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Today's faculty features:

John K. Villa, Partner, **Williams & Connolly**, Washington, D.C.

Thomas B. Mason, Partner, Chair of Legal Profession and Ethics Practice, **Zuckerman Spaeder**, Washington, D.C.

Lawrence Spiegel, Partner and General Counsel, **Skadden Arps Slate Meagher & Flom**, New York

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STRAFFORD CLE WEBINAR

LAW FIRM INTERNAL INVESTIGATIONS:

ETHICAL ISSUES AND THE ATTORNEY-CLIENT PRIVILEGE

JULY 31, 2013

1:00 – 2:30 EDT

JOHN K. VILLA
WILLIAMS & CONNOLLY LLP
WASHINGTON, D.C.

John K. Villa
Williams & Connolly LLP
Washington, D.C.

APPLICABILITY OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PROTECTION TO INTERNAL LAW FIRM COMMUNICATIONS

Like other business organizations, law firms have increasingly relied upon in-house committees or designated lawyers to promote and enforce compliance with legal and ethical obligations arising out of their various representations. While the creation of these in-house compliance structures has been applauded and encouraged by courts,[1] ethics commissions,[2] and commentators,[3] the law has not been clear as to the applicability of the attorney-client privilege or work-product protection to communications between a lawyer and an in-house adviser regarding a potential claim should the law firm become a party to litigation. As the Supreme Court sagely observed in *Upjohn v. United States*,[4] "[a]n uncertain privilege . . . is little better than no privilege at all."[5] This means that the uncertainty regarding the privileged nature of these communications chills them from occurring or at least occurring in written form.

Although recent case law may provide more clarity in some jurisdictions,[6] law firms should still keep *Upjohn's* admonition in mind and exercise caution before embarking on their own internal investigations into a problematic representation, unless the applicable law leaves no doubt that the communications exchanged during the course of such an investigation will remain protected by the attorney-client privilege and work-product protection. To get a better appreciation for this cautionary advice, let's first examine the case law that has controlled for thirty some years, and then review a fresh look that has come from the highest courts of Massachusetts and Georgia.

John K. Villa
Williams & Connolly LLP
Washington, D.C.

It has become a well-established rule in the corporate context that the attorney-client privilege applies to communications between an employee and in-house counsel where the purpose of the communication is the securing of legal advice on behalf of the corporate client.[7] By analogy, courts have generally recognized that the privilege may apply in the law firm setting where one lawyer seeks legal advice from another lawyer within the firm.[8] In one case, for example, the court applied the privilege to preclude discovery from the law firm of privileged communications between the firm and one of its lawyers who was counsel of record in the action.[9] In another case, a federal appellate court similarly applied the privilege to preclude a law firm's associates from testifying before a grand jury concerning their conservations with a partner as to their investigation into a colleague's conduct, where the associates had been enlisted by the partner to perform the investigation on behalf of the firm.[10]

As these cases illustrate, intra-firm communications may generally be protected from compelled disclosure by the attorney-client privilege – *at least where disclosure is sought by a non-client*. But where a law firm seeks to assert the privilege against a client in connection with legal advice from its in-house counsel, most courts have more or less followed the lead of the decision in *In re Sunrise Securities Litigation*.[11] In this case, a former client (Sunrise) sued *inter alia* a law firm that had served as Sunrise's outside counsel, who sought to withhold from discovery documents reflecting consultations between lawyers within the firm that occurred both during the course of the firm's representation of Sunrise and after the institution of litigation against the firm. Relying on pertinent ethical rules prohibiting the simultaneous representation of clients having adverse interests[12] and on decisions precluding the assertion of the privilege by

a person owing conflicting fiduciary duties to the parties in the litigation (known colloquially as the *Garner* doctrine),[13] the court set forth the following broad rule:

> [A] law firm's communications with in house counsel is not protected by the attorney client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking discover the communications. . . .The attorney client privilege therefore will protect only those otherwise privileged documents in which Blank Rome's representation of itself violated Rule 1.7 with respect to a Blank Rome client seeking the document.[14]

