The Attorney-Client Privilege and Work Product Doctrine

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Topics

- Privilege
  - Attorney-Client Privilege
  - Common Interest Doctrine
  - Work Product Doctrine
  - Safeguarding Privilege
- Duty to Preserve Documents

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Attorney-Client Privilege

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Attorney-Client Privilege

- A (i) communication which is (ii) made in confidence (iii) to an attorney (iv) by a person who is or is about to be a client (v) for the purpose of obtaining legal advice from that attorney is (vi) privileged from disclosure at the insistence of the client (vii) unless waived. See 8 J. Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961).
- Client's communication with agent of attorney is also privileged if done for purpose of obtaining legal advice. *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).

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Attorney-Client Privilege

- Non-legal advice such as financial, accounting or business advice is not a proper basis to invoke privileges to communication.
- Waiver of one communication may well be a waiver of the entire subject matter addressed in that communication.
- In house professionals.
- Common Interest Doctrine.

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Attorney-Client Privilege

- Generally privilege must be established by the party claiming its protection on a specific, document-by-document (or communication) basis.
  - Blanket claims of privilege are not sufficient.
  - A privilege log is kept to identify which documents are privileged and why.

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Attorney-Client Privilege: Who is a Client?

- A client is a person or entity who receives or seeks legal services from an attorney.
  - A consultation without fees is sufficient.
  - Services must be legal in nature:
    - Cannot be business or accounting advice.
    - Cannot be solely tax return preparation.
- A corporation's lawyer usually represents the entity rather than employees or shareholders.
  - Joint privilege is possible when certain circumstances exist, such as when:
    - The employee clearly sought personal and confidential legal advice from corporate counsel who knew of its personal nature and avoided a conflict of interest.

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Attorney-Client Privilege: Who is a Client?

- Communications between attorneys and corporate employees:
  - *Upjohn Co. v. U.S.* found that even communications with lower level employees of a company could be privileged when:
    - They are treated as confidential;
    - They are communicated to counsel at the direction of superiors for the purpose of obtaining legal advice; and
    - The communications are related to the duties of the employee.

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Attorney-Client Privilege: Corporate Situations

- Communications between attorneys and employees of related entities and subsidiaries may be considered privileged when the confidential information is critical to the representation by the attorney(s).
- Some courts have required corporations claiming privilege to show that communications to in-house counsel were primarily for the purpose of obtaining legal advice as opposed to ordinary business advice or other purposes.

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Generally Unprotected Communications

- Client identity (except under very rare circumstances)
- Client fee arrangements
- The existence of attorney-client relationship (the fact of it)
- The purpose for which the lawyer was retained
- The factual circumstances surrounding communications, i.e. the date of the communication, persons present, means of communication, etc.
- The whereabouts of a client
- Billing statements/hourly records, with the exception that such communications are not discoverable to the extent they reveal client confidences (in which case such information is typically redacted)

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Waiver of Attorney-Client Privilege

- Types of disclosure include:
  - Deliberate disclosure to third party
  - Advice of counsel defense (sword/shield)
  - Inadvertent disclosure

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United States v. Stewart (SDNY July 22, 2016)

- In connection with a high-profile insider trading trial, JPMorgan waived its attorney-client privilege for certain communications related to a FINRA inquiry.
- In response to a FINRA inquiry, JPMorgan conducted an internal investigation and submitted a written response to FINRA – affirming that none of its employees with knowledge of a stock acquisition – including employee Stewart – knew the investors involved in insider trading.
- In Stewart's criminal case the government moved to compel JPMorgan's in-house counsel to testify regarding the Stewart interview and to disclose her interview notes.

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United States v. Stewart (Continued)

- JPMorgan asserted the attorney-client privilege and work product doctrine over the communications between Stewart and in-house counsel as well as the notes taken during the interviews.
- Government argued that JPMorgan waived privilege by disclosures to FINRA.

