COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC NO. 09733

SUFFOLK CONSTRUCTION CO.,
Plaintiff - Appellant

v.

COMMONWEALTH OF MASSACHUSETTS, DIVISION OF CAPITAL ASSET MANAGEMENT,
Defendant - Appellee

On Appeal from a Judgment of the
Superior Court, Suffolk County

BRIEF OF THE AMICUS CURIAE CITY SOLICITORS AND TOWN COUNSEL ASSOCIATION

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ISSUE PRESENTED

Whether the holding in General Electric Co. v. Department of Environmental Protection, 429 Mass. 798, 806-07 (1999) ("General Electric"), should be extended to preclude protection of attorney-client communications from disclosure under the Massachusetts Public Records Law G.L. c. 66, §10 and c. 4, §7(26) ("MPRL")?

STATEMENT OF INTEREST OF AMICUS CURIAE

The City Solicitors and Town Counsel Association ("CSTCA") is the oldest and largest bar association dedicated to the practice of municipal law in the Commonwealth. The members of the CSTCA are attorneys and their assistants who represent municipal governments as city solicitor, town counsel, town attorney, or corporation counsel. Members of CSTCA also include attorneys who represent or advise cities, towns, and other governmental agencies in other capacities. CSTCA's mission is to promote better local government through the advancement of municipal law.

CSTCA's primary concern is with the potential harm to the fundamental underpinnings of the attorney-

client relationship if the MPRL is interpreted to preclude protection of attorney-client communications from disclosure. The CSTCA is further concerned about the improper advantage that would be accorded private litigants in litigation against public entities if the MPRL is interpreted to require the disclosure of attorney-client communications, while a similar requirement is not imposed on private entities litigating against public entities.

CSTCA members routinely provide legal advice to municipal clients in the form of privileged legal memoranda, letters and emails. If public governmental clients, including municipal governments, are not afforded the protections of the attorney-client privilege as are private litigants, it will greatly hamper the municipal attorney's ability to provide comprehensive, candid and direct advice to his or her clients for fear that such communications would be discoverable and used against such clients in pending or subsequent litigation. CSTCA therefore, requests that this Court limit its holding in General Electric to the work product doctrine and not allow the MPRL to destroy the time honored and socially important values that are protected by the attorney-client privilege.

STATEMENT OF FACTS

The CSTCA adopts the statement of facts recited by the trial judge in Suffolk Construction Co. v. Commonwealth of Massachusetts, Division of Capital Asset Management, Suffolk Superior Court, Civil Action No. 05-3600-A. APP 00227-00230

STATEMENT OF PROCEEDINGS

The CSTCA adopts the Commonwealth of Massachusetts, Division of Capital Asset Management's ("DCAM") statement of proceedings.

ARGUMENT

A. Background and Importance of Attorney-Client Privilege

The attorney-client privilege is an ancient and well established privilege which dates back to the middle of the Sixteenth Century in England. See Emily German Shea, Note, "The Taxation of Legal Services: Does it Violate the Right to Counsel," 25 Suffolk Univ. L. Rev. 1163, 1175 (1991). The attorney-client privilege was adopted and expanded in the United States to cover criminal prosecution through the Sixth Amendment to the United States Constitution. See id.

at 1164. While several states have codified the privilege, Massachusetts still relies on the common law application of the privilege. See Foster v. Hall, 29 Mass. (12 Pick.) 89, 93, 99 (1831).[1]

The attorney-client privilege is one of the oldest and most respected evidentiary privileges. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); see also Foster v. Hall, 29 Mass. (12 Pick.) 89, 94-101 (1831). The privilege protects confidential communication between a lawyer and client when the purpose of communication is to obtain or provide legal assistance. See Rent Control Bd. of Cambridge v. Praught, 35 Mass. App. Ct. 290, 296 (1993) Like other deep-rooted privileges, the rule governing the attorney-client relationship furthers valuable societal objectives. See Commonwealth v. Goldman, 395 Mass. 495, 502 (1985); In re Reorganization of Elec. Mut. Liab. Ins. Co., 425 Mass. 419, 421 (1997). By safeguarding confidential communication, the privilege not only empowers individuals to seek legal assistance

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[1] States that have enacted statutes codifying the attorney-client privilege include the states of Washington (RCW 5.60.060); Ohio (Ohio Revised Code 2317.02); Kansas (K.S.A. 60-426); and Indiana (Indiana Code section 34-46-3-1(1)).

when necessary, but it also ensures the public's right to informed legal advice. See Trammel v. United States, 445 U.S. 40, 51 (1980); Purcell v. Dist. Attorney for the Suffolk Dist., 424 Mass. 109, 111 (1997); Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1834). The privilege "encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice." Upjohn Co., 449 U.S. at 389. The privilege recognizes that such communication requires the client to be "free from the consequences or the apprehension of disclosure." See id. The privilege belongs solely to the client. See In re John Doe Grand Jury Investigation, 408 Mass. 480, 483 (1990).

