining at what point the attorney-client relationship is established for the purpose of the privilege.

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4. *Id.* at 419, 746 S.E.2d at 102. Chief Justice Hunstein, who wrote the opinion of the court, explained that the court must use the same rules that govern the work-product doctrine in any other attorney-client relationship in determining its applicability to the relationship between attorneys and in-house counsel. *Id.* at 429, 746 S.E.2d at 108. Furthermore, Justice Hunstein reasoned that the work-product doctrine will attach, just like the attorney-client privilege, once the attorney-client relationship becomes adversarial. *Id.* at 430, 746 S.E.2d at 109.

5. GA. RULES OF PROF'L CONDUCT (2013).

6. *St. Simons Waterfront, LLC*, 293 Ga. at 419-20, 429, 746 S.E.2d at 102, 108.

7. RFF Family P'ship, LP v. Burns & Levinson, LLP, 991 N.E.2d 1066, 1068, 1078-81 (Mass. 2013) (holding that communications between attorneys and in-house counsel are protected by the attorney-client privilege if: (1) the law firm designated a firm attorney to act as in-house counsel; (2) the in-house counsel remained separate from the client matter or "a substantially related matter"; (3) there is no billing to the client for the time spent with the in-house counsel; and (4) the communications were confidential, and also holding that the Massachusetts Rules of Professional Conduct do not prohibit the extension of the attorney-client privilege over communications between attorneys and in-house counsel if these four conditions are met); Alyson M. Palmer, *Lawyers' Talks with Law Firm GC May Be Shielded*, DAILY REP., July 12, 2013, at 1-2 (stating that the Georgia Supreme Court would have been the first appellate court of last resort to rule on the "scope of the attorney-client privilege for firm in-house counsel" if the Massachusetts court did not rule on the issue the day before).

8. *See generally* Mark Curriden, *Inside Story: A Georgia Case Focuses on the Extent to Which Communications Between Lawyers and a Firm's In-House Counsel Should Be Protected*, A.B.A. J., May 2013, at 22-23; Palmer, *supra* note 7.

9. Mark J. Fucile, *The Double Edged Sword: Internal Law Firm Privilege and the "Fiduciary Exception,"* 76 DEF. COUNS. J. 313, 315 (2009) ("The number of courts that have addressed this issue to date remains relatively small.").

II. Factual Background

In 2006, SSW hired Hunter Maclean to assist with the development and sale of high-end condominiums on St. Simons Island, Georgia. Hunter Maclean attorneys were responsible for drafting the form purchase contracts for presale of the condominiums.[10] When the real estate market declined in late 2007, buyers in southern Georgia began opting out of their contracts,[11] with some, including SSW's condominium buyers, claiming problems with the contracts.[12] SSW sought advice from attorneys at Hunter Maclean about the likelihood of a court granting specific performance of the contracts, but members of the firm's litigation team advised SSW that specific performance was unlikely and began reviewing buyers' claims at the request of the primary attorneys for SSW.[13]

On February 18, 2008, two of the primary attorneys and a member of the litigation team engaged in a conference call with two SSW representatives to discuss settling with the buyers. According to Hunter Maclean, one attorney began discussing the settling process and the claims to the representatives when the president of SSW joined the conversation in an angry fashion. The attorneys thought the statements by the president meant that SSW would bring suit against Hunter Maclean; however, one of SSW's representatives and its president testified that there was no intention to sue at that point. Instead, they claimed that the president joined the conversation to inform the attorneys that he was not interested in settling. One of the attorneys testified that she determined around this time that Hunter Maclean should withdraw from representing SSW. Additionally, she testified that she informed the client of the need to seek outside counsel a few days prior to and during the conference call.[14]

After this conference call, the attorneys sought advice from the firm's in-house counsel regarding potential claims SSW might have against the firm. Hunter Maclean's in-house counsel interviewed the attorneys and sought assistance from outside counsel. The firm's in-house counsel was not involved with Hunter Maclean's representation of SSW. Hunter Maclean continued to represent SSW in closings and negotiations with

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10. *St. Simons Waterfront, LLC*, 293 Ga. at 420, 746 S.E.2d at 98.

11. Curriden, *supra* note 8, at 22.

12. *St. Simons Waterfront, LLC*, 293 Ga. at 420, 746 S.E.2d at 102.

13. Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC, 317 Ga. App. 1, 2, 730 S.E.2d 608, 612 (2012) (indicating that there was a specific-performance provision in the pre-sale purchase form contracts drafted by Hunter Maclean).

14. *Id.* at 3, 6, 730 S.E.2d at 612, 614-15.

buyers while the firm sought new counsel for their client.[15] The attorneys helped prepare defenses for potential claims with the in-house counsel during the firm's continued representation of SSW.[16] Additionally, one Hunter Maclean attorney represented SSW in negotiations with buyers while assisting in-house counsel in the "internal investigation/defense efforts, acting as in-house counsel."[17]

Sometime around the February 2008 conference call, Hunter Maclean attorneys started drafting a letter to SSW regarding the rescinding buyers' individual claims and advice on how to deal with these claims. Despite SSW's request for this letter, the firm's in-house counsel advised Hunter Maclean "to stop drafting it after he perceived that SSW was adverse to the firm." Consequently, the letter was never completed or sent to SSW.[18] In 2009, SSW retained the services of a new firm and filed a complaint against Hunter Maclean alleging legal malpractice, breach of fiduciary duty, and fraud.[19]