Holding

- District Court concluded:
  i. JPMorgan waived its attorney-client privilege by disclosing to FINRA the communications with Stewart. Court said JPMorgan was not compelled to make the Stewart disclosure to FINRA – JPMorgan could have asserted its privilege and refused disclosure.
  ii. However, court ruled no subject matter waiver. A limited form of implied waiver applies when the waiver occurs in an extra-judicial setting. Thus, waiver is limited to the communications already disclosed to FINRA.

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Attorney-Client Privilege: John Doe Summons

- *Taylor Lohmeyer Law Firm v. United States*, 385 F. Supp. 3d 548 (2019)
- Does Attorney-Client Privilege attach to a client name?
- The law firm argued that the information sought by the summons is protected by attorney-client privilege.
- While the identity of a client in a matter is not normally privileged, an exception exists in which an attorney must conceal the identity when disclosure would supply the last link in an existing chain of incriminating evidence.
- The firm's attorney-client privilege argument was rejected because the firm's blanket assertion of privilege did not establish that disclosing their clients' identities would essentially be disclosing privileged communications.

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Does Privilege Survive Corporate Dissolution?

Affiniti Coloradi, LLC v. Kissinger & Fellman, 2019 Colo. App. Lexis 1370 (2019)

- Former general counsel of EAGLE-Net, a dissolved corporation, asserted the attorney-client privilege over internal EAGLE-Net documents.
- Well-settled law presumes that the attorney-client privilege survives the death of an individual client because knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel.
- The attorney-client privilege applies to corporations.

Posthumous Attorney-Client Privilege

- The one public policy argument supporting posthumous privilege for a dissolved corporation is to encourage full and frank communications.
- The trending majority view follows the rule that the attorney-client privilege does not survive a corporation's dissolution if there is no one with the authority to assert it.
- Because EAGLE-Net is a dissolved corporation with no management to act on its behalf, there is no privilege. Further, a former corporate director or manager cannot invoke the corporation's attorney-client privilege.

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Dual Purpose Documents: Legal and Accounting Advice

- Taxpayers have been denied privilege claims when documents were prepared by both accountants and attorneys, or someone who serves both roles.
- Taxpayers cannot immunize their tax returns by having them prepared by a lawyer instead of an accountant.
- The non privileged use of dual-purpose documents can waive the privileged use.

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Dual Purpose Documents: Legal and Accounting Advice

- Documents prepared for audits to substantiate positions taken on tax returns are not privileged because the preparation of tax returns and substantiating those returns is not considered to be the practice of law.
  - Analysis of law, however, is legal work even if done for an audit.
  - Information can become so intertwined with legal advice that it becomes privileged.
  - Privilege may apply to certain communications while excluding others from the same transaction.

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Waiver of Attorney-Client Privilege

- Types of disclosure include:
  - Deliberate disclosure to a third party
  - Advice of counsel defense (sword/shield)
  - Inadvertent disclosure

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Waiver of Attorney-Client Privilege

Deliberate disclosure to a third party

Do you waiver the privilege to in-house legal memorandum if you produce an outside law firm's analysis based on the internal in-house document?

United States v. Sanmina, 2018 WL 4827346 (N.D. CA 2018)

- Sanmina in-house counsel analyzed a large deduction related to a subsidiary and prepared an internal memoranda. Sanmina later engaged DLA Piper to prepare a valuation report to support the deduction. DLA's report referenced the in-house memoranda. The taxpayer provided the IRS with the DLA valuation report, but refused to produce the in-house counsel memoranda.

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Waiver of Attorney-Client Privilege

United States v. Sanmina (Continued)

- The District Court held that although the in-house memoranda were protected by the attorney-client privilege and work-product, taxpayer waived all privileges by disclosing the memoranda to DLA "for the purpose of producing a valuation report to then turn over to the IRS." (DLA based its conclusions on the memoranda). The court concluded that it was fundamentally unfair for Sanmina to disclose the valuation report while withholding its foundation.

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Waiver of Attorney-Client Privilege

Reasonable Cause

Does a taxpayer waive privilege by raising a "reasonable cause" defense?

