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IS THE ATTORNEY-CLIENT PRIVILEGE UNDER ATTACK?

By Jennifer Gross and Nancy B. Rapoport

Let's assume that you advise a company about a wide variety of its practices. The company has both U.S. and foreign business operations. As part of your advice, you suggest some changes to the tax treatment of some of the client's deals. You even warn your client that, if the Internal Revenue Service (IRS) decides to challenge the tax treatment, it has virtually a 100 percent chance of winning. And, of course, to make sure that your client pays attention to your advice, you put this advice to your client in writing. Fast forward to a time at which the IRS calls the tax treatment into question. We have two questions for you: Might you have to produce your work product on the tax treatment? And, while we're asking questions that might make you gulp, are your privileged communications here in the United States protected in other jurisdictions?

Textron: Be Afraid. Very, Very Afraid.

In the First Circuit case of *U.S. v. Textron, Inc. and Subsidiaries*, 577 F.3d 21 (1st Cir. 2009), Textron tried to block production of its work papers to the IRS. Those work papers

included (1) summary spreadsheets showing for each disputable item the amount in controversy, estimated probability of a successful challenge by the IRS, and resulting reserve amounts; and (2) back up e-mail and notes. In some instances the spreadsheet entries estimated the probability of IRS success at 100 percent. Textron said that the spreadsheets had been shown to and discussed with its independent auditor but physically retained by Textron. (*Id.* at 25)

Textron argued that these work papers were protected because "litigation over specific items was always a possibility" (*Id.*). The district court jettisoned any attorney-client

privilege protection for the work papers, concluding that by showing the work papers to Textron's outside accountant, Textron had waived the privilege. But the district court found that the work papers were protected by the work product rule (Federal Rule of Civil Procedure 26(b)(3)), having been prepared in part in anticipation of potential (albeit remote) litigation.

The First Circuit, in an en banc rehearing of an opinion affirming the district court, rejected the district court's reasoning as well as the original appellate panel's decision. For the First Circuit, the question was whether "a document [that] is not in any way prepared 'for' litigation but relates to a subject that might or might not occasion litigation" was protected by the work product rule (*Id.* at 26). In reversing the district court, the First Circuit pointed out:

It is not enough to trigger work product protection that the *subject matter* of a document relates to a subject that might conceivably be litigated. Rather, as the Supreme Court explained, "the literal language of [Rule 26(b)(3)] protects materials *prepared for* any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." (*Id.* at 29; emphasis in original; citations omitted)

Here's the part of the opinion that might make you nervous: Nor is it enough that the materials were prepared by lawyers or represent legal thinking. Much corporate material prepared in law offices or reviewed by lawyers falls in that vast category. It is only work done in anticipation of or for trial that is protected. Even if prepared by lawyers and reflecting legal thinking, "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." (*Id.* at 30; citations omitted)

Unlike the First Circuit, the Fifth Circuit uses a different standard for determining work-product protection (the "primary purpose" test), and to gain clarification of the matter, several amici filed briefs with the Supreme Court, including the American Bar Association (www.abanet.org/abanet/media/release/news_release.cfm?releaseid=867) and the Association of Corporate Counsel (www.acc).

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If your work product doesn't pertain to pending litigation, it may not be protected.

com/aboutacc/newsroom/pressreleases/LAWYER-CLIENT-WORK-PRODUCT-CONFIDENTIALITY.cfm), in support of Textron's position.

The Supreme Court denied *certiorari* in *Textron*, but questions still abound.

First, could the Textron lawyers have still done their job in such a way to make their communications privileged? The beauty of a privileged communication is that it's protected (with some exceptions, such as the crime-fraud exception) whether or not it was made in anticipation of litigation. We know that privilege can be destroyed when the client or the lawyer reveals the communication to a third party. (Could Textron have argued that the outside accountants, hired by Textron, were agents of Textron and, therefore, that the privileged communications hadn't been communicated to a third party? We don't think that it's likely that independent auditors, though, could be considered agents of the company.) How are transactional lawyers supposed to clear up questions with the client's outside accountants without divulging otherwise privileged material? What are these lawyers supposed to do: haul a litigator with them every time they meet with the auditors, so that any notes that the lawyers have are "prepared in anticipation of litigation"?

Unlike the First Circuit's majority, we don't find that the lines between documents prepared in anticipation of litigation and documents prepared in the ordinary course of business are clearly marked. Attorneys are trained to think about potential litigation issues as they go about their daily affairs. (We know—we've trained them.)

