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Georgia Deems Intra-Firm Communications Regarding Potential Malpractice Privileged Under Certain Circumstances

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Lawyers for the Profession® Alert

Hunter, Maclean, Exley & Dunn v. St. Simons Waterfront, LLC, ___ S.E.2d ___, 2012 WL 2866299 (Ga. App. July 13, 2012)

Brief Summary

The Georgia Court of Appeals held that lawyers' communications with a law firm's in-house counsel regarding a current client's potential claims against the firm are privileged so long as the in-house lawyer's role is clearly defined and segregated from the underlying client matter.

Complete Summary

During a legal malpractice action between a law firm and one of its former clients, the former client sought to discover internal communications between lawyers at the firm (including in-house counsel) that occurred while the firm was still representing the client. The firm obtained an interlocutory appeal on the issue of whether the attorney-client privilege protects such communications.

The Georgia Court of Appeals held that "whether a law firm may claim privilege to legal advice regarding duties to a current client from in-house counsel depends on whether there is a conflict of interest between firm counsel's duty to the law firm and firm counsel's duty to the outside client." The court then held that conflicts are not automatically imputed to firm in-house counsel so long as such counsel does not individually have a conflict. Factors relevant to assessing an individual conflict include: whether firm counsel represents outside clients; how firm counsel is compensated; and whether firm counsel's role is clearly known throughout the firm. The court further held that part-time firm counsel can avoid imputation if they serve as firm counsel on a formal and ongoing basis, thereby clearly establishing the firm as the client before any communication about the underlying matter occurs.

Regarding lawyers who act as firm counsel on an *ad hoc* basis, the court held that the burden is on the firm to establish that an attorney-client relationship between firm counsel and the firm was established before any communication about the underlying matter occurred. This rule also applies where full-time firm counsel delegate tasks to lawyers who are not clearly demarcated as in-house lawyers, the court held.

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The court then held that assessing whether privilege attaches to communications with outside counsel involves an inquiry into whether the in-firm attorneys involved in the communication were subject to an imputed conflict, and, if so, whether they exchanged any information beyond necessary background information. Finally, the court held that the foregoing guidelines should also be used to assess claims of work product protection.

Significance of Opinion

Nationwide, jurisprudence regarding the issue of intra-firm privilege has substantially evolved since the issue first came to the fore over two decades ago. There has been a recent trend toward expanding the availability of such privilege, and this opinion marks another step in that direction—especially to the extent it rejects the automatic imputation rule which has been adopted by multiple other jurisdictions. The court here was wary that such a rule creates an untenable choice between either hastily withdrawing (and potentially violating ethical rules in doing so), hiring outside counsel, or risking waiver of the privilege.

For more on this topic see:

Illinois Appellate Court Rejects Fiduciary Duty Exception to Attorney-Client Privilege

ABA Discusses Ethical Issues Related to Law Firm In-House Counsel

Northern California District Court Addresses Privilege and Work Product Issues Relating to Law Firm's In-House Communications

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