A dispute arose between Hunter Maclean and SSW during the discovery phase of the lawsuit. SSW demanded documents and depositions from Hunter Maclean attorneys, its outside counsel, and its in-house counsel. In response, Hunter Maclean filed motions for protective orders and to quash the subpoenas for depositions, asserting the attorney-client privilege and the work-product doctrine. SSW filed a motion to compel discovery, specifically to retrieve communication between Hunter Maclean attorneys and outside counsel and the firm's communication with in-house counsel.[20] SSW argued that the in-house counsel's advice to the attorneys constituted a breach of a fiduciary duty by Hunter Maclean, which went "to the heart of SSW's claims."[21] Furthermore, SSW claimed to be "entitled to the information" because

15. *St. Simons Waterfront, LLC*, 293 Ga. at 420, 746 S.E.2d at 102.

16. *Hunter, Maclean, Exley & Dunn, P.C.*, 317 Ga. App. at 5, 730 S.E.2d at 613.

17. *Id.*

18. *Id.* at 6, 730 S.E.2d at 614.

19. *St. Simons Waterfront, LLC*, 293 Ga. at 420, 746 S.E.2d at 102 (indicating that the fraud claim was for Hunter Maclean's representation of SSW involving the condominiums and its conduct once the firm's interest became adverse); *Hunter, Maclean, Exley & Dunn, P.C.*, 317 Ga. App. at 7, 730 S.E.2d at 615 (indicating that the legal malpractice claim was for a failure to properly advise SSW on the requirements of O.C.G.A. §§ 44-3-70 to -117 (2011) (Georgia Condominium Act), its drafting of contracts, and its representation of SSW when buyers began to rescind on the contracts).

20. *Hunter, Maclean, Exley & Dunn, P.C.*, 317 Ga. App. at 8, 730 S.E.2d at 615-16 (stating that Hunter Maclean's privilege log identified twenty-one documents created after the February 18, 2008 conference call).

21. *Id.* at 8, 730 S.E.2d at 616.

the communication occurred during Hunter Maclean's representation of SSW.[22]

The Superior Court of Chatham County, Georgia granted SSW's motion to compel communication between the firm's attorneys and in-house counsel, holding that any privilege pertaining to this relationship was "abrogated" because of a conflict of interest between the firm and the client.[23] The court reasoned that the Georgia Rule of Professional Conduct 1.10[24] applied to the firm's in-house counsel because he was a partner at the firm.[25]

The Georgia Court of Appeals vacated the judgment and remanded the case for the trial court to apply a new standard of analysis.[26] On interlocutory appeal, the Georgia Court of Appeals considered other jurisdictions' approaches for analyzing the applicability of the privilege to law-firm in-house counsel.[27] The court of appeals determined that the proper standard for analyzing the privilege's extension to communication between attorneys and the firm's in-house counsel turned on whether there was a conflict of interest between the in-house counsel's duty to the law firm and his duty to the client.[28] Furthermore, the court noted that the attorney-client privilege protects communications

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22. *Id.*

23. *St. Simons Waterfront, LLC*, 293 Ga. at 420-21, 746 S.E.2d at 103. Furthermore, the superior court held that there was a conflict of interest because Hunter Maclean failed to inform SSW of the conflict and prepared defenses against SSW while continuing to represent SSW. *Id.* at 421, 746 S.E.2d at 103.

24. GA. RULES OF PROF'L CONDUCT R. 1.10 (2013). Section (a) of this rule states, "While 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 Rules 1.7: Conflict of Interest: General Rule[;] 1.8(c): Conflict of Interest: Prohibited Transactions[;] 1.9 Former Client[;] or 2.2: Intermediary." GA. RULES OF PROF'L CONDUCT R. 1.10(a). Section (b) states,

> When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:
>
> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
>
> (2) any lawyer remaining in the firm has information protected by Rules 1.6: Confidentiality of Information and 1.9(c): Conflict of Interest: Former Client that is material to the matter.

GA. RULES OF PROF'L CONDUCT R. 1.10(b).

25. *Hunter, Maclean, Exley & Dunn, P.C.*, 317 Ga. App. at 9 & n.12, 730 S.E.2d at 616 & n.12. Consequently, the superior court determined that "any privilege within the firm was negated by this conflict of interest." *St. Simons Waterfront, LLC*, 293 Ga. at 420-21, 746 S.E.2d at 103.

26. *Hunter, Maclean, Exley & Dunn, P.C.*, 317 Ga. App. at 24, 730 S.E.2d at 625.

27. *St. Simons Waterfront, LLC*, 293 Ga. at 421, 746 S.E.2d at 103.