The court recognized, however, that the communications would be privileged if the representation has concluded. And finally, the court suggested that communications between the subject law firm and *its outside counsel* would be privileged, even those occurring during the representation.[15]

The *Sunrise Securities Litigation* case illustrates that the rule on privilege in the law firm in-house counsel setting have been predicated upon the notion that the privilege is inapplicable where there is a conflict of interest[16] that violates the professional conduct rules.[17] As explained by one court:

> [W]hen a law firm chooses to represent itself, it runs the risk that the representation may create an impermissible conflict of interest with one or more of its current clients. In light of these ethical concerns, the courts that have considered the issue have resoundingly found that, where conflicting duties exist, the law firm's right to claim privilege must give way to the interest in protecting current clients who may be harmed by the conflict. . . .As a result, a law firm cannot assert the attorney-client privilege against a current outside client when the communications that it seeks to protect arise out of self-representation that creates an impermissible conflicting relationship with that outside client.[18]

For the same reasons, some courts have also rejected a law firm's claim of work-product protection.[19] While one cannot say that this rule is inherently obvious, most lower courts have followed *Sunrise Securities* to one extent or another.[20] One natural result of this rule has been

that law firms have retained outside counsel relatively promptly to consult on potential claims for existing clients to assure that privileged is preserved.

Not all courts, however, have concurred with the *Sunrise Securities Litigation* rule.

Some courts, for example, have recognized that intra-firm consultations regarding a lawyer's ethical and legal obligations to a client are confidential – but only until the firm learns of the possibility of a potential claim by the client against the firm, at which point the firm must disclose the conclusions regarding the consultations.[21] Under this view, consultations that continue after knowledge of a concurrent conflict are not protected by the attorney-client privilege, unless the firm has either withdrawn from the representation or has obtained an express waiver from the clients under the ethical rules.[22]

More recently, a few courts have made a clean break from the *Sunrise Securities Litigation* rule that relies on the ethical rules as the basis for determining whether the attorney-client privilege or work-product protection applies in the context of intra-law firm consultations.[23] Two of these cases, from Massachusetts and Georgia, are very significant, both because the approaches taken in resolving this issue are not based upon a somewhat dubious ethical analysis that has so far prevailed, and because, to date, they are the only decisions from a state's highest court to have addressed the issue. It may be reasonably said that they are a recognition that law firms, like corporations and other entities, are entitled to consult internal counsel and expect those consultations to remain privileged. Until this trend is more broadly adopted, however, law firms must remain wary of unbridled internal communications regarding a potential claim by a current client.

In *RFF Family Partnership, LP v. Burns & Levinson, LLP*,[24] a case arising in Massachusetts, the plaintiff made a commercial loan that was secured by what the plaintiff believed to be a first mortgage on the borrower's real property, and retained the defendant law firm to investigate the title of property, conduct due diligence, draft the necessary documents, and later, upon default on the loan, to foreclose on the mortgage. Prior to the foreclosure sale, an assignee of another mortgage claimed that its mortgage was superior and sought by emergency motion to enjoin the plaintiff's foreclosure. While the assignee's motion was denied, it continued to assert the superiority of its lien and the plaintiff's title insurer retained another law firm to represent the plaintiff in connection with that matter. The defendant continued its representation of the plaintiff with respect to the sale of the foreclosed property. Approximately one year later, the other law firm filed a notice of claim with the defendant law firm alleging a breach of its obligations in connection with its title search. After consultation with its in-house counsel on how to respond to the notice of claim, the defendant law firm sought to withdraw from the representation but was asked to continue with the representation in order to complete the sale of the property.[25]

In a subsequent malpractice action filed by the plaintiff, the defendant law firm moved for a protective order to preserve the confidentiality of the communications between the individual firm lawyers and the firm's in-house counsel regarding the firm's reply to the notice of claim. After the grant of the motion for a protective order, the plaintiffs appealed,[26] arguing that the communications were not protected by the attorney-client privilege because the law firm failed to withdraw from the representation or seek a fully informed consent *before* seeking legal

advice from in-house counsel as required by the duty of loyalty reflected in pertinent ethical rules.[27] In substance, the plaintiffs were urging adherence to the *Sunrise Securities* rule.

