COMMISSIONER OF REVENUE vs. COMCAST CORPORATION & another.[1]

SJC-10209

November 4, 2008. - March 3, 2009.

CIVIL ACTION commenced in the Superior Court Department on May 26, 2005.

Motions to compel production of certain withheld documents and for reconsideration were heard by Frank M. Gaziano, J., and entry of final judgment was ordered by Thomas E. Connolly, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

William W. Porter, Assistant Attorney General, for the plaintiff.

David J. Nagle for the defendants.

John S. Brown, George P. Mair, Donald-Bruce Abrams, & Matthew D. Schmall, for The New England Cable & Telecommunications Association, Inc., amicus curiae, submitted a brief.

Shirley K. Sicilian & Sheldon H. Laskin for Multistate Tax Commission, amicus curiae, submitted a brief.

Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, & Botsford, JJ.

MARSHALL, C.J.

We transferred this appeal here on our own motion to consider whether the attorney-client privilege or the work-product doctrine protect from disclosure communications between an in-house corporate counsel and outside tax accountants consulted by him regarding the structuring of a sale of stock mandated by an antitrust consent judgment.

In connection with an audit examination by the Commissioner of Revenue (commissioner) [FN2] of Comcast Corporation's (Comcast's) [FN3] corporate excise tax returns for the tax period November 1, 1996, through December 31, 1997, the commissioner is investigating whether Comcast and its affiliates improperly failed to pay Massachusetts corporate excise taxes in connection with the forced liquidation of shares of stock that yielded approximately $500,000,000 in capital gains. The capital gains were reported on a Comcast affiliate's Federal

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tax return but were not reported on any Massachusetts corporate excise tax return. The commissioner sought the production of documents through an administrative summons pursuant to G.L. c. 62C, § 70.[4] [FN4] Comcast responded that some of the documents were protected by the attorney-client privilege and the work-product doctrine.

[FN5] [5] The commissioner then filed a complaint in the Superior Court seeking to compel production of the withheld documents. The commissioner's request was denied, the judge ruling that the documents at issue in this appeal were protected by the privilege and the work-product doctrine. The commissioner moved unsuccessfully for reconsideration. Pursuant to a joint motion of the parties, final judgment entered in the Superior Court. See Mass. R. Civ. P. 58(a), as amended, 371 Mass. 908 (1977). The commissioner appealed. We conclude that the documents are protected from disclosure by the work-product doctrine. We affirm. [6] [FN6]

1. Factual background. The audit examination of Comcast and its affiliates, see note 3, supra, by the Department of Revenue (department) was commenced in June, 2000, three years after the acquisition of Continental Cablevision, Inc. (Continental Cablevision), by U S West, Inc. (U.S. West), a predecessor to Comcast. That acquisition gave rise to an antitrust challenge by the United States Department of Justice. We describe briefly the antitrust action and the related corporate transactions before turning to the documents at the center of this litigation. The facts are undisputed unless otherwise noted.

a. The stock sale. In February, 1996, Colorado-based U.S. West announced plans to purchase Continental Cablevision, a Massachusetts cable television company with headquarters in Boston. Through a wholly owned subsidiary, Continental Teleport, Inc. (Continental Teleport), Continental Cablevision at the time owned 11.2% of the stock of Teleport Communications Group, Inc. (TCG), a company that, like U.S. West, was a local telecommunications services provider. [7] [FN7] Continental Teleport, like its parent

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Continental Cablevision, was a Massachusetts corporation. The acquisition of Continental Cablevision by U.S. West was completed on November 15, 1996, and Continental Cablevision was immediately merged into MediaOne Group, Inc. (MediaOne), a wholly owned subsidiary of U.S. West.

Meanwhile, on November 5, 1996, the Department Of Justice filed a civil antitrust action against U.S. West and Continental Cablevision, see 15 U.S.C. §§ 18, 25, alleging that the acquisition would lessen competition in the market for dedicated telecommunications services. The Department of Justice, U.S. West, and Continental Cablevision agreed to settle the antitrust claims, and on February 28, 1997, a final judgment entered whose terms required that, to preserve competition in the sale of dedicated communication services in certain markets, U.S. West divest, on or before June 30, 1997, the portion of TCG stock necessary to reduce U.S. West's ownership interest to less than ten per cent of the outstanding shares of TCG common stock, and to further divest all remaining interest in TCG on or before December 31, 1998.

US West retained the investment firm Lehman Brothers Inc. to assist it with the required sale of the TCG stock. Because the stock sale was anticipated to have significant tax consequences for U.S. West, Thomas Kennedy, executive director of U.S. West's tax department, turned to Attorney Andrew E. Ottinger, Jr., at the time serving in U.S. West's Colorado-based law department, for advice regarding options for structuring the stock sale. Ottinger was an experienced tax litigator, but was unfamiliar with Massachusetts tax law. Concerned that the Massachusetts DOR would challenge, in Ottinger's words, "the appropriateness of the chosen vehicle" for U.S. West's sale of the TCG stock, Ottinger sought the advice of two Massachusetts-based partners of Arthur Andersen LLP (Andersen), in circumstances we shall later describe in some detail.

