

When Work Papers are not Subject to the Attorney-Client Privilege

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TEXTRON

The recent *Textron* decision is causing quite a kerfuffle. The court permitted Internal Revenue Service to gain access to documents created by the defense-contracting firm to determine whether the company's calculation of its tax liabilities would pass muster during a possible IRS audit. Textron was trying to shield the documents under the Work-Product Doctrine.

Work-Product Doctrine

The Work-Product Doctrine shields an individual or business from having to turn over documents created in anticipation of litigation. The Doctrine traces its roots to a 1947 Supreme Court decision, *Hickman v. Taylor*, 329 U.S. 495. It protects material prepared in anticipation of litigation from being revealed to opposing lawyers in a court case. Seeing those materials gives an opponent the edge by sharing the other side's legal strategy.

Tax Work Papers

Tax accrual work papers for public companies may never deserve work product immunity. Corporate taxpayers create work papers to comply with federal securities law. They exist exclusively because of financial accounting and disclosure requirements. Their creation occurs regardless of any prospect for future litigation.

Attorney-Client Privilege

One of the concerns of this case is that this may be an attack by the IRS on the Attorney-Client Privilege. That privilege is broader and protects communications between clients and their lawyers. That privilege is not solely for communications that deals with anticipated litigation.

However, Textron, like most other public companies, showed the tax accrual papers to outside accountants. Once you send documents to someone other than the lawyers you have effectively removed attorney-client privilege over these documents.

Dangers of Email

One of the points to take away from this case is the danger of sending out blast emails to your lawyers, copying third parties who are not lawyers. If you do so, you have probably waived the attorney-client privilege for the contents of that email. It is all too easy to add others to the email distribution. Independent auditors do not enjoy confidential relationships with their clients for purposes of the attorney-client privilege.

References:

- [More on the Textron Decision, In-House Lawyers' Latest Worry](#) from the WSJ Law Blog
- [Audit Work Papers Were Discoverable by IRS Since They Were Done for](#)

[SEC-Required Financial Statements Not Litigation](#) from Jim Hamilton's World of Securities Regulation

Document hosted at [JDSUPRA™](#)
<http://www.jdsupra.com/post/documentViewer.aspx?fid=a3705440-63d6-4472-b135-29c270956a85>

- [Ruling in Tax-Auditing Case Puts Corporations on Edge](#) by Amir Efrati for The Wall Street Journal
- [Textron decision on work product privilege](#) by Alice Woodley on the Legal Ethics Forum
- [Textron decision](#) – Hosted on JD Supra
- [The Application of the Attorney-Client Privilege to Tax Accrual Workpapers: The Real Legacy of United States v. Textron](#), by Claudine Pease-Wingenter, 8 Houston Bus. & Tax L.J. 337 (2008)

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