On appeal, the Supreme Judicial Court of Massachusetts rejected the plaintiff's argument that the duty of loyalty, as reflected in the ethical rules, is determinative of the applicability of the attorney-client privilege:

> [A]n attorney's or a law firm's duty of loyalty to a client is not always painted in bright lines. It may not always be clear when the interests of the client and the law firm have become so adverse that withdrawal is required in the absence of client waiver, and even when it is clear that withdrawal is necessary, a law firm may need to consider how to minimize the potential adverse consequences of withdrawal to the client, such as where a law firm's withdrawal may imperil a business deal that is near a closing or where a law firm represents the client, or its subsidiaries, in multiple legal matters. . . .Soliciting [legal] advice, whether from an in-house counsel at the law firm or from an attorney at another law firm, is not in and of itself adverse to the client, and doing so may ultimately benefit the client.[28]

In addition, the SJC refused to accede to the plaintiff's request to adopt the fiduciary duty exception to the attorney-client privilege or to recognize what the court characterized as the "current client exception."[29] As to the fiduciary duty exception, the court found that it was inapplicable since the legal advice was procured by the law firm at its own expense and for its own defense in the plaintiff's threatened litigation.[30] With respect to the "current client exception", which is based on the professional conduct rules proscribing current client conflicts and requiring the imputation of a current client conflict to the entire firm,[31] the court found that it suffered from "two fundamental flaws:" (1) neither the language of the rule or its commentary suggests an intent to prohibit intra-firm ethics consultations, nor does the purpose of the rule require such a prohibition;[32] and (2) even if the consultation constituted a violation of the ethical

rules, the violation would not deprive the client of the protections of the attorney-client privilege.[33]

Departing from the majority of lower courts that have addressed the issue, Massachusetts adopted a new approach for determining the applicability of the privilege in the context of an intra-law firm consultation. Under this approach, four conditions must be met in order for the privilege to attach: (1) the law firm must designate an attorney or attorneys within the firm to represent the firm as in-house or ethics counsel, thereby establishing an attorney-client relationship between the in-house counsel and the firm when the consultation occurs; (2) when a current, outside client threatens litigation against the firm, the in-house counsel must not have performed any work on the matter at issue or a substantially related matter; (3) all time spent in consulting with in-house counsel must be billed to the law firm; and (4) all communications between the law firm and in-house counsel must be made in and kept confidential.[34]

In *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*,[35] a case arising in Georgia, the plaintiff retained the defendant in connection with a condominium development project to draft a form purchase contract for use in pre-selling the condominium units prior to their construction. When several purchasers subsequently sought to rescind the contracts based, in part, on alleged defects with the purchase contract, the plaintiff and the law firm involved in drafting the contracts discussed the attempted rescissions in a conference call. Following the call, the law firm notified the defendant's in-house counsel of its belief that the plaintiff would seek to hold the law firm responsible for the rescinded contracts. During subsequent consultations with in-house and outside counsel regarding the matter, the law firm continued to represent the plaintiff in closings and in negotiating with rescinding purchasers. At the same

time, however, the law firm sought replacement counsel for the plaintiff. After the plaintiff retained other counsel to handle the rescinding purchasers and to consider filing suit against the law firm, new counsel requested that the law firm continue to handle ongoing closings. The law firm agreed to this request.[36]

In its subsequent malpractice action against the defendant law firm, the plaintiff filed a motion to compel the deposition of defendant law firm's in-house counsel and the production of documents from both in-house and outside counsel. Finding that the conflict of interest that developed between the plaintiff and the defendant abrogated any privilege that may have existed, the trial court granted the plaintiff's motion to compel as to in-house counsel. According to the trial court, since the defendant was attempting to defend itself against potential claims while still representing the plaintiff, and failed to advise the plaintiff of the conflict, the conflict was imputed to in-house counsel; as a consequence of the imputation, any privilege applicable to the communications at issue was destroyed.[37]