- In *Ad Investments 2000 Fund LLC v. Commissioner,* 142 T.C. 13 (2014), taxpayers raised a reasonable cause defense to penalties imposed on a Son-of-Boss transaction. The Service sought to compel the production of six opinion letters issued by Brown & Wood LLP.
- The taxpayer argued that the partnership reasonably believed that its tax treatment of partnership items was more likely than not the proper tax treatment without relying on the tax opinions. The Service argued that the taxpayer placed the tax opinions in controversy by relying on an affirmative defense to penalties that turns on the partnership's beliefs or state of mind.

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Waiver of Attorney-Client Privilege

Ad Investments 2000 Fund LLC (Continued)

- The Tax Court found that the taxpayer placed the partnership's legal knowledge, understanding, and beliefs into contention, topics which the tax opinion may bear.
- The Court held that if the taxpayer is to rely on its legal knowledge and understanding to establish reasonable cause and good faith, “it is only fair that respondent be allowed to inquire into the bases of that person’s knowledge, understanding, and beliefs including the opinion.”
- The Tax Court granted the IRS’ motion to compel.

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Waiver of Attorney-Client Privilege

Claw Back of Privileged Documents

FRE 502(b) – Claw back provision provides:

Inadvertent Disclosure.

When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

1) the disclosure is inadvertent;
2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

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Waiver of Attorney-Client Privilege

FRE 502(d)

Under Rule 502(d), a federal court may issue an order providing that a party's disclosure of documents protected by the attorney-client privilege or work product protection does not waive the privilege (unless there was an intent to waive the privilege).

According to the Advisory Committee notes, this is true even when a party produced documents without conducting any screening for privileged material (see *Advisory Committee Notes to FRE 502(d)*).

A Rule 502(d) order is unique because:

- The no-waiver effect also applies in other federal and state court proceedings.
- The parties may incorporate into the order a specific and detailed agreement regarding its scope and effect in the litigation.
- Privileged documents must be returned to the disclosing party "irrespective of the care taken by" the party in reviewing them prior to production.

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Selective Waiver of Privilege: Does it still exist?

- Generally, voluntary disclosure of a privilege communication to a third party will destroy the attorney-client privilege.
- *Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1978 [en banc]) adopted the theory of "selective waiver" related to voluntary disclosure of otherwise privileged material to government agencies.
- Relying on selective waiver, corporations have subsequently divulged privileged information to the government with the expectation that the corporation could still assert the privilege as to private litigants.

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Selective Waiver of Privilege

- Other than the Eight Circuit in *Diversified Industries*, no other federal appellate court has upheld the selective waiver doctrine.

Utility of confidentiality agreements

- The Second Circuit in *In re Steinhardt Partners*, L.P., 9 F.3d 230 (1993) acknowledged that a voluntary disclosure could be protected as a selective waiver if the disclosing party and the government have entered into an explicit confidentiality agreement. Second Circuit refused to adopt a *per se* rule against selective waiver, instead holding that courts should assess selective waiver on a case-by-case basis.

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Selective Waiver of Privilege

- Even with a confidentiality agreement in hand may not prevent disclosure to a private litigant.
  - In *Gruss v. Zwirn*, 2013 WL 3481350 (Nov. 20, 2013), the Southern District of New York held that the voluntary disclosure of privileged communication to the government, even with a confidentiality agreement in place, can be treated as a waiver of attorney-client privilege with respect to the communication and the underlying source documents.
  - Following voluntary disclosure of information to SEC regarding financial irregularities, former CEO sued and sought production of attorney notes and summaries of witness interviews conducted by outside counsel. Defendants opposed, claiming the notes and summaries were protected by attorney-client privilege and the work-product doctrine.

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Selective Waiver of Privilege

Gruss v. Zwirn (Continued)

- District Court held that when a party selectively discloses attorney-client communications to an adverse entity, the privilege is waived not only as to the materials provided, but also as to the underlying source material. Court also held that the law firm did not have a privacy interest in the interview notes that would protect them from disclosure. Court agreed to an in camera review of the interview notes to protect disclosure of notes that constituted opinion work product.
- In 2008, Congress considered, but decided against, incorporating the selective waiver doctrine in the Federal Rules of Evidence.