After receiving advice from Andersen, U.S. West caused the following transactions to occur. On February 11, 1997, a new entity, Continental Holding Company (Continental Holding), a Massachusetts corporate trust, G.L. c. 62, § 8, was established by U.S. West. That same day, Continental Teleport was dissolved, and its assets, including its then remaining TCG shares, [8][FN8] were simultaneously transferred to Continental Holding. US West subsequently divested itself of the TCG shares in four separate transactions, culminating with the largest sale on November 30, 1997. [9][FN9]

Continental Holding reported a capital gain of $495,733,830 from the sale of the TCG shares on its December 31, 1997, Federal tax return. Claiming an exemption as a Massachusetts corporate trust under G.L. c. 62, § 8 (b), it did not file a Massachusetts corporate excise tax return for that same taxable period. [10][FN10], [11][FN11] Continental Holding was

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dissolved on February 12, 1999, two years after its creation, and its assets transferred to U.S. West's successor.

b. Retention of Arthur Andersen LLP. Prior to U.S. West's disposition of the TCG stock, its in-house tax counsel Ottinger reta ined Andersen for advice. Becau se the circumstances of that retention are central to the legal issues, we recite them in some detail.

Ottinger graduated from law school in 1977 and jo ined the tax department of U.S. West in 1986. In 1987, he transferred to U.S. West's law department, where he served as State and local tax counsel until 2000, except for a brie f period as regulatory counsel in 1995-1996. Ottinger initially became involved with U.S. West's acquisition of Continental Cablevision while he was serving as regulatory counsel, but it was in his position as State and local tax counsel that he sought Andersen's advice regarding the impending sale of TCG stock.

As State and local tax counsel, Ottinger was U.S. West's attorney "chi efly responsible" for property tax, State income tax, and sales and use tax matters. He spent approximately forty per cent of his time working on tax-related litigation, handling one-half of those matters himself and retaining outside counsel for the remainder. In connection with his own cases, Ottinger regularly prepared assessments analyzing litigation risks for U.S. West to evaluate the appropriateness of a tax determinat ion. Because U.S. West had, in Ottinger's words, a "sophisticated Tax Department," he ra rely hired outside tax consultants to assist him, although he did so on occasion.

With respect to the particular matter at issue here -- the sale of the TCG stock compelled by the antitrust consent decree -- Ottinger understood the transaction to have significant tax consequences for U.S. West. Accordingly, he explained, he examined "planning opportunities" for the transaction himself, but turned to experienced "outside consultants" to help him "interpret Massachusetts la w," because he himsel f lacked sufficient understanding of Massachusetts State tax law. [12] [FN12] Specifically, Ottinger stated that he considered "various ways to set up the transact ion, to determine the best, legitimate vehicle by which to deal with the tax consequences from the sale of [TCG] shares, and to assess the risks of litigation associated with the different vehicles." Ottinger ultimately retained Michael E. Porter, III, and Edward Gartland, two Massachusetts-based Andersen partners. Both had previously been employed by the depa rtment, Porter as a senior attorney at the department. [13] [FN13] During January and February, 1997, Ottinger spoke with Porter and Gartland on several occasions, discussing the various options for U.S. West to follow relating to the sale of TCG stock, and to assess the risks of and exposure to litigation for any "vehicle" considered. He asked the Andersen partners to prepare a memorandum discussing the "pros and cons of the various planning opportunities and the attendant litigation risks," which they did. The Andersen memoranda (var ious drafts of it) are the documents in contention here.

Ottinger stated that he considered all of hi s communications with the Andersen partners to

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be attorney-client communications and attorney work product, and, accordingly, "took all necessary precautions" to ensure that documents received from Andersen remained "confidential and privileged," including sending the documents to the segregated, locked files of U.S. West's law department maintained for privileged documents.

c. The challenged documents. Six of the documents withheld by Comcast are at issue in this appeal.[14] [FN14] The six documents are different drafts and the final memorandum prepared by the Andersen partners at the request of Ottinger before the corporate reorganization took place.[15] [FN15] The Andersen memoranda, each addressed "to file," and some sixteen pages long, single spaced, address the structuring of the required sale of TCG stock. The memoranda contain a detailed analysis of various corporate entities and address various options, and attendant litigation risks, for the TCG stock sale in light of applicable Massachusetts law.

2. Prior proceedings. a. Audit and administrative summons. The department commenced its audit in June, 2000. According to the commissioner, the issue relevant to this appeal is whether U.S. West had what the commissioner terms "a legitimate business purpose" for reorganizing Continental Teleport as a Massachusetts corporate trust (i.e., as Continental Holding) at the time the sale of TCG stock that resulted in the substantial capital gains described above was being contemplated. The commissioner claims that, during the DOR's investigation, U.S. West did not identify any independent economic or business purpose for the reorganization; she seeks disclosure of the Andersen memoranda contending that they will "reveal detailed information about why the transaction was structured as it was."[16]

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[FN16]

During the first four years of the audit, the department issued three information document requests (IDRs), seeking information regarding Continental Teleport. [17] [FN17] In response to these requests, Comcast produced certai n records, which the commissioner deemed "insufficient." In May, 2004, the commissioner issued an administrative su mmons pursuant to G.L. c. 62C, § 70, seeking the production of records relating to the sale of TCG stock, including records dealing with the reorganization of Continental Teleport into Continental Holding. Comcast again produced responsive documents, but withheld others, including the Andersen memoranda, under claims of attorne y-client privilege and work-product doctrine, all of which were listed in the privilege log prepared by Comcast. See note 5, supra.

b. Proceedings in the trial court. In May, 2005, five years after the commencement of the audit, the commissioner filed a complaint in the Superior Court seeking to compel production of all of the docume nts listed on the Comcast privilege log as well as unredacted versions of all redacted documents. After a no nevidentiary hearing and an in camera review of the documents, a judge in the Superior Co urt denied the commission er's motion, holding, inter alia, that the Andersen memoranda were protected by the attorney-client privilege because they contained "a detailed analysis of Massachusetts tax law" and "provided in-house counsel with legal information critical to his ability to effectively represent his client." The judge also concluded that the Andersen memoranda were protected by the work-product doctrine as "prepared in anticipation of litigation." The judge later denied the commissioner's motion for reconsideration of so much of the order as related to the Andersen memoranda.