On interlocutory appeal, the Georgia Court of Appeals reversed.[38] The court rejected the rule of automatic imputation[39] and, as summarized by the Georgia Supreme Court, set forth a framework for determining the applicability of the privilege that focused on the nature of the communications, the structure of the in-house counsel position, and the extent to which the law firm complied with the professional conduct rules in obtaining the client's informed consent to its "undertaking defensive measures in anticipation of litigation during its ongoing representation of the client."[40]

Granting certiorari, the Georgia Supreme Court vacated the opinion of the court of appeals, ruling that the same analysis conducted to determine the applicability of the attorney-client privilege in other contexts applies in the law firm in-house counsel context.[41] Thus, in order for the privilege to apply to communications between a law firm and its in-house counsel involving a client's potential claims against the law firm, the following conditions must be met: "(1) there is a genuine attorney-client relationship between the firm's lawyers and in-house counsel; (2) the communications in question were intended to advance the firm's interests in limiting exposure to liability rather than the client's interests in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence; and (4) no exception to the privilege applies."[42]

With respect to establishing the existence of an attorney-client relationship, the court held that the in-house counsel must actually act in that capacity with regard to anticipated litigation against the firm or to other matters related to the firm's compliance with its ethical and legal obligations, and the firm must "be clearly established as the client before or in the course of the in-firm communication[.]"[43] While recognizing that the existence of an attorney-client relationship between a law firm and its in-house counsel may appear inconsistent with the ethical rules proscribing conflicts of interest and imputing conflicts to all lawyers within the firm, the court rejected the view that the ethical rules played a role in determining the applicability of the privilege:

> While we acknowledge that the principle of imputed conflicts may present ethical problems for firms employing in-house counsel, we do not believe that potential ethics violations are relevant to the attorney-client privilege determination. In promulgating our Rules of Professional Conduct, the State Bar has stated bluntly that the Rules 'are not intended to govern or affect judicial application of either the attorney-client or work

> product privilege[.]'. . .Given this clear pronouncement, we conclude that the potential existence of an imputed conflict of interest between in-house counsel and the firm client is not a persuasive basis for abrogating the attorney-client privilege between in-house counsel and the firm's attorneys.[44]

As to the requirement that no exception to the privilege apply, the court declined to adopt the fiduciary duty exception. Finding that one of the rationales for the exception did not apply in the law firm in-house counsel context due to the absence of a mutuality of interest between the law firm and an outside client threatening litigation,[45] the court then rejected the "fiduciary duty trumps privilege" rationale followed by the majority of courts that have addressed the issue of privilege in this context. As explained by the court:

> We have previously concluded that 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. For the same reasons we decline to engraft our Rules of Professional Conduct onto our privilege law, we also reject the notion that the attorney's duty of loyalty should automatically trump the privilege. Specifically, this approach ignores our State Bar's admonition that the Rules of Professional Conduct are not intended to affect the law of privilege. It also discounts the importance of the distinct duty of loyalty owed by the in-house counsel to his firm. Thus, we decline to adopt the fiduciary exception to the attorney-client privilege in this context.[46]

Turning to the issue of the applicability of the work-product protection, the court similarly held that the standard rules that govern its application in other contexts apply in the law firm in-house counsel context.[47] Thus, "once an attorney-client relationship has been established between firm in-house counsel and the firm for purposes of defending against perceived or actual legal action by the firm's outside client, the materials generated by in-house counsel in connection with those efforts should enjoy work product protection vis-à-vis the outside client just as in any other context."[48]

John K. Villa
Williams & Connolly LLP
Washington, D.C.