28. *Hunter, Maclean, Exley & Dunn, P.C.*, 317 Ga. App. at 13-14, 730 S.E.2d at 619.

between corporate employees and in-house counsel, but a "bright-line rule" does not exist for attorneys' communication with the firm's in-house counsel.[29] The absence of a bright-line rule was because this was the first time "the applicability of the attorney-client privilege to a law firm's in-house communications concerning a current client" had been considered in Georgia courts.[30] The Georgia Supreme Court granted certiorari.[31]

III. LEGAL BACKGROUND

A. *The Attorney-Client Privilege*

The attorney-client privilege grants protection over certain communications between attorneys and their clients from disclosure to the adverse party.[32] This is one of the oldest recognized privileges for protecting communication.[33] Generally, the attorney-client privilege attaches 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."[34]

In *Upjohn Co. v. United States*,[35] the United States Supreme Court addressed the issue of the attorney-client privilege in the corporate context.[36] The Court determined that attorney-client privilege protection extends to an attorney's communication with both individual clients and corporate clients.[37] The dispute in this case arose from an Internal Revenue Service (IRS) demand for the production of files relating to an internal investigation conducted by Upjohn Company's general counsel regarding "questionable payments" made by foreign subsidiaries to foreign government officials.[38] The Supreme Court held that the communications by the corporation's employees to the corporation's in-

29. *Id.* at 12, 730 S.E.2d at 618.
30. *Id.* at 13, 730 S.E.2d at 619.
31. *St. Simons Waterfront, LLC*, 293 Ga. at 419, 746 S.E.2d at 102.
32. *Upjohn Co.*, 449 U.S. at 389.
33. *Id.*
34. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).
35. 449 U.S. 383 (1981).
36. *Id.* at 389-90.
37. *Id.* ("Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation . . . .").
38. *Id.* at 386-88. The files that the IRS demanded were employee responses to a questionnaire created by the corporation's general counsel and notes from interviews. *Id.*

house counsel were protected by the attorney-client privilege.[39] The Court reasoned that there is a public interest in the preservation of the attorney-client privilege, effectuated by its purpose "to encourage full and frank communication" within the attorney-client relationship.[40]

B. The Attorney-Client Privilege in the State of Georgia

As early as the nineteenth century, Georgia courts have recognized that certain communication between an attorney and a client should be protected from disclosure and from being used as evidence against the party seeking protection over the communication.[41] In *Marriott Corp. v. American Academy of Psychotherapists, Inc.*,[42] the Georgia Court of Appeals laid out a five-part test for determining whether a corporate employee's communication was protected by the attorney-client privilege.[43] Factors of this "subject matter test" that would make the attorney-client privilege apply include the following: (1) the purpose of the communication was to secure legal advice; (2) there was direction by a corporate superior to make the communication; (3) the request by the superior was for the purpose of seeking legal advice; (4) the "subject matter of the communication [was] within the scope of the employee's . . . duties"; and (5) the communication remained confidential.[44] Additionally, the court of appeals noted that "'[c]ommunications between client and attorney are excluded from public policy, and are incompetent as evidence against the client.'"[45]

In *Southern Guaranty Insurance Co. v. Ash*,[46] the Georgia Court of Appeals addressed the application of the attorney-client privilege to communication between an attorney and a corporate client.[47] The information sought to be protected by the attorney-client privilege included the attorneys' correspondence, letters, newsletters, and directives that were of a "general nature" and included advice to the client, Southern Guaranty Insurance Company of Georgia.[48] The court of appeals noted that sections 24-9-21, 24-9-24, and 24-9-25 of the

39. *Id.* at 386.

40. *Id.* at 389.

41. Fire Ass'n of Philadelphia v. Fleming, 78 Ga. 733, 737, 3 S.E. 420, 422 (1887) (holding that letters between an attorney and his client were not admissible in court).

42. 157 Ga. App. 497, 277 S.E.2d 785 (1981).

43. *Id.* at 505, 277 S.E.2d at 791-92.

44. *Id.*

45. *Id.* at 503, 277 S.E.2d at 790 (quoting McKie v. State, 165 Ga. 210, 140 S.E. 625 (1927)).

46. 192 Ga. App. 24, 383 S.E.2d 579 (1989).

47. *Id.* at 24, 383 S.E.2d at 580.

48. *Id.*

Official Code of Georgia Annotated (O.C.G.A.)[49] provided certain evidentiary privileges that protected the use of communications by an adverse party.[50] According to the court of appeals, the burden was upon the corporation to establish that communication between the corporation's counsel and the employee was privileged and should be protected from disclosure under these code sections.[51] Additionally, the court of appeals determined that the Superior Court of Cherokee County, Georgia should consider the "totality of the circumstances" when deciding whether communication warrants protection by the attorney-client privilege.[52] The court of appeals laid out factors to be considered, which included the existence of an attorney-client relationship; "the nature and purpose of the communication;" how the communication was made; and to whom the communication was made.[53]

The attorney-client privilege in the state of Georgia is now governed by O.C.G.A. § 24-5-501(a)(2).[54] The code sections mentioned in *Southern Guaranty Insurance Co.* were repealed, and this new statutory provision for the attorney-client privilege went into effect on January 1, 2013.[55] This statute was amended because the previous three statutes governing the attorney-client privilege were confusing, and the legislature felt this newly enacted provision provided a more clear description of the privilege.[56]

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49. O.C.G.A. §§ 24-9-21, -24, -25 (2010), *repealed by* O.C.G.A. § 24-5-501 (2013).

50. *S. Guar. Ins. Co.*, 192 Ga. App. at 25, 383 S.E.2d at 581.

51. *Id.* at 29, 383 S.E.2d at 583.