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Role of In-House Counsel

- Attorney-client privilege for in-house counsel does not exist in many countries (many of E.U. continental countries vs. common law/Commonwealth countries)
- **Akzo Nobel** Decision (2010)
  - EU's highest court, Court of Justice, held that corporate client's communications with its in-house counsel are not privileged because such lawyers are not independent from their clients
  - Applies to EU courts, not courts of EU member states
- Other jurisdictions, however, do acknowledge that communications to or from in-house counsel may be protected by the attorney-client privilege

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UK Privilege

English law recognizes the existence of privileges

The principal types of privilege acknowledged by UK law are:

- Legal advice privilege
- Litigation privilege
- Joint privilege
- Common interest privilege

Understanding the scope of the “client” in any engagement is critical to avoid inadvertent loss of privilege under UK law.

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UK Privilege

In *RBS Rights Issue Litigation [2016] EWHC 3161* (Ch), the UK High Court ordered disclosure of attorney notes of interviews with employees and former employees of RBS, which had been prepared by RBS' external US counsel and in-house counsel, in respect to two internal investigations. The interviews were conducted in the US in response to a subpoena from a US regulator (SEC).

- The case concerned a civil shareholder class action against RBS in the UK. Court said privilege claims are decided by law of the forum (not US law).
- UK law takes a narrow view of the “client” in the context of the attorney-client privilege.
- In the case of a corporate entity, the “client” will not be all employees of the corporation. The client is limited to those who are authorized to give instructions to lawyers on behalf of the corporation.
- UK law does not follow U.S. Supreme Court’s precedent in *Upjohn*, where any corporate employee can be the "client” of either in-house or external counsel when assessing claims of privilege.

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UK Privilege

RBS Rights Issue Litigation (Continued)

- Reminder of the complexities surrounding privilege in cross-border litigation and investigations.
- In any cross-border investigation/litigation you must consider which individuals constitute "the client".
- Even where a narrow view of a client applies, documents can still be protected provided they were prepared for the dominant purpose of litigation (i.e., work product). N.B. RBS did not assert a litigation/work product claim, only the attorney-client privilege was argued.
- Plan witness interviews carefully and consider the purpose of each interview and how the interview will be memorialized.

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Effective Defenses to Avoid Waiver

- Kovel Agreement
- Joint Defense Agreement/Common Interest Doctrine
- Agreement with IRS

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Kovel Agreement

- Named after *United States v. Kovel*, 296 F.2d 9181 (2d Cir. 1961) – covered communications between an attorney and an accountant.
- Under limited circumstances, attorney-client privilege may extend to cloak communications involving third parties.
- The purpose of the third party is to assist the attorney in rendering legal advice to the client. Thus, experts engaged by an attorney to assist in rendering tax advice and representation to a taxpayer fall under the attorney-client privilege.
- **Kovel** recognizes that the inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party's participation is to improve the understanding of the communication between the attorney and client.

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Kovel Agreement

- Kovel Agreement is not limited to accountants and can be extended to any expert who acts as the attorney's agent. See *e.g., In re Copper Market Antitrust Litigation*, 2001 WL 459164 (S.D.N.Y. 2001) (Kovel extended to communication with public relations firm retained by outside counsel.
- What about investment bankers?
  - *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999). Circuit Court held that conversations between an investment banker and an in-house attorney were not privileged. Court would not extend **Kovel** because rather than translating or interpreting communication between the attorney and the client, the banker was simply providing factual information about a transaction to the attorney.

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United States v. Adams (2018 WL 5311410)

Does filing an amended tax return invalidate a Kovel agreement?