3. Discussion. We first address the standard of review of the judge 's ruling on the commissioner's motion to compel.

The commissioner contends that our review is de novo wher e the scope of the attorney-client privilege and the work-product doctri ne in a summons enforcement proceeding, as well as the interpretation of G.L. c. 62C, § 70, are questions of law. The commissioner also argues that because the eviden ce before the judge in the Superior Court comprised only affidavits and other documents, we ma y "assess the evidence anew," quoting Meschi v. Iverson, 60 Mass.App.Ct. 678, 681-682 n. 7 (2004) . Comcast responds that a more deferential standard of re view is warranted. Citing Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. Ltd. (Bermuda), 425 Mass. 419, 421 (1997) (EMLICO), Comcast argues that decisions regarding the attorney-client priv ilege and the work-product doctrine raise questions of fact review able for clear error. Id., citing Purcell v. District Attorney for the Suffolk Dist., 424 Mass. 109, 113 (1997) ("existence of the privilege and th e applicability of any exception to the privilege is a question of fact for the judge").

In general, we uphold discovery rulings "unl ess the appellant can demonstrate an abuse of discretion that resulted in prejudicial error." Buster v. George W. Moore, Inc., 438 Mass.

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[17] General Mills, Inc. v. Commissioner of Revenue, supra.

635, 653 (2003), citing Solimene v. B. Grauel & Co., 399 Mass. 790, 799 (1987). Where the attorney-client privilege is concerned, however, our review is more textured. On appeal from any decision on a privilege claim, we re view the trial judge's ru lings on questions of law de novo. [18] [FN18] We generally review a judge's fact findings, at least after a bench trial, for clear error. See Mass. R. Civ. P. 52(a), as amended, 423 Mass. 1402 (1996). Where, as here, we are dealing with a motion to compel and the motion judge's findings are based solely on documentary evidence, we do not accord them any special deference. Cf. Cavallaro v. United States, 284 F.3d 236, 245 (1st Cir.2002) (under Federal law findings of motion judge on a documentary record reviewed for clear erro r). We review discretionary judgments for abuse of discretion. See Matter of a Grand Jury Investigation, 437 Mass. 340, 356 (2002) (evidentiary ruling where privilege at issue). Mixed questi ons of law and fact, such as whether there has been a waiver, genera lly receive de novo review. See 2 P.R. Rice, Attorney-Client Privilege in th e United States § 11.36, at 234-236 & nn. 43-46 (2d ed.1999) (surveying Federal jurisprudence and concludi ng that appellate courts generally review mixed questions of law and fact de novo).

We turn now to the merits, and consider first whether the Andersen memoranda are protected by the attorney-client privilege.

a. Attorney-client privilege. The classic formulation of the attorney-client privilege, which we indorse, is found in 8 J. Wigmore, Eviden ce § 2292 (McNaughton rev. ed. 1961): "(1) Where legal advice of any kind is sought (2) from a professional legal advise r in his capacity as such, (3) the communications rela ting to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently pr otected (7) from disclos ure by himself or by the legal adviser, (8) except th e protection be waived." See Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 448 (2007) (privile ge protects "all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice"). See generally Mass. G. Evid . § 502(a) & (b), at 87-88 (2008-2009). The purpose of the privilege "is to enable clients to make full disclosure to legal counsel of all relevant facts ... so that counsel may render fully informed legal advice," id. at 449, with the goal of "promot[ing] broader public interests in the observance of law and administration of justice." Id., quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). That important societal interest is, howe ver, in tension "with society's need for full and complete disclosure" in adversary proceedings. Matter of a John Doe Grand Jury Investigation, 408 Mass. 480, 482 (1990), quoting In re Grand Jury Investigation, 723 F.2d 447, 451 (6th Cir.1983), cert. de nied, 467 U.S. 1246 (1984). In Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 615-616 (2007), quoting In re Grand Jury Investigation, supra, and Commonwealth v. Goldman, 395 Mass. 495, 502, cert. denied, 474 U.S. 906 (1985), we recently said:

"The attorney-client privilege is so highly valued that, while it may appear 'to frustrate the investigative or fact-finding process ... [and] create [ ] an inherent tension with society's need for full and complete disclosure of all rele vant evidence during implementation of the judicial process,'... it is acknowledged th at the 'social good derived from the proper performance of the functions of lawyers acting for their clie nts ... outweigh [s] the harm

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that may come from the suppr ession of the evidence.' "

While the tension is unquestionably resolved in favor of recognizing the privilege, we have consistently held that we construe the privilege narrowly, in part to protect the competing societal interest of the full discl osure of relevant evidence. See EMLICO, supra at 421 (attorney-client privilege "ordinarily strictly construed"); Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 1), 424 Mass. 430, 457 n. 26 (1997) ("We must, however, construe the privileg e narrowly"). A narrow construction of the privilege is particularly appropriate where, as here, information is being withheld from the government in a tax enforcement proceeding. Cf. Cavallaro v. United States, supra at 245, quoting United States v. Arthur Young & Co., 465 U.S. 805, 816 (1984) ("the doctrine of construing the privilege narrowly ... has partic ular force in the context of IRS [Internal Revenue Service] investigations given the 'congr essional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry' ").