We're sympathetic to the majority opinion's desire not to have everything that an attorney does be shielded from all discovery, because we know that lawyers have sometimes been complicit in untoward schemes. Rule 26, though, doesn't shield everything. There are normal ways around the work-product rule. The work product rule itself has exceptions. But there's a big difference between saying that attorneys shouldn't protect everything by labeling it "work product" (we agree with that) and forcing attorneys to

produce their impressions about issues that legitimately might be litigated.

The problem with *Textron* is that, every time you comment on a client's situation, you'll have to determine whether that comment pertains to litigation *that is going to happen*. If your work product doesn't pertain to pending litigation—let's say, if your comment pertains only to reviewing a client's business plans for a widget that will explode upon being exposed to air—it may not be protected, even though you know that exploding widgets lead inexorably to lawsuits.

Let's say that you don't want to run the risk of producing your comments on the exploding widgets. Do you just tell your client your thoughts by phone, rather than put your comments in writing? Is that the best way to advise your client? (Is that your safest course of action later, if you and the client get crosswise with each other and the client starts to blame you for letting it market the exploding widget?)

We hate the idea of a world in which the best protection for work product is not to share it with clients in an attempt to give the client the best advice possible. Not everything that lawyers do is protected by privilege; now more of the work product that lawyers construct is threatened as well.

Attorney-Client Communications in Foreign Jurisdictions

Some degree of attorney-client privilege exists in every country on earth. However, the source of the privilege, as well as its extent, will vary widely depending on the country. The first step is to determine whether foreign or domestic law will apply to the communication. If foreign law will apply, the next step is to determine whether the communication will be privileged. To some degree, the existence of privilege will depend on whether the country in question is a common law country, a civil law country, or derives its laws from some other source. An important caveat to the concept of universal attorney-client privilege is corporate attorney-client privilege. Although most countries recognize some sort of privilege for independent attorneys, in some places the privilege is limited or does not exist

with respect to in-house counsel.

So how do you know whether U.S. law will apply? One important fact in determining this is where the issue is being litigated. Most U.S. courts will apply the law of the site where the counsel gives the legal advice or where the communication was made as means of determining whether the client has a reasonable expectation that the privilege exists. Thus, whether the privilege exists under U.S. law may depend on where you are when you advise the client. If you are not in the United States when the advice is given, it is possible that the laws of the other country would apply. And if the issue is being litigated in the courts of a foreign country, the question of whether U.S. or foreign law applies would depend on the laws of the foreign jurisdiction. However, as a general rule, the most important factor in determining the existence of attorney-client privilege with respect to foreign clients is whether the client had the reasonable expectation that the communication was privileged in the place where the advice was sought.

If U.S. law regarding privilege does not apply, it is important to determine whether the privilege exists in the specific country or region. It is helpful to look at the sources of attorney-client privilege as a means of determining whether it exists and to what extent it exists. Under common law, the concept of privilege is part of a fundamental principle of justice. The right attaches to the client, not the attorney, and only the client has the authority to waive that right (although attorneys can waive it by accident). In civil law countries, such as France, privilege comes out of the concept of "professional secrecy." Failure to honor the obligation of secrecy is considered a criminal offense. Thus attorney-client privilege is centered on the attorney in some countries and on the client in others.

You should be aware that the attorney-client privilege does not exist for in-house counsel in most foreign jurisdictions. The reasons for this distinction are numerous. For example, in other countries, unlike the United States, there is a traditional reluctance to sue corporations for their misdeeds. So the need to protect the corporation may be less developed.

In addition, attorneys are trained differently in other countries. In most foreign countries, law is an undergraduate degree, not a three-year professional degree. Professional training comes with apprenticeship and passage of a bar exam. Law students who opt out of the apprenticeship may still serve as in-house counsel. They may advise the business entity on certain issues and negotiate and interpret contracts. However, they are not professional attorneys in the sense that most in-house counsels in the United States are. Consequently, these in-house counsel would not enjoy the same rights that a professional would.

So what can you do to ensure that your communications with your client will be protected? As stated earlier, the guiding principle is going to be whether your client has a reasonable expectation at the time of the communication. A good first step for research of this type is *Martindale Hubbell International Law Digest* (http://support.lexisnexis.com/lexiscom/record.asp?ArticleID=lexiscom_marhub_intdig), which provides overviews of the laws of foreign jurisdictions.

If communication with a foreign jurisdiction will occur, it is good practice to associate with foreign counsel and obtain a written opinion describing the law of privilege in that jurisdiction. It is also important to make sure that everyone involved understands the issues involved and that communication is limited to necessary personnel. Even if all the precautions are taken, the laws concerning privilege continue to evolve and may be inconsistent from jurisdiction to jurisdiction.

In sum, don't think that all of your advice to your client can be protected from discovery. It can't (in fact, that's always been true), and there are new threats to that protection every day. **GPSOLO**

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