52. *Id.*

53. *Id.*

54. O.C.G.A. § 24-5-501(a)(2) (2013) ("There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to . . . [c]ommunications between attorney and client. . . ."). The work-product doctrine is codified in O.C.G.A. § 9-11-26(b) (2006); this provision is much like the Federal Rule governing the work-product doctrine and requires the party seeking "documents and tangible things" made in preparation of trial by the other party to show a "substantial need" for these materials and an inability to obtain them without "undue hardship." O.C.G.A. § 9-11-26(b)(3). Under Rule 26 of the Federal Rules of Civil Procedure, an attorney is able to benefit from the protection of the work-product doctrine, which is "designed to balance the needs of the adversary system to promote an attorney's preparation in representing a client against society's general interest in revealing all true and material facts relevant to the resolution of a dispute." *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1371 (D.C. Cir. 1984) (discussing FED. R. CIV. P. 26 (2013)).

55. O.C.G.A. § 24-5-501(a)(2).

56. KENNETH L. SHIGLEY & JOHN D. HADDEN, GEORGIA LAW OF TORTS-TRIAL PREPARATION AND PRACTICE § 22:3 (2013).

C. *Attorney-Client Privilege Protection for Intra-Firm Communications*

There is a recent line of cases where courts dealt with the attorney-client privilege in the context of protecting communication between a law firm's attorneys and its in-house counsel. In *Koen Book Distributors v. Powell, Trachman, Logan, Carrle, Bowman & Lombardo, P.C.*,[57] the United States District Court for the Eastern District of Pennsylvania addressed whether the attorney-client privilege protected communication of a lawyer seeking legal advice from another attorney within the firm regarding a client's threat to sue for legal malpractice.[58] The court stated that it must determine whether a conflict of interest existed during the law firm's continued representation of the client before allowing the application of the attorney-client privilege.[59] Accordingly, the court held that the communication between the two attorneys was not protected by the attorney-client privilege because of the conflict of interest between the law firm and the current client.[60]

In *TattleTale Alarm Systems v. Calfee, Halter & Griswold, LLP*,[61] the United States District Court for the Southern District of Ohio denied the plaintiff's motion to compel discovery in a legal malpractice claim.[62] The plaintiff demanded that the law firm produce documents related to its representation of the plaintiff and the payment of maintenance fees for a patent held by the plaintiff, which was the subject of the dispute.[63] The court pointed to Federal Rule of Evidence 501[64] in its analysis of the dispute.[65] Additionally, the court used the balancing test from *Garner v. Wolfinbarger*,[66] which places the burden on the

57. 212 F.R.D. 283 (E.D. Pa. 2002).

58. *Id.* at 284. More specifically, the client seeking disclosure of communications between the two attorneys informed the law firm that it was considering a legal malpractice action after it had become dissatisfied with the firm's representation and continued to retain the services of this law firm for another month before eventual termination. *Id.*

59. *Id.* at 285.

60. *Id.* at 286.

61. 2011 U.S. Dist. LEXIS 10412 (S.D. Ohio Feb. 3, 2011).

62. *Id.* at *1-2.

63. *Id.*

64. FED. R. EVID. 501.

65. *TattleTale Alarm Sys.*, 2011 U.S. Dist. LEXIS 10412, at *6 ("That rule provides that federal common law governs the question of privilege unless '[s]tate law supplies the rule of decision' on the claim at issue; if that is so, 'the privilege . . . shall be determined in accordance with [s]tate law.'") (quoting FED. R. EVID. 501).

66. 430 F.2d 1093, 1098, 1103-04 (5th Cir. 1970). The court balanced the competing interests in disclosure and non-disclosure and required a showing of good cause on the part

party requesting discovery to demonstrate good cause for why the privilege should not apply to the communication.[67] Ultimately, the court declined to create an exception to the privilege under Ohio law and determined that the plaintiff did not show "good cause" under the *Garner* test to warrant an order compelling discovery.[68]

In *Garvy v. Seyfarth Shaw LLP*,[69] the Illinois Court of Appeals addressed whether a "fiduciary duty" exception to the attorney-client privilege applied to communication between a law firm's attorneys and its in-house counsel.[70] The issue on appeal arose out of a discovery dispute stemming from a legal malpractice claim against the defendant law firm, Seyfarth Shaw LLP (Seyfarth).[71] Garvy argued that the attorney-client privilege did not apply to the communication Seyfarth sought to protect because the law firm owed him a fiduciary duty due to its representation while the firm sought legal advice.[72] Citing Illinois case law, the court of appeals noted that "[t]he fiduciary-duty exception does not . . . apply to legal advice rendered concerning the personal liability of the fiduciary or in anticipation of adversarial legal proceedings against the fiduciary."[73] Additionally, the court of appeals pointed out that the state of Illinois had not adopted this exception to the attorney-client privilege and that further analysis of the exception was not necessary for determining whether the attorney-client privilege applies to communication between an attorney and the firm's in-house counsel; however, the court of appeals made it clear that even if the fiduciary-duty exception were adopted, "it clearly would not apply here where Seyfarth sought legal advice in connection with Garvy's legal

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of the moving party in order to not apply the attorney-client privilege. *Id.*

67. *TattleTale Alarm Sys.*, 2011 U.S. Dist. LEXIS 10412, at *23.

68. *Id.* at *29-30.

69. 966 N.E.2d 523 (Ill. App. Ct. 2012).

70. *Id.* at 526.