As the party asserting the privilege, Comcast bears the burden of establishing that the attorney-client privilege applies to the Andersen memoranda, a burden that "extends not only to a showing of the existence of the attorney-client relationship but to all other elements involved in the determination of the existence of the privilege, including: (1) the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capaci ty as such; (2) the communications were made in confidence; and (3) the privilege as to these communications has not been waived." EMLICO, supra at 421.

The commissioner argues that Comcast has not me t its burden for three reasons. First, she claims, Comcast submitted no proof that th e Andersen memoranda contain confidential communications from the client (U.S. West) to Ottinger. Second , she asserts, the Andersen memoranda do not fall within the "derivative privilege" recognized in United States v. Kovel, 296 F.2d 918 (2d Cir.1961) (Kovel). Last, she argues, the Supe rior Court judge improperly expanded the privilege where a narrow constr uction is required because Comcast is resisting a statutory demand for information.

As to the first point, the commissioner's argu ment appears to be based on an incorrect assertion that the privilege applies only where the underlying client information that is the subject of the communication is confidential in the sense that it is not public knowledge. Specifically, the commissioner argues that neither the requ irement that U.S. West sell Continental Cablevision's stake in TCG by the end of 1998 nor that U.S. West was considering restructuring Continental Teleport were confidential. But information contained within a communication need not itself be conf idential for the communi cation to be deemed privileged; rather the communi cation must be made in co nfidence--that is, with the expectation that the communication will not be divulged. See 2 P.R. Rice, Attorney-Client Privilege in the United Stat es § 6.2, at 9-11 (2d ed.1999), and cases cited ("The confidentiality that must be expected by the client relates to the client's communication with an attorney.... It is not necessary that the information within the communication be confidential. The communication from the client to the attorney may contain nonconfidential information.... This is not relevant to the poin t of whether confidentiality can reasonably be expected in the communications that contain that information" [emphases in original]); Restatement (Third) of the Law Governing La wyers § 71 (2000) ("A communication is in confidence ... if, at the time and in th e circumstances of th e communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileg ed person ... or another pers on with whom communications are protected under a similar privilege"); id. at comment b, at 544 ("The matter communicated need not itself be secret"). Here there is no question th at Ottinger intended

to keep the communications confidential, and he took steps to ensure that they were. In addition, as Comcast points out, in order to address appropriately the issues that Ottinger had identified, including exposure to litigation, Andersen received from counsel more than the publicly known fact that U.S. West was required to dispose of the TCG stock.

Second, the commissioner challenges the judge's conclusion that the Andersen memoranda fall within the so-called derivative attorney-client privilege. Disclosing attorney-client communications to a third party, including an accountant, generally undermines the privilege. See United States v. Ackert, 169 F.3d 136, 139 (2d Cir.1999) ("the attorney-client privilege generally applies only to communications between the attorney and the client"). There are exceptions. In Judge Friendly's landmark opinion, the United States Court of Appeals for the Second Circuit recognized that the privilege can shield communications of a third party employed to facilitate communication between the attorney and client and thereby assist the attorney in rendering legal advice to the client. Kovel, supra at 921-922. The exception can apply to accountants. Kovel, supra at 922 ("the presence of an accountant ... while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege" any more than would that of linguist who "translates" when client speaks language different from attorney). The reason, explained Judge Friendly, is because "the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." Id. The privilege does not apply unless the communication with the accountant is made "for the purpose of [the client] obtaining legal advice from the lawyer." Id. "If what is sought is not legal advice but only accounting service ... or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." Id. Now known as the Kovel doctrine or the derivative attorney-client privilege, see, e.g., 1 Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 217-218 (5th ed.2007), the doctrine has deep roots in Massachusetts jurisprudence. See Foster v. Hall, 12 Pick. 89, 93 (1831) (privilege extends to communications with agents of attorney who are "necessary to secure and facilitate the communication between attorney and client"). See also Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 616 (2007) (privilege protects "statements made to or shared with necessary agents of the attorney or the client, including experts consulted for the purpose of facilitating the rendition of such advice").

The commissioner argues that Comcast has failed to carry its burden of establishing that the derivative privilege protects the Andersen memoranda for two reasons. First, she asserts, the derivative privilege applies only where the accountant's services are necessary to "translate" or "interpret" so that the attorney is able to understand the client's situation in order to provide the requested legal advice. Second, the commissioner argues, the derivative privilege does not apply because U.S. West sought professional tax advice, not legal advice of an attorney, from Andersen. We agree that a derivative privilege does not apply to the Andersen memoranda.

If the accountant's presence is "necessary" for the "effective consultation" between client and attorney, the privilege attaches. Kovel, supra at 922. That was the logic of Kovel, and the weight of authority affirms its continuing vitality. See, e.g., United States v. Schwimmer, 892 F.2d 237, 243-244 (2d Cir.1989) (privilege applies where attorney for criminal defendant charged with financial crimes retained accountant as necessary to analyze defendant's financial transactions); United States v. Judson, 322 F.2d 460, 462 (9th Cir.1963) (Kovel exception applies where attorney advising client for assistance with IRS investigation hired accountant to prepare client's net worth statement). The "necessity" element means more than "just useful and convenient." Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir.2002), quoting 1 E.S. Epstein, supra at 187. "The involvement of the third party must be nearly indispensable or serve some specialized purpose in facilitating