- The government argued that even if the protections of Kovel did apply, Adams waived the privilege by filing an amended tax return.The government also argued that the crime-fraud exception vitiated any claim of privilege.
- District Court (Minnesota) held that communications between a taxpayer and his accountants, who were retained under a Kovel arrangement, were protected by the attorney-client privilege.

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United States v. Adams (Continued)

After conducting an in camera review, the court rejected the government's challenges:

1. The attorney-client privilege applied because Adams established the information he provided to his accountant assisted his attorney in providing legal advice to Adams regarding tax related matters.
2. Adams did not waive privilege by filing an amended tax return because the information conveyed to his accountant "comprised the type of unpublished expression that were not later revealed on the amended tax returns."
3. As to the crime-fraud exception, the government failed to make the necessary ultimate showing that Adams retained counsel with the intent to commit a fraud or crime.

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Common Interest Doctrine

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Common Interest Doctrine

- The common interest doctrine preserves the attorney-client privilege, despite disclosure to third parties of the privileged information, when a client shares privileged communication among parties with common interest.
- Sometimes referred to as the common interest doctrine or common interest privilege.
- The doctrine emerged a century ago in the context of a criminal defense, but has expanded to include parties in both civil and criminal matters, as well as non-parties.

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Common Interest Doctrine

Common interest doctrine requirements:

1. The underlying communication is privileged;
2. The parties disclosed the communication in the course of a joint defense effort;
3. The parties shared a common legal interest;
4. The parties have not waived the privilege.

Doctrine does not apply when parties share only a common business or commercial interest.

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Common Interest Doctrine

- Courts have not uniformly defined the boundaries of “common interest”
- Some courts require “identical” legal interest. (see e.g., Delaware)
- Other courts do not require a complete unity of interests among the participants. (See, e.g., California, Florida)
- Courts are not in agreement whether the common interest doctrine can apply absent anticipated or pending litigation, an element similarly required under the work product doctrine.
- Some courts require actual or pending litigation at the time of the privileged communication. (see e.g., Colorado)
- Other courts have found it unnecessary that there be actual or pending litigation. (See, e.g., Second and Seventh Federal Circuits)

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Joint Defense Agreement

- Advisable to document the existence of a common legal interest in a joint defense agreement prior to the exchange of information.
- Some courts have refused to acknowledge the existence of a joint defense agreement in the absence of a written agreement. (See e.g., California)
- The written agreement should include the following:
  - the parties intend their communication to be privileged;
  - the communication shall remain confidential;
  - any party is permitted to withdraw from the agreement upon notice to all other parties;
  - each party retains the right to independently settle the underlying lawsuit; and
  - parties should address how to resolve potential conflicts.
- The written agreement in and of itself does not ensure that the common interest protection will be sustained.

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Schaeffler v. United States, 2015 WL 6874979 (2015)

- On November 10, 2015, the U.S. Court of Appeals for the Second Circuit unanimously held that (i) the attorney-client privilege was not waived by taxpayers who shared a group of documents, including a tax memorandum, with a consortium of banks having a common legal interest with the taxpayers; and (ii) the work-product doctrine protected documents analyzing the tax treatment of the transaction prepared in anticipation of litigation with the IRS.
- Most favorable privilege decision in years – clarified and broadened common interest doctrine protection and supported the application of work-product doctrine to a complex transaction likely to receive IRS scrutiny.

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Schaeffler v. United States (Continued)

FACTS

- Schaeffler executed an eleven billion Euro loan agreement with a consortium of banks to finance a tender offer to acquire a minority interest in a target company.
- Due to market events, the stock price of the target significantly dropped, and a higher number of shareholders accepted the tender offer price. This threatened Schaeffler's solvency. This resulted in a refinance agreement which taxpayers believed an IRS audit and potential litigation as to at least some of the U.S. tax consequences of the proposed refinancing was likely.
- After all parties signed a confidentiality agreement, Taxpayers shared an E&Y tax memorandum with a consortium of banks. The E&Y document addressed the potential U.S. tax consequences of the proposed refinancing transaction.