71. *Id.* The plaintiff, Garvy, hired the defendant, Seyfarth, to assist in the management of a holding company that was owned by the plaintiff, his father, and his four siblings. After a dispute arose between the owners of this holding company, Garvy was terminated as president and CEO of the company, and the siblings filed a lawsuit against the plaintiff and the father. Garvy wished to retain Seyfarth in the chancery litigation, at which point Seyfarth, at the advice of in-house counsel, informed Garvy of a potential conflict of interest in Seyfarth's representation of Garvy or his father in the chancery litigation. Garvy asserted claims of legal malpractice, fraud, and breach of fiduciary duty against Seyfarth and sought production of internal and external communications related to its representation of Garvy. *Id.* at 526-30.

72. *Id.* at 534.

73. *Id.* at 535.

malpractice claims against it, and not in its fiduciary capacity as Garvy's counsel in the chancery litigation."[74]

IV. COURT'S RATIONALE

In *St. Simons Waterfront, LLC*, the Georgia Supreme Court addressed the proper standard for the attorney-client privilege and work-product doctrine, concluding that the analysis should be no different in the firm in-house-counsel context than the analysis for any other attorney-client relationship.[75] Accordingly, the attorney-client privilege protects communication when: (1) there is an attorney-client relationship; (2) the communication relates to the reasons for seeking legal advice; (3) the communications are confidential; and (4) no exceptions to the privilege are applicable.[76]

Chief Justice Hunstein wrote the opinion for the Georgia Supreme Court in its unanimous decision.[77] Justice Hunstein attempted to set the standard for analyzing whether communication between an attorney and a firm's in-house counsel is protected under the attorney-client privilege and work-product doctrine.[78] She began by noting that the attorney-client privilege, codified in O.C.G.A. § 24-5-501, is for the purpose of protecting parties from the "compelled disclosure" of confidential legal communication.[79] Because this privilege excludes protected communication from being used by the adverse party, it is "narrowly construed" by the courts in determining its application.[80] Justice Hunstein cited *Southern Guaranty Insurance Co.* to explain how Georgia recognizes the attorney-client privilege as protecting communications between a corporation's in-house counsel and the corporation's management and employees; however, the court had never addressed the

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74. *Id.* at 536.

75. 293 Ga. at 419, 746 S.E.2d at 102.

76. *Id.* at 423, 746 S.E.2d at 104; *see also S. Guar. Ins. Co.*, 192 Ga. App. at 25, 383 S.E.2d at 581; PAUL S. MILICH, GEORGIA RULES OF EVIDENCE § 21:2 (2012-2013). Although the court recognized that some jurisdictions apply a fiduciary-duty exception to the privilege, it declined to adopt such an exception. *St. Simons Waterfront, LLC*, 293 Ga. at 427-29, 746 S.E.2d at 107-08; *see generally* United States v. Mett, 178 F.3d 1058 (9th Cir. 1999); Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A., 220 F. Supp. 2d 283 (S.D.N.Y. 2002); *Koen Book Distribs.*, 212 F.R.D. at 284; *In re* SonicBlue, Inc., 2008 Bankr. LEXIS 181 (Bankr. N.D. Cal. 2008). The court, however, did note that the formality of the in-house counsel position is relevant in considering "the existence of an attorney-client relationship." *St. Simons Waterfront, LLC*, 293 Ga. at 424, 746 S.E.2d at 105.

77. *St. Simons Waterfront, LLC*, 293 Ga. at 419, 430, 746 S.E.2d at 102, 109.

78. *Id.* at 421, 746 S.E.2d at 103.

79. *Id.* at 421-22, 746 S.E.2d at 103 (citing O.C.G.A. § 24-5-501); *see generally* MILICH, *supra* note 76, at § 21:1.

80. *St. Simons Waterfront, LLC*, 293 Ga. at 422, 746 S.E.2d at 103.

privilege in the context of communication between a law firm's attorneys and firm in-house counsel.[81]

Deciding an issue of first impression, Justice Hunstein turned to other jurisdictions' approaches to determine the application of the privilege in the internal law-firm setting.[82] While some courts do not permit the privilege's application in this context due to a fiduciary relationship between the firm and the client,[83] other courts have only limited the circumstances in which the privilege may apply or apply the privilege with exceptions.[84] Justice Hunstein declined to adopt any of these approaches.[85] Instead, she explained why the application of the attorney-client privilege for communication with firm in-house counsel in the state of Georgia should be determined no differently than in any other circumstance in which the privilege may be asserted.[86] Justice Hunstein described the general rule for when the attorney-client privilege applies as having four requirements: "(1) there is an attorney-client relationship; (2) the communications in question relate to the matters on which legal advice was sought; (3) the communications have been maintained in confidence; and (4) no exceptions to privilege are applicable."[87] She then proceeded to apply each requirement to the communication between the Hunter Maclean attorneys and the firm's in-house counsel.[88]

Justice Hunstein stated that the trial court must determine whether the firm's in-house counsel "was actually acting in that capacity" when addressing the first prong of the attorney-client privilege test.[89] For an attorney-client relationship to exist, "[t]he firm should be clearly established as the client before or in the course of the in-firm communication."[90] She explained that whether a firm constitutes a client for the purposes of the privilege is a "fact-based determination."[91] Accordingly, Justice Hunstein listed factors that could be used to decide whether such

81. *Id.* at 422, 746 S.E.2d at 103-04 (discussing *S. Guar. Ins. Co.*, 192 Ga. App. at 24, 383 S.E.2d at 579).

82. *Id.* at 422-23, 746 S.E.2d at 104.