the attorney-client communications." Cavallaro v. United States, supra. Thus courts have rejected claims that the derivati ve privilege applies where an a ttorney's ability to represent a client is improved, even substantially, by the assistance of an accountant. See United States v. Ackert, supra at 139 ("a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's ability to represent the client"); In re G-I Holdings Inc., 218 F.R.D. 428, 434 (D.N.J.2003) (Kovel "carefully limited the attorney-client privilege ... to when the accountant functions as a 'translator' between the client and the attorney"); United States v. Chevron Texaco Corp., 241 F.Supp.2d 1065, 1071 (N.D.Cal.2002) ("The interpreter analogy and the statement that the a ccountant is needed to facilitate the client's consultation both strongly indicate that Kovel did not intend to extend the privilege beyond the situation in which an accountant was interpreting the client's otherwise privileged communications or data in order to enable the attorney to understand those communications or that client data" [emphasis in original]). [19] [FN19] See also Black & Decker Corp. v. United States, 219 F.R.D. 87, 90 (D.Md.2003) ("Cases decided after Kovel have narrowly interpreted this concept of de rivative privilege"); Comment, Privileged Communications with Accountants: The Demise of United States v. Kovel, 86 Marq. L.Rev. 977, 978, 986 (2003) ("Over the past four deca des, courts have repeatedly narrowed the holding in Kovel. As a result, there is very little protection left for communications with accountants"; communications fr om accountants that constitute "independent information and expertise for the attorney to use in representing his or her client" are not protected by attorney-client privilege). [20] [FN20] We agree with the majority of courts that the Kovel doctrine applies only when the accountant's role is to clarify or facilitate communications between attorney and client.

It is apparent that the role of the Anders en partners was not necessary for effective communication between Ottinger and his client U.S. West: Ottinger's affidavit and the Andersen memoranda demonstrate that Ottinger's purpose in consulting Andersen was to obtain advice about Massachusetts tax law, no t to assist Ottinger with comprehending his client's information. Indeed Comcast is forthright in acknowledging that Andersen was retained "to provide [Ottinger] with information he needed to advise U.S. West in its sale of the [TCG] stock." As Ottinger explained, he turned to the outside consultants who had experience in Massachusetts State tax issues "to help me interpret Massachusetts law." The Andersen memoranda reveal that an analysis of Massachusetts la w is precisely what Ottinger received. We do not doubt, as the motion judge held , that the Andersen memoranda were "critical to [Ottinger's] ability to effectively represent his client." But we agree with those courts holdin g that the privilege does no t apply where the accountant provides "additional legal advice about comply ing with the tax code even where doing so would assist the attorney in advising the client." United States v. Chevron Texaco Corp., supra at 1072. See United States v. Ackert, supra at 139 ("a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely

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because the communication proves important to the attorney's ability to represent the client").

The decision in United States v. Ackert, supra, is instructive. In that case, the United States Court of Appeals for the Second Circuit held that conversations between a company's in-house counsel and an investment banker regarding the details of a transaction proposed by the investment banker, and the transaction's potential tax consequences, were not covered by the privilege, despite the assertion--similar to the one made here by Comcast-- that "it was impossible for [counsel] to advise [the company] without these further contacts with [the investment banker]." Id. at 139. The communications were not privileged, even though the court assumed that counsel's communications with the investment banker "significantly assisted the attorney in giving his client legal advice about its tax situation." Id. Comcast argues that United States v. Ackert, supra, is distinguishable because in that case the investment banker proposed the transaction to the attorney, and "did not act as an advisor to legal counsel." While Comcast is correct that the investment banker initiated the discussions, see id. at 138, it misapprehends the nature of the communications that followed as counsel sought the advice of the investment banker to formulate his own legal views.

In In re G-I Holdings Inc., supra, the court reached a similar result on similar facts. There, as here, the company's attorneys retained an outside accountant "to explain tax concepts to in-house counsel so that in-house counsel could then render legal advice to [the company's] senior management." Id. at 435. The court rejected the argument that the attorney-client privilege should apply, despite the in-house attorney's assertion that the accountant's advice was "necessary in order for us to provide legal advice and counsel to the senior management." Id. In the court's view, neither the company nor its attorneys "needed [the accountant] to facilitate communications between them. They could communicate competently on their own." Id. at 436. We reach the same conclusion here.

The commissioner's second argument--that U.S. West sought tax advice, not legal advice from Andersen, and is therefore not privileged[21] [FN21]--relies in large part on United States v. Adlman, 68 F.3d 1495 (2d Cir.1995) (Adlman I), S. C., 134 F.3d 1194 (2d Cir.1998) (Adlman II). In Adlman I, in-house counsel asked an outside accountant to evaluate the "tax consequences" of a proposed corporate restructuring. Id. at 1497. The accountant produced a memorandum containing a "detailed legal analysis of likely IRS challenges" and "possible legal theories or strategies" that could be deployed in response. Adlman II, supra at 1195. Like Ottinger, the Adlman attorney claimed that the accountant's memorandum was prepared in order to assist him in rendering his advice to the company, and that he considered the memorandum "private and confidential." See Adlman I, supra at 1498. The court nevertheless determined that the Kovel doctrine did not shield the memorandum from disclosure. Id. at 1500. While the facts in Adlman I are somewhat different from the facts here--as is inevitably the case--we agree with and adopt the reasoning of the Adlman court in that case.[22] [FN22]

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21 [illegible] supra, [illegible]

22 United States v. Adlman, [illegible] Adlman II [illegible]

We recognize the difficulty of drawing a line between "legal" advice and "tax or accounting" advice given to a client in order to resolve on which side of the line the Andersen advice to U.S. West fell. Here, whether characterized as "accounting advice" or "legal analysis," it was advice provided by third parties in circumstances that we have determined is not covered by the privilege, derivative or otherwise, so we need not resolve the point. We reject Comcast's suggestion that our decision rejecting its claim of privilege for the Andersen memoranda will reduce the attorney-client privilege to a "meaningless protection." Colorado-based Ottinger was free to seek advice on Massachusetts tax law from a Massachusetts attorney, where the privilege would apply. Instead, he sought advice on Massachusetts tax law from Massachusetts accountants, where no privilege applies. If his actions left his client potentially at risk, that is "the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of client and lawyer under conditions where the lawyer needs outside help." Kovel, supra at 922.

b. Work product. Because the Andersen memoranda are not protected by the privilege, we now consider whether they are protected from disclosure by the work-product doctrine.

