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The Work-Product Doctrine Might Not Protect Your Attorney's Work Product

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Last summer, in *United States v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009), a divided en banc panel of the U.S. Court of Appeals for the First Circuit adopted a dramatically narrow view of the work-product doctrine, under which only documents that are prepared "for use" in litigation would be shielded from disclosure. The decision left lawyers and clients alike concerned about the continued vitality of the work-product doctrine, particularly as it applied to so-called "dual purpose documents" that are prepared for both litigation and business purposes. On May 24, the U.S. Supreme Court denied certiorari, thus leaving intact both the First Circuit's opinion and the discomfort it caused. By refusing to wade into the debate, the Supreme Court also left unresolved a split in the federal courts that inspired the dissenting judges in *Textron* to invite the Court to "intervene and set the circuits straight on this issue which is essential to the daily practice of litigators across the country." Until the Supreme Court takes up this invitation, however, it is incumbent upon lawyers to understand both the "qualified" nature of the work-product doctrine in general, and the specific tests that courts will apply to determine which types of documents are subject to its protections.

The Supreme Court first recognized the work-product doctrine more than 60 years ago in *Hickman v. Taylo*r, 329 U.S. 495 (1947). That lawsuit arose out of the sinking of the tug *J.M. Taylor*, during which five of the nine crewmembers on board drowned. Shortly after the accident, the tug owners' counsel set out to interview all relevant witnesses, and obtained signed statements from many of the survivors. Eventually, the families of all five deceased crewmembers sued. While four of these lawsuits settled out of court, the plaintiff in the fifth lawsuit refused to settle, and, during discovery, demanded copies of all of the statements that the tug owners' lawyers had obtained during their investigation. The law firm refused, but the trial court ordered that the statements be produced. When the firm again refused, the court "adjudged [the attorneys] in contempt and ordered them imprisoned until they complied."

The Supreme Court overturned this decision and announced the now-familiar rule that lawyers are entitled to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel," and thus counsel cannot be forced to produce "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs . . . aptly though roughly termed . . . the '[w]ork product of the lawyer.'" The doctrine was eventually codified in Federal Rule 26(b)(3), which protects from disclosure all "documents and tangible things that are prepared in anticipation of litigation or for trial." Courts have had relatively little trouble identifying documents that were "prepared . . . for trial," however, within the much broader universe of dual purpose documents, courts have had a more difficult time isolating those that were "prepared in anticipation of litigation." In this regard, the Supreme Court was particularly prescient in *Hickman* when it characterized the term "work product" as an apt though "rough" description of the types of documents that should be protected from disclosure.

In *Textron,* the IRS brought an enforcement action against the company in federal court and subpoenaed the com-

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pany's "tax accrual work papers." Like all publicly traded corporations, Textron was required to prepare audited financial statements, which would include a description of the reserves the company kept on its books to account for contingent tax liabilities. The "tax accrual work papers" at issue in *Textron* were prepared by the company's lawyers and tax professionals to calculate these reserves. Specifically, the work papers identified items in the company's tax returns that could be challenged by the IRS, along with the dollar amount associated with each "debatable" item, and a percentage estimate of the IRS's chances of success.

In a different context, the U.S. Supreme Court explained the significance of tax accrual work papers to the IRS, noting that they allow the agency to "pinpoint the 'soft spots' on a corporation's tax return" and provide "an item-by-item analysis of the corporation's potential exposure to additional liability." Therefore, it was not surprising that Textron refused to produce its work papers, citing, among other reasons, the work-product doctrine. While Textron acknowledged that the immediate purpose of the work papers was to establish the reserve figures for its financial statement, the company argued that litigation over specific items was possible and the work papers reflected their lawyers' calculations of the risk associated with each item. The District Court accepted Textron's argument and ordered that the work papers not be produced. A three-judge panel of the First Circuit affirmed this ruling, but, after granting the government's petition for rehearing en banc, the full First Circuit overturned the District Court's decision and ordered the work papers produced.

In rejecting Textron's argument, the First Circuit concluded that the work-product doctrine only protects documents "prepared for use in possible litigation". Accordingly, because the "purpose of the [tax accrual] work papers was to make book entries, prepare financial statements and obtain a clean audit," they did not fall within the scope of its protections. According to the majority, it was "not enough to trigger work-product protection that the subject matter of a document relates to a subject that might conceivably be litigated"; rather, to qualify for protection, the document must have been prepared for some anticipated use at trial. The majority offered anecdotal examples of the types of documents that might satisfy this test, noting that "[e]very lawyer who tries cases knows the touch and feel of materials prepared for a current or possible . . . lawsuit," and that "[a]ny experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials."

With this decision, the First Circuit appears to have announced a new test for determining whether dual purpose documents are protected from disclosure under the work-product doctrine, one that is significantly narrower than those adopted by its sister courts. The Second, Third, Fourth, Seventh, Eighth, and D.C. Circuits have adopted the relatively lenient "because of" test, which evaluates dual purpose documents to determine whether "the document[s] can fairly be said to have been prepared or obtained because of the prospect of litigation." One court characterized this test as requiring a court to simply determine whether a party "had litigation in mind" when it created the relevant documents. In contrast, the Fifth Circuit has adopted a "primary purpose" test, which looks to whether such documents were prepared "primarily [] to assist in future litigation." Even under this more restrictive test, however, dual purpose documents are covered by the work-product doctrine if their primary purpose is to assist in future litigation.

The "for use" test adopted in Textron grafts an additional requirement onto the "primary purpose" test and further limits the scope of the work-product doctrine. Under this test, dual purpose documents, even those prepared by counsel or with counsel's input, will only be protected from disclosure if their primary purpose is to assist in litigation and they are actually prepared for use in litigation. It is not difficult to imagine the types of documents that might satisfy the first of these requirements but not the second. Countless documents are prepared by counsel to evaluate the risk of potential litigation and advise clients on how to manage or respond to those risks, but few, if any, are prepared for use at trial. As the sharply worded dissent in *Textron* noted, a standard that requires both of these prerequisites to be satisfied will have a chilling effect on the advice lawyers give to their clients, as lawyers will become more reluctant to put their concerns and uncertainties about their clients' positions in writing out of a fear that their opinions will be discoverable in the future. As such, the First Circuit's ruling appears to miss the core holding of Hickman by actually narrowing the zone in which counsel can work without "unnecessary intrusion by opposing parties and their counsel."

Unlike in *Hickman*, the attorneys in *Textron* were not imprisoned for refusing to turn over the tax accrual work papers. Nonetheless, the impact of the decision should not be underestimated. While the First Circuit is currently the only court to have adopted the "for use" test, its opinion serves as a reminder that the work-product doctrine is a qualified privilege that does not sweep as broadly as counsel and clients would often like to believe, particularly in connection with dual purpose documents. While it certainly seems that this issue is ripe for the kind of "intervention" from the Supreme Court suggested by the dissenting judges in *Textron*, until this happens, the burden is on counsel — in-house and outside alike — to understand the scope of the work-product doctrine and appreciate that it may be more "qualified" in some jurisdictions than in others. ■