83. *Id.*; *see generally supra* note 54.

84. *St. Simons Waterfront, LLC*, 293 Ga. at 423, 746 S.E.2d at 104; *see generally Garvy*, 966 N.E.2d at 523; *TattleTale Alarm Sys.*, 2011 U.S. Dist. LEXIS 10412; Thelen Reid & Priest LLP v. Marland, 2007 U.S. Dist. LEXIS 17482 (N.D. Cal. Feb. 21, 2007).

85. *St. Simons Waterfront, LLC*, 293 Ga. at 423, 746 S.E.2d at 104.

86. *Id.*

87. *Id.* (citations omitted).

88. *Id.*

89. *Id.*

90. *Id.* at 423-24, 746 S.E.2d at 104.

91. *Id.* at 424, 746 S.E.2d at 104-05.

an attorney-client relationship exists.[92] These factors include but are not limited to: (1) whether there is a distinction between the legal malpractice claim against the firm and the actual representation of the client-claimant; (2) separate files for communication and work-product for the potential malpractice claim against the firm and the actual representation; and (3) the "level of formality" of the in-house counsel's position.[93] With respect to these factors, Justice Hunstein explained that if in-house counsel were involved in representing clients—meaning they acted as more than just in-house counsel for the firm—it would be more important to show they maintained a procedural practice to distinguish their work as in-house counsel from the firm's business.[94] Justice Hunstein noted that the "assumption" that an attorney within a firm can represent the firm against a current client is inconsistent with the Georgia Rules of Professional Conduct, which prohibit conflicts of interest.[95] Because of this inconsistency, the court declined to adopt a standard that considered the Rules of Professional Conduct and determined that these rules are silent as to this situation and will not be interpreted to prohibit attorney-client privilege protection.[96] Furthermore, Justice Hunstein cited to the preamble to these rules, which states that they "'are not intended to govern or affect judicial application of either the attorney-client or work product privilege.'"[97] Ultimately, Justice Hunstein concluded that "an imputed conflict of

92. *Id.* at 424, 746 S.E.2d at 105.

93. *Id.; see also* Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1749 (2005) (noting that separate billing procedures can be used to distinguish the firm as the client); 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 (2000) (distinguishing between "the firm lawyers who are the clients and the firm lawyers who are the counsel").

94. *St. Simons Waterfront, LLC*, 293 Ga. at 424, 746 S.E.2d at 105.

95. *Id.* at 424-25, 746 S.E.2d at 105. The Georgia Rules of Professional Conduct impute the conflicts of individual attorneys to all of the firm's attorneys. GA. RULES OF PROF'L CONDUCT R.1.7, 1.10 (2013).

96. *St. Simons Waterfront, LLC*, 293 Ga. at 421, 746 S.E.2d at 103.

97. *Id.* at 425, 746 S.E.2d at 106 (quoting GA. RULES OF PROF'L CONDUCT, pmbl., ¶ 19) (2013). Justice Hunstein quoted this preamble further, stating,

> [T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. *Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.*

Id. (quoting GA. RULES OF PROF'L CONDUCT, pmbl., ¶ 18).

interest" is no reason for courts to forbid the application of the attorney-client privilege between a firm's attorneys and its in-house counsel.[98]

Next, Justice Hunstein discussed whether the communications between the firm's attorneys and the in-house counsel were for the purpose of obtaining and providing legal advice.[99] She compared the communication between the attorneys and in-house counsel to that of a corporation's employees and general counsel.[100] Similar to the attorney-client privilege in the corporate context, Justice Hunstein established that the communication between attorneys and in-house counsel must be "regarding matters within the scope of the attorneys' employment with the firm" to warrant attorney-client privilege protection.[101]

Chief Justice Hunstein then determined whether the communication was maintained in confidence.[102] Once again, she turned to the attachment of the attorney-client privilege in the corporate context to help her make this determination.[103] Justice Hunstein reasoned that for "intra-firm communications" to be privileged, the communication regarding the malpractice claims should remain confidential to the firm's in-house counsel, management, attorneys, and other employees knowledgeable about the firm's underlying representation.[104]

Justice Hunstein next concluded that there was no exception to the attorney-client privilege that could apply under the circumstances before the court.[105] As Justice Hunstein recounted, Georgia recognizes only a few exceptions to the attorney-client privilege that would waive the privilege.[106] Although some jurisdictions recognize a fiduciary exception, the opinion made it clear that this exception does not apply to the attorney-client privilege analysis in Georgia courts.[107] An adoption of the fiduciary exception to the privilege had never been considered in Georgia appellate courts prior to this case.[108] Justice Hunstein explained that the purpose of the fiduciary exception was so communica-

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98. *Id.* at 425-26, 746 S.E.2d at 106.

99. *Id.* at 426, 746 S.E.2d at 106.

100. *Id.*

101. *Id.* at 426-27, 746 S.E.2d at 106.

102. *Id.* at 427, 746 S.E.2d at 107.

103. *Id.* ("The privilege does not attach to communications 'made by lawyers to their corporate or individual clients [that] are not of a confidential nature.'") (quoting *S. Guar. Ins. Co.*, 192 Ga. App. at 28, 383 S.E.2d at 583).

104. *Id.*

105. *Id.*

106. *Id.* ("Georgia law recognizes an exception to the attorney-client privilege for communications in furtherance of a crime, fraud, or other unlawful end.") (citing MILICH, *supra* note 76, at § 21:17).