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Schaeffler v. United States (Continued)

- Taxpayers argued that there was no privilege waiver of the E&Y memo because the taxpayers and the bank consortium had a common legal interest. The taxpayers also argued that the tax memo was subject to work-product protection because it was prepared in anticipation of litigation.

District Court Decision

- Held that the attorney-client and federal tax practitioner privileges were waived when the tax memo was shared with the bank consortium – no common legal interest because the consortium's interest was commercial rather than legal.
- Held no work-product protection because documents did not specifically refer to litigation, and the advice provided would have been provided even if taxpayers had not anticipated an audit or litigation with the IRS.

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Schaeffler v. United States (Continued)

Circuit Court Decision

- Reversed the District on both privilege grounds.

Common Interest Doctrine

- Test is whether the communications were made in the course of an "ongoing common enterprise" and "intended to further the enterprise."
- Court determined that because of the threat of insolvency and default, the taxpayers and the bank consortium "had a strong common interest" in obtaining particular tax treatment of the refinancing and restructuring (Because of German law the taxpayer and the banks could not back out of the tender offer transaction).
- The taxpayers and the bank consortium could avoid mutual financial disaster by cooperating in securing a particular tax treatment to the refinancing and restructuring transaction.
- Both parties "had a strong common interest in the outcome."
- A "financial interest of a party, no matter how large, does not preclude a court from finding a legal interest shared with another party where the legal aspects materially affect the financial interests."

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Schaeffler v. United States (Continued)

- Work Product Doctrine
- Court cited to United States v. Adlman (134 F.3d 1194 [2d Cir. 1998])
- Work Product doctrine applied to the tax memo because it was prepared to address specific tax issues that may arise in an anticipated audit and litigation.
- Court found that the tax memo “was specifically aimed at addressing the urgent circumstances arising from the need for a refinancing and restructuring and was necessarily geared to an anticipated audit and subsequent litigation,” which was “highly likely.”
- The decision supports a liberal interpretation of what constitutes “anticipation of litigation" in the work-product context.

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Joint Defense - Waiver

United States v. Burga, 2019 WL 3859157 (2019)

- Taxpayer and counsel met with a third-party businessman to discuss an on-going IRS audit of a related Liechtenstein foundation. Taxpayer entered into a joint defense agreement with the businessman and his counsel. IRS asserted that taxpayer's communications with counsel, with the businessman present, waived privilege.
- Taxpayer referenced the joint defense agreement and argued there was a shared common legal interest because they had a legal obligation and interest in ensuring that the IRS examination was conducted properly and any potential tax liabilities were valid.
- The Court held that there was no common legal interest. Even though there was a written agreement, such an agreement is neither necessary nor sufficient to show a common legal interest where none exists. There were significant degrees of separation between taxpayer and the third-party businessman .

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Work Product Doctrine

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Work Product Doctrine – Federal Work Product Rule

Fed. R. Civ. P. 26(b)(3)

- Protects only documents created "**in anticipation of litigation**"
- Work product protection can be overcome by a showing of:
  i. a substantial need of the materials in case preparation, and
  ii. undue hardship in obtaining the substantial equivalent of the materials by other means
- Nevertheless, **opinion work product is not discoverable**

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Work Product Doctrine – Anticipation of Litigation

United States v. Microsoft (January 15, 2020) (W.D. WASH)

- IRS brought a summons enforcement proceedings arising from an audit of Microsoft's cost sharing arrangements with affiliates in Puerto Rico.
- Microsoft withheld 174 documents on privilege grounds – asserting privilege under (i) work product doctrine and (ii) federally authorized tax practitioner privilege.
- IRS asserted that the documents were created by KPMG while designing and implementing a transfer of software rights to Microsoft operations in Puerto Rico.
- Microsoft employed KPMG "to help the lawyers provide legal advice" and to give its own tax advice.