The recent decisions from the highest courts in Massachusetts and Georgia, together with some decisions from courts in other jurisdictions, may be indicative of a trend toward recognizing the applicability of the attorney-client privilege and work-product protection in the law firm in-house counsel context, notwithstanding the ethical implications that may ensue. Until more courts of last resort address this issue, however, lawyers must approach this issue with caution and not assume that their consultations with in-house counsel regarding a current client will remain protected from compelled disclosure if the client subsequently sues the firm. Thus, the admonition from *Upjohn* echoes loudly: unless you are certain that your communications will be governed by the law of Massachusetts or Georgia, remain cautious as there may be no privilege at all.

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[1] *See, e.g., TattleTale Alarm Systems, Inc. v. Calfee, Halter & Griswold, LLP,* No. 2:10-cv-226, 2011 WL 382627, at *5 (S.D. Ohio Feb. 3, 2011) ("[I]ndividual lawyers who come to the realization that they have made some error in pursuing their client's legal matters should be encouraged to seek advice promptly about how to correct the error[.]. . .While consultation with outside counsel might be a fair substitute in some cases. . .[in other cases] it may be too late to protect the client from damage. All of this suggests, as a practical matter, there are societal values to be served by allowing members of a law firm to converse openly and freely about potential mis-steps in their representation of a client[.]"); *Thelen Reid & Priest LLP v. Marland,* No. C 06-2071 VRW, 2007 WL 578989, at *7 (N.D. Cal. Feb. 21, 2007) ("The court recognizes that law firms should and do seek advice about their legal and ethical obligations in connection with representing a client and that firms normally seek this advice from their own lawyers. Indeed, many firms have in-house ethics advisers for this purpose.").

[2] *See, e.g.,* N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 789, 2005 WL 3046319, at *2 (2005) (stating that because the professional conduct rules explicitly impose obligations on law firms, "[we are persuaded] that the Code endorses and in some cases requires mechanisms within a law firm to promote obedience to a firm's obligations."); *see also* ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 08-453, at 1-2 (2008) (observing how law firms are increasingly addressing their ethical obligations under the professional conduct rule by designating individual lawyers or committees to serve as counsel for the firm and its lawyers) .

[3] *See id.* at *3.

[4] *Upjohn v. U.S.,* 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

[5] *Id.,* 449 U.S. at 393.

[6] *See St. Simons Waterfront, LLC v. Hunter, MacLean, Exley & Dunn, P.C.,* __S.E.2d__, 2013 WL 3475328 (Ga. July 11, 2013); *RFF Family Partnership, LP v. Burns & Levinson, LLP,* __N.E.2d__, 2013 WL 3389006 (Mass. July 10, 2013); *Garvy v. Seyfarth Shaw LLP,* 359 Ill. Dec. 202, 966 N.E.2d 523 (Ill. Ct. App. 2012), *appeal denied,* 979 N.E.2d 876 (Ill. 2012); *see also TattleTale Alarm Systems*, 2011 WL 382627 (S.D. Ohio Feb. 3, 2011).

[7] *See Upjohn,* 449 U.S. at 389-390; *see generally* John Villa, *Corporate Counsel Guidelines*, § 1:3 (Thomson Reuters/West 2012).

[8] *See Hertzog, Calamari & Gleason v. Prudential Ins. Co.,* 850 F. Supp. 255, 255 (S.D.N.Y. 1994) ("No principled reason appears for denying a comparable attorney-client privilege to a law partnership which elects to use a partner or associate as counsel of record in a litigated matter. That partner or associate is the functional equivalent of a corporate staff attorney representing a corporate employer."); *In re Sunrise Securities Litigation,* 130 F.R.D. 560, 595 (E.D. Pa. 1989) ("[I]t is possible in some instances for a law firm, like other business or professional associations, to receive the benefit of the attorney-client privilege when seeking legal advice from house counsel."); *see also RFF Family Partnership,* 2013 WL 3389006, at *4 ("Where a law firm designates one or more attorneys to serve as its in-house counsel on ethical, regulatory, and risk management issues that are crucial to the firm's reputation and financial success, the attorney-client privilege serves the same purpose as it does for corporations or governmental entities: it guarantees the confidentiality necessary to ensure that the firm's partners, associates, and staff employees provide the information needed to obtain sound legal advice."); *accord. Versuslaw, Inc. v. Stoel Rives, LLP,* 127 Wash. App. 309, 111 P.3d 866, 878 (2005).