107. *Id.* at 427-28, 746 S.E.2d at 107.

108. *Id.*

tion between an attorney and trustee that was legal advice that benefited the trust would not be protected from disclosure to the beneficiary.[109] Furthermore, she pointed to the two rationales used by other courts for applying this exception in their analysis.[110] The first rationale is that "the importance of the trustee's duty to the beneficiaries trumps the goals served by the attorney-client privilege."[111] The other rationale is that the beneficiary is the attorney's "real client."[112] Justice Hunstein stated that this real-client rationale does not apply to communication between attorneys and in-house counsel.[113] She reiterated that there is no mutuality of interest between the current client potentially bringing a claim and the attorneys seeking advice from in-house counsel, as there is in the context of the attorney and beneficiary relationship.[114] Additionally, the court declined to adopt the "fiduciary duty trumps privilege" notion because the "breach of an attorney's duty of loyalty is an issue of legal ethics and professional responsibility collateral to, and not directly bearing on, privilege law."[115]

V. IMPLICATIONS

A. Attachment of the Attorney-Client Privilege

The use of in-house counsel is becoming a more prevalent practice for law firms.[116] The Georgia Supreme Court's ruling on this contemporary discovery issue has caught the attention of law firms of all sizes and with offices outside the state of Georgia.[117] Many courts have not addressed the concerns that are common to the attorney-client privilege as applied to intra-firm communications.[118] Consequently, these jurisdictions do not have a bright-line rule for this attorney-client

109. *Id.* at 428, 746 S.E.2d at 107.

110. *Id.*; *see generally Koen Book Distribs.*, 212 F.R.D. at 286; *In re SonicBlue, Inc.*, 2008 Bankr. LEXIS 181, at *2, *8-9.

111. *St. Simons Waterfront, LLC*, 293 Ga. at 428, 746 S.E.2d at 108.

112. *Id.*

113. *Id.*

114. *Id.* at 428, 746 S.E.2d at 107-08.

115. *Id.* at 428-29, 746 S.E.2d at 108.

116. Curriden, *supra* note 8, at 22; Jonathan D. Glater, *In a Complex World, Even Lawyers Need Lawyers*, N.Y. TIMES (Feb. 3, 2004), *available at* http://www.nytimes.com/2004/02/03/business/in-a-complex-world-even-lawyers-need-lawyers.html.

117. Brief for Interested Law Firms in the State of Georgia as Amicus Curiae at 2-3, *St. Simons Waterfront, LLC*, 293 Ga. 419, 746 S.E.2d 98 (No. S12G1924).

118. *See generally* Curriden, *supra* note 8, at 22.

relationship and will soon be faced with similar issues.[119] Practitioners believe that the facts of this case make it "an ideal vehicle" for analyzing the big picture of communications with a firm's in-house counsel.[120] Although the court in *St. Simons Waterfront, LLC* established a rule of analysis, there are still gray areas in determining whether communications between attorneys and in-house counsel are protected.[121]

First, it is unclear from the court's analysis how to determine the precise moment the attorney-client relationship comes into existence and the privilege attaches to the communication.[122] For example, in *St. Simons Waterfront, LLC*, there are disputed facts as to whether SSW took an adverse position with Hunter Maclean during the conference call.[123] Allowing a law firm to subjectively determine when the client has become adverse gives the law firm a lot of power in seeking protection over communication with in-house counsel. Additionally, the court's ruling could result in an extension of the privilege that the court may not have intended. It will be interesting to see how law firms use this opinion to predict whether communication is protected going forward and how broadly the lower state courts will apply the privilege to intra-firm communications.

The Georgia Supreme Court's ruling that the fiduciary exception does not bar protection of communication with a firm's in-house counsel provides persuasive authority for other states that do not recognize such an exception to the privilege.[124] For example, the states of California and Connecticut have not created a fiduciary exception to the attorney-client privilege.[125] For law firms with in-house counsel or that are contemplating having a member of the staff serve in the position, this case certainly provides guidance and cautions for law firms to consider. The court's ruling opens the door for intra-firm communication in general, encouraging attorneys to seek advice from in-house counsel even with ethical questions and the handling of a client while enjoying some

119. The reference to the absence of a bright-line rule, or a standard of analysis, in some jurisdictions for the application of attorney-client privilege is to highlight that there are courts, outside the ones addressed in the Legal Background section of this Article, that have not to this date heard a discovery dispute of this nature.

120. Curriden, *supra* note 8, at 22.

121. *St. Simons Waterfront, LLC*, 293 Ga. at 419-20, 746 S.E.2d at 102.

122. *See id.* at 429, 746 S.E.2d at 108.

123. *Id.* at 420, 746 S.E.2d at 102.

124. *Id.*

125. *See generally* Wells Fargo Bank v. Super. Ct. of Los Angeles Cnty., 990 P.2d 591, 595 (Cal. 2000); Shirvani v. Capital Investing Corp., 112 F.R.D. 389, 391 (D. Conn. 1986).

sense of security and confidentiality.[126] Additionally, the court explicitly stated factors that could be considered in determining whether the attorney serving as in-house counsel is in fact serving in that role for the purpose of protected communication;[127] however, law firms should keep a watch on Hunter Maclean's success in establishing protection of communication.[128] Although the standard of analysis for the privilege laid out by the Georgia Supreme Court is favorable to law firms, the factual determination of whether the attorney serving as in-house counsel meets the court's definition of in-house counsel will provide law firms in non-fiduciary-exception states with the facts this determination turns on.[129] As a result, this case will have a direct impact on how law firms set up the position and how they prepare for legal malpractice suits.