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Work Product Doctrine – Anticipation of Litigation

United States v. Microsoft (continued)

- Microsoft claimed that the documents were protected as having been prepared “by or for Microsoft in anticipation of litigation with the IRS.” Microsoft asserted that it entered into the cost-sharing arrangements with the expectation that the IRS would challenge the agreements.
- IRS alleged that (i) the work product doctrine did not apply because the documents were not created "because of" litigation, and (ii) the federally authorized tax practitioner privilege under section 7525 was inapplicable to the document because the privilege does not cover business or accounting advice, or apply to communications encouraging participation in a transaction with a significant tax avoidance purpose.

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Work Product Doctrine – Anticipation of Litigation

United States v. Microsoft (continued)

District Court ordered Microsoft to turn over all 174 documents

Work Product

- Court held that the documents were not protected by the work product doctrine because the documents served a "dual business and litigation purpose" and "were not created in anticipation of litigation."

Federally Authorized Tax Practitioner Privilege (IRC § 7525)

- Court concluded that section 7525 did not apply because the documents fell under the statute's "tax shelter exception." The Court found that "a significant purpose, if not the sole purpose, of Mircosoft's transaction was to avoid or evade federal income tax."
- Court applied a broad definition to tax shelter found in section 6662.

Troubling decision because routine tax advice may no longer be protected by section 7525.

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Work Product Doctrine – Waiver

- Federal Work Product Rule – Waiver
- If a document was protected by attorney-client privilege and work product doctrine, but was disclosed to a third party:
  - **The disclosure likely waives attorney-client privilege**
  - Work product protection is probably not waived unless the disclosure substantially increased the possibility that an **adversary could obtain the information**
- Why the difference? The protections serve different goals:
  - Privilege exists to protect the confidential relationship between attorney and client by fostering honest communications between them
  - Work product doctrine exists to promote the adversarial system by protecting the fruits of the attorney's labor in preparing for trial

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United States v. Deloitte

- *United States v. Deloitte* (D.C. Cir. 2010): Documents created for the purpose of obtaining a certified financial statement can be work product if they are prepared in anticipation of litigation.
  - Applied the "because of" litigation standard (majority rule)
  - A document can be work product even if it has a dual purpose
  - A document can be work product even if it is not generated by a lawyer or at the lawyer's request, so long as the document contains the lawyer's thoughts and legal analysis
  - Thus, disclosure of work product to an independent auditor did not waive work product protection because ethical rules prevent the auditor from disclosing confidential client information without client consent

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United States v. Julius Baer, 315 F.R.D. 103 (2016)

- United States sought forfeiture of taxpayer's accounts at Julius Baer, alleging the funds were traceable to acts of fraud, extortion, bribery and embezzlement committed by the taxpayer, the former Prime Minister of Ukraine.
- Taxpayer sought a protective order to withhold disclosure to the government of a PLR request and the IRS' response (the PLR request related to tax issues raised in the forfeiture action)
- Taxpayer claimed that the PLR request qualified as opinion work product because it was prepared by his attorneys and analyzed complex issues surrounding his potential tax liability. Taxpayer also claimed no waiver of work product protection because the IRS is not his adversary.

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United States v. Julius Baer (Continued)

- Court denied taxpayer's motion.
- Court held that the PLR Request was work product because "it was drafted with an eye toward litigation with the IRS." However, the taxpayer waived work product because the IRS was an adversary and could sue taxpayer on the issues raised in the PLR Request if it believed that he owed taxes.
- Court held that the IRS response to the PLR Request was not work product, because the IRS response does not reflect taxpayer's counsel's "mental impressions of the case."

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Safeguarding Your Work Product

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Safeguarding Your Work Product

- If litigation is expected, involve counsel and document the expected litigation risk and the manner in which work product is created and disseminated.
- Enter into explicit confidentiality agreements with auditors.
  - Subject to applicable legal exceptions, companies may consider requiring the auditor to advise the taxpayer of any subpoenas and summons in order to allow the company to intervene and assert work product protection.
- Segregate tax compliance files from privileged tax material.
  - Tax opinions and other privileged tax memoranda should, where possible, not be shared with members of the tax compliance function.
  - Privileged information should not be shared with third parties or internal auditors unless prior approval has been received from in-house tax counsel.