[9] *Hertzog, Calamari & Gleason,* 850 F. Supp. at 255-256.

[10] *U.S. v. Rowe,* 96 F.3d 1294, 1296-1297 (9th Cir. 1996).

[11] *In re Sunrise Securities Litigation,* 130 F.R.D. 560 (E.D.Pa. 1989).

[12] *See id.,* 130 F.R.D. at 596, n.8 (citing Rule 1.7 of the Pennsylvania Rules of Professional Conduct).

[13] *Id.* at 596-597 (citing *Valente v. PepsiCo.,* 68 F.R.D. 361 (D. Del. 1975) and *Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970)).

[14] *Id.* at 597.

[15] *Id.* at 597, n. 12.

[16] *See In re SonicBlue, Inc.*, Bankr. No. 03-51775, 2008 WL 170562, at *9 (N.D. Cal. Jan. 18, 2008); *Bank Brussels Lambert v. Credit Lyonnais (Suisse),* 220 F. Supp. 2d 283, 285-287 (S.D.N.Y. 2002); *Koen Book Distrib. v. Powell, Trachtman, Logan, Carrie, Bowman & Lombard,* 212 F.R.D. 283, 286-287 (E.D. Pa. 2002); *In re Sunrise Securities Litigation,* 130 F.R.D. at 596-597.

[17] *See ABA Model Rules of Prof'l Conduct,* Rule 1.7 (2013) (prohibiting a lawyer from representing a client if the representation involves a concurrent conflict of interest, unless the lawyer obtains the informed consent of each affected client); *see also id.,* Rule 1.10(a) (imputing a lawyer's conflict of interest to all lawyers within the firm).

[18] *In re SonicBlue,* 2008 WL 170562 at *9; *accord. Koen Book Distrib.,* 212 F.R.D. at 285-286 (since the firm failed to withdraw as counsel or seek to obtain the clients' consent for representing itself while continuing to represent the plaintiffs, it could not assert the attorney-client privilege over communications between firm lawyers "concerning if and how to continue to represent the clients and how to respond to the clients' communications" as the communications "clearly establish that the law firm was in a conflict of interest relationship with its clients.").

[19] *See Koen Book Distrib.,* 212 F.R.D. at 286 ("[W]here a client, as opposed to some other party, seeks discovery of the lawyer's mental impressions. . . .[the work-product doctrine] cannot shield a lawyer's papers from discovery in a conflict of interest context any more that can the attorney-client privilege."); *accord. Thelen Reid & Priest LLP,* 2007 WL 578989, at *8-*9.

[20] *See, e.g., In re SonicBlue,* 2008 WL 170562, at *9; *Thelen Reid & Priest LLP,* 2007 WL 578989, at *8-*9; *Bank Brussels Lambert,* 220 F. Supp. 2d at 285-287; *Koen Book Distrib.* 212 F.R.D. at 286-287;

[21] *Thelen Reid & Priest LLP,* 2007 WL 578989, at *8-*9; *accord. Asset Funding Group, LLC v. Adams & Reese, LLP,* Civil Action No. 07-2965, 2009 WL 1605190, at *2-*3 (E.D. La. June 5, 2009); *see also* N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 789, 2005 WL 3046319 (2005) (opining that a lawyer may consult with one or more lawyers within the firm with respect to her duties to a client, without violating ethical prohibitions on the unauthorized representation of conflicting interest, and may be required to disclose conclusions about the firm's ethical or legal obligations but not necessarily matters pertaining to the underlying consultations); *cf.* ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 08-453 (2008) (addressing the ethical implications of in-house ethics consulting).

[22] *See Asset Funding Group,* 2009 WL 1605190, at *3 (in-house attorney-client privilege was vitiated when defendant knew of the conflict with a pre-existing client but continued conferring with in-house counsel without complying with the ethical rules).