B. Avoiding Monetary Influences

The idea that a law partner serving as in-house counsel is an equity partner in the business may present the appearance that the in-house counsel is never truly separated from the business interest a firm has in the client. Unlike a corporate in-house counsel who is paid a salary, an attorney acting as both in-house counsel and partner may receive income based on an increase in firm business and attorney fees. This issue is addressed by the court, which ruled that the Georgia Rules of Professional Conduct should not be considered in the analysis and that there is no imputation of conflicts to the in-house counsel.[130] If the defendant law firm in a discovery dispute meets the burden of proving the attorney-client privilege should apply, which includes a showing of separation and formality in the position, then the communication is protected, regardless of the lawyer's status in the firm.[131] Nevertheless, this analysis does not consider the in-house counsel's income that may be derived from the welfare of the firm's business. A possible resolution would be restructuring the in-house counsel's income to reflect a more strict salary-based pay rather than benefiting from a percentage of the

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126. *St. Simons Waterfront, LLC*, 293 Ga. at 429, 746 S.E.2d at 108.

127. *Id.* at 424, 746 S.E.2d at 105.

128. *Id.* at 429, 746 S.E.2d at 108. The burden is on Hunter Maclean on remand to establish that the attorneys' communications with the in-house counsel should be protected by the attorney-client privilege. *Id.*

129. *Id.* at 423-24, 746 S.E.2d at 104-05.

130. *Id.* at 425-26, 746 S.E.2d at 105-06. Because there is no automatic imputation of conflict in the Georgia Supreme Court's analysis, law firms are given a chance to prove separation from the in-house counsel's work in that capacity and the in-house counsel's work for the client. *Id.*

131. *Id.* at 424, 429, 746 S.E.2d at 105, 108.

business; however, practitioners and partners could respond by demanding compensation for the inability to represent outside clients and prosper from the firm's business and clients.[132]

Another solution, as suggested in the factors laid out by the Georgia Supreme Court, is to have the in-house counsel bill his time separately and to the firm rather than the client.[133] Separate billing would dissuade in-house counsel from making decisions with dollar signs in mind because there would be no monetary incentive in doing so.[134] Although there may be concerns that in-house counsel may give advice to an attorney that ultimately helps the business of the firm, it would be nearly impossible to draw a distinction between motivation to further firm business and zealous advocacy. Additionally, just like a partner, in-house counsel will profit when the firm is prospering and will suffer if legal malpractice suits result in payments of damages.

C. *The Indispensability of the Attorney-Client Privilege for Law Firms*

Plaintiffs' lawyers believe that the standard set by the Georgia Supreme Court, and even the Georgia Court of Appeals, makes it too easy for attorneys to seek the protection of the privilege to the detriment of their clients.[135] As the attorney for SSW expressed, law firms may be granted protection over information from disclosure "simply because the in-house attorney was 'segregated' from directly representing the client."[136] But if courts do not recognize the attorney-client privilege between a firm's attorneys and their in-house counsel, law firms will be put at a disadvantage in the event of a legal malpractice claim. The law firm will be denied privileges and opportunities for confidential preparation of defenses that are afforded to any other type of defendant and that are enjoyed by the plaintiff bringing the lawsuit. Recognition of the attorney-client privilege for communications with in-house counsel will encourage firms to invest in such a position for their staff.[137] This will in turn increase the level of formality of this attorney-client relationship within a firm. Regardless of this case's applicability, this

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132. *See* Chambliss, *supra* note 93, at 1759-60 (discussing a firm's general counsel remaining a partner at the firm, despite his position as in-house counsel and his separation from client work, and not being "compensated like a partner"); Glater, *supra* note 116.

133. *See St. Simons Waterfront, LLC*, 293 Ga. at 424, 746 S.E.2d at 105.

134. Glater, *supra* note 116.

135. *See* Curriden, *supra* note 8, at 23.

136. *Id.*

137. Chambliss, *supra* note 93, at 1724 (discussing how broad protection of communication would encourage internal investigations and early advice on ethical issues).

is a win for law firms of all shapes and sizes because it broadens the attorney-client-privilege protection over internal firm communication. Attorneys can potentially speak about pending malpractice suits with in-house counsel with an understanding that the privileged communication will remain a secret.

NICHOLAS J. GARCIA

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Casenote

Suspects Beware: Silence in Response to Police Questioning Could Prove as Fatal as a Confession*

I. INTRODUCTION

The Fifth Amendment to the United States Constitution[1] provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."[2] The Fifth Amendment guarantees a right against government-compelled self-incrimination.[3] A person may invoke the right against self-incrimination when he believes he is being forced by a government official to implicate himself in any crime, and his belief is reasonable considering his situation.[4] If his belief is reasonable, he is not required to answer the incriminating question, and he cannot be punished for refusing to answer.[5]

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1. U.S. CONST. amend. V.
2. *Id.*
3. *See* Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013).
4. Hoffman v. United States, 341 U.S. 479, 486-87 (1951).
5. *See id.* at 485-86.