

## Legal Updates & News

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#### Massachusetts Supreme Judicial Court Upholds Use of Work Product Doctrine to Protect Documents

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On March 3, 2009, the Massachusetts Supreme Judicial Court upheld the trial court's determination that memoranda prepared by an accounting firm at the request of in-house counsel were protected as work product. *Commissioner of Revenue v. Comcast Corp.*, SJC-10209 (Mass. Mar. 3, 2009). The court, however, rejected the trial court's holding that the attorney-client privilege protected the memoranda.

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#### Background

In an unpublished decision, the Massachusetts Superior Court had held that certain documents prepared by the accounting firm Arthur Andersen were protected under both the attorney-client privilege and the work product doctrine. The Commissioner of Revenue, after failing to overturn the decision in a request for reconsideration, appealed to the Supreme Judicial Court.

The dispute arose out of the Massachusetts Commissioner of Revenue's audit of Comcast Corporation, which focused on whether the liquidation of certain shares of stock in Teleport Communications Group, Inc., in 1997, to comply with the terms of an antitrust judgment that arose from US West's acquisition of Boston-based Continental Cablevision, was designed to improperly avoid Massachusetts tax. During the course of the audit, the Commissioner issued an administrative summons to Comcast requesting documents relating to the transaction and the formation of certain entities involved in the transaction.

In planning for the liquidation, US West had relied on its in-house tax counsel for advice. In-house tax counsel in turn sought advice from Arthur Andersen. He was unfamiliar with Massachusetts law, and was seeking advice on "various ways to set up the transaction, to determine the best, legitimate vehicle by which to deal with the tax consequences . . . and to assess the risks of litigation associated with the different vehicles." A memorandum was prepared, discussing the "pros and cons of the various planning opportunities and the attendant litigation risks."

During the course of the Department's audit, the Commissioner issued an administrative summons for the production of documents. Comcast produced voluminous documents, but declined to produce certain documents, including various versions of the memorandum prepared by Arthur Andersen, arguing that the documents were protected by both the attorney-client privilege and the work product doctrine.

#### Trial Court's Decision

The Superior Court had held that the documents were protected by both the attorney-client privilege and

the work product doctrine. With regard to the attorney-client privilege, the Superior Court relied on a First Circuit Court of Appeals decision, *Cavallaro v. United States*, 284 F.3d 236 (1st Cir. 2002), which held that the Massachusetts attorney-client privilege extends to communications between a client and an accountant working for the attorney if the “accountant [was] ‘necessary, or at least highly useful, for the effective consultation between the client and the lawyer.’” (Citation omitted.) The Superior Court held that the Arthur Andersen documents were protected by the attorney-client privilege because: (i) the memos contained a detailed analysis of Massachusetts tax law; and (ii) the memos provided in-house counsel with information critical to his ability to effectively represent his client. The Superior Court also found that the memorandum was protected by the work product doctrine, because it outlined the feasibility of the potential restructuring in light of applicable Massachusetts law, and the potential for litigation brought by the Massachusetts Department of Revenue.

### **Supreme Judicial Court rejects attorney-client privilege arguments**

The Supreme Judicial Court, while acknowledging the importance of the attorney-client privilege generally, rejected this argument. It did recognize that, in certain circumstance, while disclosure of documents to a third party, including an accountant, generally waives the privilege, an exception to the waiver rule applied when the privilege is invoked to protect communications necessary to facilitate communication between the attorney and client and thereby assist the attorney in rendering legal advice to the client. *United States v. Kovel*, 296 F.2d 918, 921-22 (2d Cir. 1961). The exception can apply to accountants, but in the Supreme Judicial Court’s view, only applies when the communication with the accountant is made “for the purpose of [the client] obtaining legal advice from the lawyer.” *Comcast*, slip op. at 7 of 17 (citing *Kovel*, 296 F.2d at 922). The court found that it was not sufficient that the attorney’s ability to represent a client was improved, even substantially, by the assistance of the accountant; the privilege would apply only when the accountant’s role is to clarify or facilitate communications between attorney and client. Here, the attorney’s purpose was to obtain advice about Massachusetts tax law, not to seek assistance in understanding his client’s information, and so the court declined to apply the attorney-client privilege. It rejected the company’s argument that failure to protect the documents would eviscerate the privilege, noting that in-house counsel could have hired a lawyer, whose work would have been privileged, rather than an accountant.

### **Work Product Privilege Upheld**

However, the court did uphold the use of the work product doctrine to protect the documents from disclosure. The court noted that the work product doctrine, arising from *Hickman v. Taylor*, 329 U.S. 495 (1947), is designed to ensure the operation of the adversary system by protecting counsel’s work from intrusion or interference, and creating a “zone of privacy for strategic litigation planning . . . to prevent one party from piggybacking on the adversary’s preparation.” *Comcast*, slip op. at 9 of 17 citing *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995). “Opinion” work product, which reflects the thoughts and mental impressions of a party’s lawyer or other representative, is entitled to heightened protection.

The Massachusetts work product doctrine is set forth in Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure and explicitly protects from disclosure documents prepared by a client’s nonlawyer representatives if they are prepared “in anticipation of litigation.” The court applied the majority test for determining whether documents were prepared “in anticipation of litigation,” finding that documents are protected if they were prepared “because of” existing or expected litigation, and agreeing that work-product protection should not be denied to a document that analyzes the risk of litigation even though it may also assist in a business decision. This is sometimes called the “dual purpose” rule, and represents the majority rule in the Federal appellate courts. The Supreme Judicial Court rejected the Commissioner’s argument that the documents were prepared to avoid litigation, and that there was not a specific enough prospect of litigation. The court concluded that the documents were prepared because of the “prospect of litigation,” and would not have been prepared “irrespective of the prospect of litigation,” citing the recent decision in *United States v. Textron Inc.* 553 F.3d 87 (1st Cir. 2009). (For additional information on the *Textron* case, please see earlier [Tax Update](#).)

Since the commissioner failed to meet the difficult burden of demonstrating any “extremely unusual” situation that would be necessary to overcome the heightened protection afforded to opinion work product, the Andersen memoranda were held to be protected from disclosure.

### **Thoughts to Consider**

This state supreme court case joins a group of recent federal court decisions providing broad protection to documents prepared in anticipation of litigation under the work product doctrine. *Textron; Regions Fin. Corp. v. United States*, 2008 WL 2139008, 101 AFTR 2d 2008-2179 (N.D. Ala. May 8, 2008); *United States v. Roxworthy*, 457 F.3d 590 (6th Cir. 2006). The attorney-client privilege often is unable to provide protection where the documents in question may have been prepared by or shared with nonlawyers. Such circumstances can result in loss of the attorney-client privilege, which is generally waived when the privileged information is disclosed outside the attorney-client relationship. However, the work product doctrine is more robust, and is not generally waived unless the disclosure would substantially increase the likelihood of an adversary obtaining the information. *See, e.g., Regions Fin. Corp.* Lawyers and nonlawyers alike need to be alert to the possibility of protection for documents prepared in anticipation of litigation, and ensure that such documents are not inadvertently produced in response to broad information document requests and demands for disclosure increasingly being served by state departments of revenue.