The Massachusetts Rules of Professional Responsibility impose many duties on counsel, including duties to provide competent representation, Mass. R. Prof. C. 1.1, 426 Mass. 1308 (1998); to seek the lawful objectives of the client, Mass. R. Prof. C. 1.2, 426 Mass. 1310 (1998); to act diligently, Mass. R. Prof. C. 1.3, 426 Mass. 1313 (1998); to represent a client zealously, id.; to maintain communications with and advise the client, Mass. R. Prof. C. 1.4, 426

Mass. 1314 (1998); and to maintain client confidences, Mass. R. Prof. C. 1.6, 426 Mass. 1322 (1998). In re Georgette, 439 Mass. 28 (2003). According to Comment 5 to Rule 1.6 of the Massachusetts Rules of Professional Responsibility:

> The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to virtually all information relating to the representation, whatever its source. The term "confidential information" relating to representation of a client therefore includes information described as "confidences" and "secrets" in former DR 4-101(A) but without the limitation in the prior rules that the information be "embarrassing" or "detrimental" to the client.

As stated by the trial court in this case:

> I acknowledge the value of the General Electric reasoning to the contention of Suffolk Construction. The work product doctrine is analogous to the attorney-client privilege. It may be a lesser included element of the privilege. However, as DCAM argues and as Justice vanGestel observed in the Kiewit-Atkinson-Kenny decision, the privilege is ancient, powerful, and socially useful to the function of litigation as the mechanism for the peaceful resolution of disputes. The withdrawal of it from any party or client is extraordinary. I concur

> with Justice vanGestel that it should come from explicit legislation or unmistakable appellate decision. APP0233

Allowing the attorney-client privilege to be abrogated or eviscerated by application of the MPRL would impair the fiduciary relationship between the governmental client and the municipal attorney, and will undermine one of the fundamental purposes of the attorney-client relationship, which is to encourage open, candid and frank communications between the attorney and the client. When the governmental client receives full and candid advice from its counsel that is protected by the attorney-client privilege, it is much more likely that the governmental entity will be fully advised of its legal responsibilities and the potential risks and rewards of various possible courses of action, thus aiding the governmental client in making informed decisions that are in the best interests of the people that it serves.

B. The Massachusetts Public Records Law Did Not Abrogate the Common Law Attorney-Client Privilege Which Is Protected by the Massachusetts Constitution.

The Massachusetts Constitution provides as follows:

> "All the laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution."MASS.CONST.PT.2,C.6,ART.6

Thus, all common law privileges continue to exist in Massachusetts unless explicitly eliminated by the legislature. See Melody vs. Reab, 4 Mass. 471, 472 (1808) ("Further, statutes are not to be construed as taking away a common law right, unless the intention is manifest."); Commonwealth v. Rumford Chemical Works, 82 Mass. 231, 232 (1860) ("In the decisions of our own, it has often been recognized as an established rule that a statute is not to be construed as a repeal of the common law unless the intent to alter it is clearly expressed.").

The language of the MPRL has no explicit reference to the abrogation of the attorney-client privilege, which is a well established doctrine now as it was at the time of the framing of the Massachusetts Constitution. The trial court in this case looked but could not find in the MPRL the "explicit legislation"

which is necessary to withdraw the attorney-client privilege from the bounds of the MPRL. APP0233

Since the legislature did not express a clear intent to abrogate the attorney-client privilege, reading an implicit abrogation of the attorney-client privilege into the MPRL would be a violation of the Massachusetts Constitution and clearly established precedent which has interpreted the pertinent provision of the Constitution.

Accordingly, since there is no clear expression in the MPRL to repeal the attorney-client privilege, the constitutional protection given to the privilege still exists despite the enactment of the MPRL.

C. Importance of the Attorney-Client Privilege in the Municipal Law and Public Law Setting

The preeminent importance of the attorney-client relationship is reflected in the Massachusetts Rules of Professional Responsibility and applicable case law. The attorney-client privilege has been recognized in the governmental lawyer-public client context, including under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552. See Christopher J. Petrini, *Privileges at risk: restoring*

the rights of the public-sector client, Mass. Lawyers Weekly, 34 MLW 1951 (2006).