The work-product doctrine, drawn from Hickman v. Taylor, 329 U.S. 495 (1947), functions "to enhance the vitality of an adversary system of litigation by insulating counsel's work from intrusions, inferences, or borrowings by other parties." Ward v. Peabody, 380 Mass. 805, 817 (1980), citing Hickman v. Taylor, supra at 511, and Developments in the Law--Discovery, 74 Harv. L.Rev. 940, 1028-1029 (1961). The purpose of the doctrine is to establish a "zone of privacy for strategic litigation planning ... to prevent one party from piggybacking on the adversary's preparation." Adlman I, supra at 1501. While the attorney-client privilege shields communications between attorney and client (and in some circumstances third parties), the work-product doctrine protects an attorney's written materials and "mental impressions." Hickman v. Taylor, supra at 510.

The commissioner argues that the language of G.L. c. 62C, § 70, see note 4, supra, requires that we examine the applicability of the doctrine in this case under the rules of criminal procedure, specifically Mass. R.Crim. P. 14(a)(5), as appearing in 442 Mass. 1518 (2004), rather than under the broader discovery rule pertaining to civil matters, Mass. R. Civ. P. 26(b)(3), 365 Mass. 772 (1974). We decline to do so because the claim has been waived, as we now explain.

In the Superior Court, the commissioner did not make this argument in her motion to compel or at the hearing before the judge on the motion. She made the argument for the first time in a motion to reconsider the judge's order filed some fourteen months later. The motion judge ruled that the issue could have been raised in the motion to compel, and was waived. See Commonwealth v. Gilday, 409 Mass. 45, 46-47 n. 3 (1991) (motion for reconsideration is not "the appropriate place to raise new arguments inspired by a loss before the motion judge"); Publishers Resource, Inc. v. Walker-Davis Publ., Inc., 762 F.2d 557, 561 (7th Cir.1985) (motion for reconsideration should not serve as occasion to tender new legal theories for first time). It was well within the judge's discretion not to consider the commissioner's new argument on the motion for reconsideration. See Liberty Sq. Dev. Trust v. Worcester, 441 Mass. 605, 611 (2004) (where party filed "amended" motion and motion

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[illegible]

for "reconsideration" seven weeks after action on original motion, judge not required to entertain party's "belated efforts to improve on its original motion;" no error in the denial of motion that "merely seeks, as this one did, a 'second bite at the apple' "); Clamp-All Corp. v. Foresta, 53 Mass.App.Ct. 795, 807 (2002) (judge did not abuse discretion in denying motion for reconsideration where party was "a sophisticated litigant" and "failed to offer any substantial reason" why it had not filed affidavit "at the time it filed its original motion"); Anderson v. Cornejo, 199 F.R.D. 228, 252-253 (N.D.Ill.2000), and cases cited. See also Int'l Strategies Group, Ltd. v. Greenberg Traurig, LLP, 482 F.3d 1, 6 (1st Cir.2007) ("We review a district court's denial of a motion for reconsideration or relief from judgment for abuse of discretion").

The commissioner argues that here, unlike Commonwealth v. Gilday, supra, she sought reconsideration of an interlocutory order rather than a final judgment, and waiver therefore does not apply. We do not agree. The commissioner cites no authority supporting her claim. In any event, motions to reconsider an interlocutory order are themselves not "appropriate vehicles to advance ... new legal theories not argued before the ruling." Zurich Capital Mkts. Inc. v. Coglianese, 383 F.Supp.2d 1041, 1045 (N.D.Ill.2005). Certainly a judge may exercise discretion and reconsider an interlocutory order when, for example, all parties and all issues will continue to be litigated. See Anderson v. Cornejo, supra at 253. But flexibility is not necessarily warranted here. The motion judge's order denying the commissioner's motion to compel was "interlocutory" only in the sense that it was not appealable until final judgment entered. The order, however, was a ruling on the only relief sought in the commissioner's complaint, production of withheld documents. The judge's order cannot be fairly characterized as an "order that relates to some intermediate matter in the case." Black's Law Dictionary 1130 (8th ed.2004) (defining "interlocutory order"). [23] [FN23]

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[22] [illegible] fourteen months [illegible] Liberty Sq. Dev. Trust v. Worcester, [illegible] Anderson v. Cornejo, [illegible]

[23] [illegible] Commonwealth v. Siano, [illegible]

We therefore address Comcast's work-product claims under the rules applicable to civil proceedings, as did the motion judge. The Massachusetts work-product doctrine is codified in rule 26(b)(3). [24] [FN24] By its terms the rule protects a client's nonlawyer representatives, protecting from discovery documents prepared by a party's representative "in anticipation of litigation." The protection is qualified, and can be overcome if the party seeking discovery demonstrates "substantial need of the materials" and that it is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." There is a further limitation: the court is to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." This so-called "opinion" work product is afforded greater protection than "fact" work product. See, e.g., In re Grand Jury Subpoena, 220 F.R.D. 130, 145 (D.Mass.2004).