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Safeguarding Your Work Product (Continued)

- In addition, an explicit subject matter waiver agreement may prevent a subject matter waiver and may also allow the taxpayer to retain privileges vis-à-vis third parties. Case law in the applicable circuit should be analyzed to determine if a confidentiality agreement will be effective.
- Key elements of a subject matter waiver agreement:
  - A statement that the disclosures are, at a minimum, protected by the attorney work product doctrine, the attorney-client privilege, and any other applicable privilege, and that the taxpayer does not intend to waive the protection of any such privilege.
  - A statement that the Government will not assert that the disclosures constitute a waiver of the protection of the attorney work product doctrine or attorney-client privilege, or any other privilege.

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Duty to Preserve Documents

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Duty to Preserve Documents

- "Spoliation" – violation of duty to preserve
- Once a party reasonably anticipates litigation, it must preserve documents
- "Litigation Hold" procedures: when does the duty arise?
  - During audit?
- *Consolidated Edison Co. of N.Y. v. United States,* 90 Fed. Cl. 228 (Fed. Cl. 2009)
  - Unique features of tax disputes
  - Court found insufficient evidence that taxpayer should have anticipated litigation

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Duty to Preserve

- The duty to preserve documents and the penalty for failure to do so, i.e., spoliation, are defined by the courts.
  - *Consolidated Edison Co. of N.Y. v. United States*, 90 Fed. Cl. 228 (Fed. Cl. 2009) ("Sanctions for spoliation arise out of the court's inherent power governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.") (citations omitted).
- The duty to preserve arises when litigation is reasonably anticipated:
  - "While a litigant is under no duty to keep or retain every document in its possession, once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents." *Adorno v. Port Auth. of New York and New Jersey*, 258 F.R.D. 217, 227 (S.D.N.Y.2009).

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- Does the duty to preserve arise at the same time work product is created?
  - Consolidated Edison addressed whether the taxpayer failed in its duty to preserve potentially relevant emails in the migration of those emails from one server to another in 2000. At an earlier juncture the court had rejected the taxpayer's claim that a 1997 tax memorandum was work product. In moving for sanctions, the Government adopted the taxpayer's original argument that it had anticipated litigation in 1997 and so should have preserved the emails.
    - Court focused on the unique features of tax disputes: given the "elaborate structure set up to administratively resolve disputes" with the IRS, the point in the IRS administrative process at which it is reasonable to conclude that litigation should be anticipated will differ in each case.
    - Court held that there was insufficient evidence indicating the taxpayer should have anticipated litigation prior to the email migration.
      - 1997 memorandum and a 1999 listed transaction notice did not "predetermine" litigation.

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Duty to Preserve

- *Samsung Electronics Co., Ltd. v. Rambus Inc.*, 439 F.Supp.2d 524 (E.D. Va. 2006)
  - The court found that defendant's document retention policy, which included the intentional destruction of discoverable documents as a part of the company's IP litigation strategy, constituted spoliation. The court looked to the anticipation of litigation in the work-product doctrine:
    - "The determination of when a party anticipated litigation is necessarily a fact intensive inquiry, and a precise definition of when a party anticipates litigation is elusive. One helpful analytical tool is the more widely developed standard for anticipation of litigation under the work product doctrine."

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Duty to Preserve

- Special considerations in tax cases?
  - Burden of proof on taxpayer
  - The Internal Revenue Code requires maintenance of relevant records supporting return positions. Failure to maintain such records can result in the imposition of a negligence penalty under IRC Section 6662.
  - The Government can ask for a finding that missing documents are adverse to the taxpayer.
- Intentional destruction of relevant documents outside the normal record retention policy raises other issues such as fraud, concealment and obstruction of justice.
- With respect to all significant transactions or large reported items, at a minimum complete transactional documentation should be maintained, including key memoranda, notes etc. discussing such transactions and items, regardless of the requirements of the Code.

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Questions?

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