Governmental clients have a unique need for informed legal assistance. Because government clients act on behalf of the entire community, the public suffers the consequences when the government is unable to effectively litigate cases. For example, when a plaintiff sues a town or city, the local taxpayers pay the judgment. Similarly, the public bears the burden when the Attorney General is unable to successfully pursue an environmental polluter or a company engaged in consumer fraud. Since the Massachusetts state and local governments play an active role in regulating businesses and providing social services, the legal decisions of the public entity client have far-reaching consequences.

"[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.". Hickman v. Taylor, 329 U.S. 495, 510-511 (1946). Without the attorney-client privilege, communication between the municipal attorney and the municipal client will be constrained and could lead to the absence of clarity, and in some instances

communication will be completely precluded. Without the privilege, municipalities will potentially find that resources would be better invested in legal assistance for actual litigation instead of investing in legal advice and assistance that could help the municipal client avoid litigation, for the very reason that seeking such advice could be obtained by an opposing litigant through the MPRL and then used against the municipal entity as part of the litigation.

The municipal attorney will also be constrained in providing advice because she will have to weigh the importance of complying with the duty of due care with the duty of protecting her client's interests. If a municipal client should seek non-litigation or pre-litigation legal advice from its counsel, the municipal attorney will have to ensure that any communication on the subject is inconclusive and nonspecific because such an opinion could become evidence in subsequent litigation. The municipal attorney will be required to provide opinions that do not clearly evaluate whether the municipal client's proposed course of action is supported by the law, because providing such an evaluation could be obtained

and used against the municipal client if requested pursuant to the MPRL. Such limited or couched advice will not provide the municipal client with the kind of advice needed to avoid litigation. In the worst case scenario, the advice provided by the municipal attorney might be so constrained as to make it impossible for the municipal client to make any kind of informed decision, or it will have to be offered in such a manner that it actually deemphasizes preferable alternative solutions.

CSTCA's members rely upon the attorney-client privilege in addressing their municipal client's ever increasing, legally complex needs. Municipal counsel are routinely asked to provide legal advice on employment issues, ownership interests, land use, zoning, contractual obligations, civil rights issues, statutory interpretation, and compliance with state and federal law, as well as to provide qualitative assessments of the practical risks of the government client's conduct.

Exemption (d) to the MPRL, the deliberative process exemption, provides only a limited protection for policy development. It applies to:

> [I]nter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based.

This exemption, as interpreted by the Supervisor of Public Records, is limited to circumstances in which development of a policy is ongoing. APP 00087, 00089. As a result, a municipality could be severely prejudiced in a situation where a municipal counsel writes a memorandum of law, opinion, analysis of probabilities of success, and recommendations for commencing litigation, all in response to a Board of Selectmen's request because the Selectmen are considering filing a lawsuit. Once the decision (i.e. policy making) to file a lawsuit is made, the Supervisor of Public Records would take the document out of the protection of Exemption (d) and rule that the document is a public record. ("The exemption may not be used to withhold information that might possibly be involved in future litigation. I might point out that G.L. Chapter 4, section 7(26) provides no exemption for material that is the subject of or related to current or future litigation.") APP 00087. The harm to the municipality is obvious because the

defendant in the litigation now knows the strengths and weaknesses of the municipality's case.

Another way that Exemption (d) may not fully protect municipalities is that some of the concerns and issues expressed in advice communications from counsel may come up in later disputes, thus harming municipalities by forcing the disclosure of a whole panoply of municipal legal concerns around a given issue.

If the MPRL can be used to weaken or destroy the attorney-client privilege, it would have a chilling effect on the relationship between municipal clients and the attorneys that represent them. A municipal client would never again be truly free to engage in fulsome discussions with its attorney because of the fear that such confidential discussions and the resulting advice could be used as evidence against the municipal client in a subsequent legal proceeding. Encouragement of candid advice is one of the functions intended to be protected by the attorney-client privilege.

CONCLUSION

The attorney-client privilege is fundamental to the integrity of the adversarial process and the

rendering of informed legal advice. Without this protection, clients will be reluctant to speak frankly when seeking guidance, attorneys will hesitate before analyzing their client's case candidly and in writing, and the level of legal analysis will subsequently decline. Moreover, creating an exception to the attorney-client privilege for public clients, while not simultaneously creating such an exception for private litigants against the government, creates an unequal playing field and confers an unfair advantage upon private litigants vis-à-vis their public client adversaries. As a statute promoting the broader public interest, the MPRL should not be construed and applied in a manner that diminishes or abrogates the important public policy considerations embodied within and protected by the attorney-client privilege.

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