Courts have disagreed over whether the civil rule protection for opinion work product is "absolute" or merely "heightened." See id. (collecting cases). Even if not absolute, disclosure is appropriate only in rare or "extremely unusual" circumstances. See Reporters' Notes to Mass. R. Civ. P. 26(b)(3), Mass. Ann. Laws, Rules of Civil Procedure, at 545 (LexisNexis 2008) ("discovery, except in extremely unusual circumstances, may not be had of an attorney's mental impressions and similar intellectual work-product. This protection applies also to 'other representative[s] of a party,' provided their work relates to litigation"); Adlman II, supra at 1204 ("at a minimum ... a highly persuasive showing" is needed to overcome protection for opinion work product); In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir.1979) (interview memoranda "will be discoverable only in a 'rare situation' "). We need not decide here whether protection for opinion work product is absolute because we conclude that the commissioner has not made a "highly persuasive" showing that the circumstances in this case are so unusual that protection for opinion work product should be denied on a lower standard. See discussion, infra.

Comcast bears the burden of establishing that the Andersen memoranda were prepared in anticipation of litigation. See Colonial Gas Co. v. Aetna Cas. & Sur. Co., 144 F.R.D. 600, 605 (D.Mass.1992). If that burden is met, the burden shifts to the commissioner to demonstrate a substantial need for the memoranda and that she cannot obtain the substantial equivalent of the memoranda without undue hardship. See United States v. Textron Inc. & Subsidiaries, 507 F.Supp.2d 138, 149 (D.R.I.2007), aff'd in part, F.3d, [No. 07-2631] (1st Cir.2009) ("The burden of establishing 'substantial need' rests on the party seeking to overcome the privilege"). Moreover, if the Andersen memoranda are "opinion" work product, the commissioner must make, at a minimum, a "far stronger showing of necessity and unavailability by other means." Upjohn Co. v. United States, 449 U.S. 383, 402 (1981).

The commissioner does not contest that the Andersen partners qualify as a "party's representative[s]" under rule 26(b)(3). We therefore must determine the scope of the requirement of rule 26(b)(3) that the Andersen memoranda be prepared "in anticipation of litigation" in order to qualify for work-product protection. Specifically, in this case we must

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determine whether work-product protection is applicable "to a litigation analysis prepared by a party or its representative in order to inform a business decision which turns on the party's assessment of the likely outcome of litigation expected to result from the transaction." Adlman II, supra at 1197.

In Adlman II, supra at 1198, the court noted that the phrase "in anticipation of litigation" has given rise to a range of views by courts and commentators, and that "two tests had developed" as to documents that, although prepared because of expected litigation, are intended to inform a business decision influenced by the prospects of the litigation. The court then engaged in a lengthy discussion of the two tests, viz., (1) whether the documents "are prepared 'primarily or exclusively to assist in litigation'--a formulation that would potentially exclude documents containing analysis of expected litigation, if their primary, ultimate, or exclusive purpose is to assist in making the business decision" and (2) whether the documents "were prepared 'because of' existing or expected litigation--a formulation that would include such documents, despite the fact that their purpose is not to 'assist in' litigation." Id. We need not repeat here the court's exploration of the contours of the two tests. It is sufficient to say that we agree with both the reasoning and the conclusion that the latter formulation ("because of" existing or expected litigation) is the correct test. [25] [FN25] That test is "consistent with both the literal terms [of the rule] and the purposes" of the work-product doctrine, id., both of which "suggest strongly that work-product protection should not be denied to a document that analyzes expected litigation merely because it is prepared to assist in a business decision." Id. at 1199. The "because of" test "appropriately focuses on both what should be eligible for the [r]ule's protection and what should not." Id. at 1203. Thus, a document is within the scope of the rule if, "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared because of the prospect of litigation". Adlman II, supra at 1202, quoting 8 C.A. Wright, A.R. Miller, & R.L. Marcus, Federal Practice and Procedure § 2024, at 343 (1994) (Wright & Miller). [26] [FN26] That test is consistent with our own jurisprudence. See Ward v. Peabody, 380 Mass. 805, 817 (1980) (preparation for litigation "includes litigation which, although not already on foot, is to be reasonably anticipated in the near future"). [27] [FN27]

We now apply the "because of" test to the facts in this case. [28] [FN28] The commissioner

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25 [illegible] United States v. Adlman, [illegible] Adlman II [illegible] Adlman II, supra [illegible] Rollins Envtl. Servs., Inc. v. Superior Court, [illegible]

26 [illegible] Adlman II, supra, [illegible] id. [illegible] State v. United States Dep't of the Interior, [illegible]

27 [illegible]

28 [illegible]

argues that the Andersen memoranda do not meet that test because they were prepared to "avoid the prospect of litigation," citing In re Grand Jury Proceedings, No. M-11-189 (S.D.N.Y. Oct. 3, 2001), [29] [FN29] and because, in her view, Ottinger's "conclusory assertions fall far short of demonstrating a specific prospect of litigation." We disagree with the commissioner on both points. As Adlman II, supra at 1197, makes clear, a litigation analysis prepared so that a party can make an informed business decision is afforded the protections of the work-product doctrine. In our own review of the circumstances of Andersen's retention, and on review of the Andersen memoranda, see Adlman II, supra at 1204, we conclude that the documents at issue "can fairly be said to have been prepared or obtained because of the prospect of litigation." Wright & Miller, supra. As Ottinger's affidavit makes clear, his concern focused on the reasonable possibility that the department would challenge any nonpayment of Massachusetts State taxes in light of the substantial capital gains realized by U.S. West on the divestment of the TCG shares. Thus, Ottinger requested the Andersen partners to discuss "the pros and cons of the various planning opportunities and the attendant litigation risks." What the Andersen partners gave Ottinger was an analysis prepared "in order to inform a business decision which turns on the party's assessment of the likely outcome of litigation expected to result from the transaction." Adlman II, supra at 1197. [30] [FN30]