[23] *See St. Simons Waterfront, LLC*, 2013 WL 3475328, at *5; *RFF Family Partnership, LP,* 2013 WL 3389006, at *9-*11; *Garvy,* 966 N.E.2d at 538; *see also TattleTale Alarm Systems*, 2011 WL 382627, at *6.
[24] __N.E.2d__, 2013 WL 3389006 (Mass. July 10, 2013).
[25] *Id.*, 2013 WL 3389006, at *1-*2.
[26] *Id.* at *2 (the appeal was transferred to the Supreme Judicial Court on that court's own motion).
[27] *Id.* at *3 (referencing Rule 1.7 of the Massachusetts Rules of Professional Conduct).
[28] *Id.* at *5. As further explained by the court, requiring a lawyer to obtain the client's consent or to withdraw from the representation before seeking legal advice in order to preserve the privilege would present the lawyer with four alternatives that would not serve the best interests of the client, thereby making such a rule dysfunctional both to the client and the law firm. *Id.* at *5-*6. *See also TattleTale Alarm Systems*, 2011 WL 382627 at *5 (noting that "by the time a matter has progressed to the point where outside counsel are called in, it may be too late to protect the client from damage.").
[29] *Id.* at *7-*9.
[30] *Id.* at *7 (relying on *United States v. Jicarilla Apache Nation,* __U.S.__, 131 S. Ct. 2313, 180 L. Ed. 2d 187 (2011)); *accord. Garvy,* 966 N.E.2d at 535-536. The court rejected the plaintiff's argument that the law firm's duty to its outside client are paramount to the law firm's own interests, stating that such a draconian rule would not only be the most dysfunctional of all rules but would also be unnecessary in order to protect the client's interests since "[p]reserving the privileged nature of [intra-firm] communications does not affect a law firm's duty to provide a client with 'full and fair disclosure of *facts* material to the client's interests.'" *Id.* at *8 (emphasis added; citing *Hendrickson v. Sears,* 365 Mass. 83, 310 N.E.2d 131 (1974)).
[31] *Id.* at *9 (referencing Rules 1.7(a) and 1.10(a) of the Massachusetts Rules of Professional Conduct).
[32] *Id.* at *9-*10 (explaining that while the imputation rule is intended to safeguard the duty of loyalty and protect a client's confidential information, "a law firm is not disloyal to a client by seeking legal advice to determine how best to address the potential conflict;" moreover, a prohibition on intra-firm consultation would not preclude the disclosure of the outside client's confidential information since the ethical rules permit a law firm to reveal confidential information to defend itself against the outside client's adversarial claims).
[33] *Id.* at *10-*11 (citing *In re Teleglobe Comm. Corp.,* 493 F.3d 345, 369 (3d Cir. 2007)); *accord. TattleTale Alarm Systems*, 2011 WL 382627, at *8.
[34] *Id.* at *11.
[35] __S.E.2d__, 2013 WL 3475328 (Ga. July 11, 2013).
[36] *Id.*, 2013 WL 3475328, at *1.
[37] *Id.* at *2.
[38] *See id.*, 317 Ga. App. 1, 730 S.E.2d 608 (2012).
[39] *Id.*, 730 S.E.2d at 620.
[40] *Id.*, 2013 WL 3475328, at *2.
[41] *Id.* at *1.
[42] *Id.* at *8.
[43] *Id.* at *4 (factors to consider in determining whether the firm has attained the status of a distinct client include billing procedures that recognize the firm as client, and the maintenance of separate files for communications related to the claim against the firm).
[44] *Id.* at *5 (quoting Ga. Rules of Prof'l Conduct, Preamble, ¶ 19).
[45] *Id.* at *7 (citing *Garvy,* 966 N.E.2d at 535).
[46] *Id.* at *8.
[47] *Id.*
[48] *Id.* at *9; *see also Garvy,* 966 N.E.2d at 539.