We have little doubt that U.S. West had "the prospect of litigation in mind when it directed the preparation of the memorandum." Id. at 1204. We agree with the motion judge who noted that the Andersen memoranda are "a detailed analysis of Massachusetts tax law," and an outline of the "feasibility of the potential restructuring in light of applicable Massachusetts law and the potential for [department] litigation." Stated differently, the Andersen memoranda or their substantial equivalent would not have been prepared "irrespective of the prospect of litigation." United States v. Textron Inc. & Subsidiaries, 553 F.3d 87 (1st Cir.2009) (work product protects tax accrual workpapers where "function of the documents was to analyze litigation"). They were created "because of" the reasonable possibility of litigation with the department. See Ward v. Peabody, 380 Mass. 805, 817 (1980). See also Long-Term Capital Holdings vs. United States, No. 3:01 CV 1290(JBA) (D.Conn. Oct. 30, 2002) (concluding that work-product doctrine was applicable based on facts "remarkably similar" to those in Adlman II).

We also agree with the judge that the Andersen memoranda constitute opinion work product. The memoranda contain the "mental impressions, conclusions, opinions, or legal theories" of its authors, and the commissioner does not appear to contend otherwise. Mass. R. Civ. P. 26(b)(3). Here, the commissioner has failed to meet her burden of demonstrating that these circumstances are so "extremely unusual" that they compel overcoming the greater protection afforded opinion work product. See Reporter's Notes, Mass. R. Civ. P. 26(b)(3), Mass. Ann. Laws, Rules of Civil Procedure, at 545 (LexisNexis 2008). Although the commissioner asserts in conclusory fashion that substantially equivalent information is not available elsewhere, she has not demonstrated that information about the business reasons for the reorganization of Continental Teleport is not available from U.S. West officials. This is not the "singular" instance in which disclosure of opinion work product is warranted. See Ward v. Peabody, supra at 818.

4. Conclusion. For all of these reasons we conclude that the Andersen memoranda are protected from disclosure by the work-product doctrine.

Judgment affirmed.

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’ ” ‘ ˜ ‹ † ‡ † – ƒ š ƒ • † ’ Ž ƒ • • ‹ • ‰ ƒ † ˜ ‹ … ‡ á ƒ • ‹ ‰ ‡ ž ‡ ‰ ä ‡ ‰ ƒ Ž ƒ † ˜ ‹ … ‡ á – ‘ – –

s v ä Š ‡ … ‘ • • ‹ • • ‹ ‘ • ž Ž › ” ‹ ‘ ‰ ‰ ƒ Š – – Š ‡ ’ ” ‘ ˆ ‘ … … ‘ ‹ ‘ • – • ‘ ^ ‹ ƒ ž Ž – ‹ ^ ‹ ‡ † „ › ‘ • … ƒ • – ‘ • ‹ – • ’ ” ‹ ˜ ‹ ‡ ‰ ‡ Ž ‘ ‰ ä ‡ ‡ • ‘ – ‡ • ˆ w á ” ƒ – ‘ ’ ƒ ƒ ä • † Š ž ‡ ‡ – ‹ ˆ ” … Ž ” ‘ ‡ ‡ ƒ ” ‹ ‘ ‹ Ž ƒ ™ ^ ‹ ” • • ƒ • † … ‘ • • — • ‹ … ä ƒ ä ‹ ‘ ‘ ‡ • • 5 • ‹ • æ Š ‘ — ‘ • ‡ – Š . ‡ ” — • ä ‡ ž ‡ • – ƒ – – ‘ ” • ‡ › • ä … ‘ • • ‹ • • ‹ ‘ • ‡ ” … ‘ • – ‡ • – • Š Š ‡ Œ ‡ — ‘ ‡ ‰ ‰ ‡ 5 • † ‡ – ‡ – Š ‹ • ƒƒ — ‹ – ‘ • ” • Š › ƒ æ … Ž ‹ ‡ • – ’ ” ‹ ˜ ‹ Ž ‡ ‰

u r ä Š ‡ … ‘ • • ‹ • • ‹ ‘ • ‡ ” • 5 . • ‡ 6 ‘ ƒ ˆ ˜ ‘ Ž ‡ – ƒ ‹ ‰ ‘ 6 • — ‡ • • ‹ ˜ ‡ • ˆ ‘ “ • ƒ • ‘ – Š ‡ ” ” ‡ ƒ • ‘ • 6 – Š ‡ ” ‡ ‹ • • ‘ ” — Ž ‡ – ƒ Š ƒ ‹ ‹ • „ ‘ ƒ ˆ ” • ™ ƒ ” • Ž ’ ‹ ” … † — ‹ … • – – “ ” ‘ † ‘ ‡ … — • ‡ • – • … ” ‡ ƒ – ‡ † ’ ” ‹ ‘ ” – ‡ ˜ ‡ • – ‰ ‹ ˜ ‹ • ‰ ” ‹ • ‡ ä 6 ‘ Ž Ž • ƒ ‰ ƒ á ‹ • — ’ ” ƒ ƒ – s w r s ä

— „ Ž ‹ • Š ‡ † ‘ • — ’ ” ƒ „ › ‘ — ‘ ‰ ’ Ž ‹ ’ ƒ • • ‡ . Ž ‡ — • á ‹ Ž † „ Ž • ‰ ‘ • … ‘ • ’ Ž ‹ ƒ • … ‡ ƒ • † „ — • ‹ • ‡ • • ‡ – Š ‹ … •