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A Primer on Tax Work Product for Federal Courts



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# A Primer on Tax Work Product for Federal Courts

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In this report, the author discusses the application of the work product doctrine in the tax context. He provides an overview of the burdens that an applicant seeking immunity for its tax materials must meet as well as the procedures used by courts to verify an applicant's claim for a privilege traditionally reserved for documents prepared with an objectively reasonable anticipation of litigation in mind. The author roots the discussion in the primary question currently before the *en banc* First Circuit in *United States v. Textron*: Are a company's tax accrual workpapers protected from discovery under the work product doctrine?

The author concludes that tax accrual workpapers never qualify as protected work product. Corporate taxpayers create these documents to comply with federal securities law, not because of future litigation. Workpapers may discuss the prospect of future litigation or contain analyses that later become the subject of litigation. But the appearance of those discussions and analyses in documents created exclusively for regulatory purposes does not transform the documents into materials created in anticipation of litigation. Moreover, it certainly does not transform them into materials created in *objectively reasonable* anticipation of litigation as required by the work product doctrine. In the event an applicant or a court attempts to justify turning regulatory documents into litigation documents, it must face the attenuated temporal connection between preparation of workpapers and future litigation. In combination with the many dispute resolution procedures available to taxpayers and the government, anticipating litigation when preparing workpapers is distinctly unreasonable both as a matter of logic and mathematical probability.



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## I. Introduction

One of the best things about being a law professor (besides the outsized year-end bonuses) is the singular obligation to seek and disseminate knowledge. This primer analyzing work product in the tax context is offered in that spirit.[1] It does not suggest what the law should be or could be or what clients and their tax practitioners may want it to be, but rather what it is. Its contents are meant to assist federal courts in thinking through the work product doctrine's application to tax materials and to help them perform effective, thorough, and proper work product analyses. In recent years, courts have increasingly considered work product issues in cases in which the government seeks documents from corporate taxpayers as part of its regulatory duty to evaluate the legitimacy of tax return positions, and taxpayers, in turn, assert work product immunity over these tax materials. Such a dispute is now before the First Circuit, which has granted *en banc* review in the closely followed case *United States v. Textron*.[2] To help bring the issues surrounding tax work product into focus, this primer addresses the central question in *Textron*: Are a company's tax accrual workpapers[3] protected from discovery by the work product doctrine, an immunity

[1]Because this is a primer rather than a comprehensive examination of tax work product, I have minimized the use of citations, particularly discursive citations. For a fuller discussion of these issues, see Dennis J. Ventry Jr., "Protecting Abusive Tax Avoidance," *Tax Notes*, Sept. 1, 2008, p. 857, *Doc 2008-18132*, or *2008 TNT 171-26*.

[2]*United States v. Textron Inc.*, No. 07-2631 (1st Cir. Mar. 25, 2009), *Doc 2009-1304*, *2009 TNT 12-11*. The rehearing is scheduled for June 2, 2009.

[3]Tax accrual workpapers support a corporate taxpayer's reserve for deferred or contingent tax liabilities and for related representations in the taxpayer's audited financial statements. They also discuss and provide support for all tax assets and liabilities reflected in the financial statements, including deferred tax assets and liabilities.

reserved for documents prepared with an objectively reasonable anticipation of litigation in mind?

In the end, this primer concludes that tax accrual workpapers never qualify as protected work product. Corporate taxpayers create these documents to comply with federal securities law. They exist exclusively because of financial accounting and disclosure requirements regardless of any prospect for future litigation. That workpapers might discuss the likelihood of litigation or contain analyses that become the subject of litigation at some point in the future does not affect the causality of their creation. While such analyses or discussions might appropriately receive work product protection if contained in other documents, their appearance in documents created for regulatory purposes does not transform them or the documents in which they are contained into materials created in anticipation of litigation. Even if litigation were a foregone conclusion as to issues discussed in the materials, the documents are never created in anticipation of litigation when made part of tax accrual workpapers. Moreover, they certainly are not created in *objectively reasonable* anticipation of litigation. In the event an applicant or a court attempted to justify transforming regulatory documents into litigation documents, it would also have to confront the attenuated temporal connection between preparation of workpapers and litigation. Indeed, in combination with the fact that tax dispute resolution procedures provide numerous opportunities for a taxpayer and the government to avoid litigation, anticipating litigation when preparing workpapers is unreasonable as a matter of logic as well as mathematical probability.

## II. What Work Product Is and Isn't

The work product doctrine protects the adversary trial process by immunizing from discovery "materials and tangible things that are prepared in anticipation of litigation or for trial."[4] The doctrine's primary purpose is to safeguard "the fruits of an attorney's trial preparations" from opposing parties.[5] Its singular focus on the preparation of trial materials distinguishes it from other recognized privileges, such as the attorney-client privilege, which protects confidential communications between a client and her attorney. Documents protected by the work product doctrine may contain confidential communications, but the fact that information included in a document is confidential has no bearing, in and of itself, on whether the document will be awarded work product protection.[6] Also, the work product doctrine does not provide a backstop to other recognized privileges, nor is it designed to save privileges lost or overcome as a result of waiver, hardship, or exception.[7] Finally, like all evidentiary privileges, the protection afforded attorney work product provides only a qualified immunity,[8] and courts, in the interest of truth-seeking, have construed it narrowly[9] — a practice that "has particular force in the context of IRS investigations given the 'congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry.'"[10]

### A. The Applicant's Burden

The party seeking protection of documents under the work product doctrine bears the burden of establishing all the elements of the privilege.[11] The applicant must show that each allegedly privileged document was created in anticipation of litigation or for trial[12] and that each document would not have been prepared "in substantially the same manner irrespective of the anticipated litigation."[13] Applicants receive heightened protection for "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."[14] Moreover, "litigation" in the work product context is construed to mean "a proceeding in a court or administrative tribunal in which the parties have the right to cross-examine witnesses or to subject an opposing party's presentation of proof to equivalent disputation."[15]

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[4]Fed. R. Civ. P. 26(b)(3).

[5]*United States v. Amer. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). The common-law doctrine has been codified and substantially incorporated in Fed. R. Civ. P. 26(b)(3).

[6]The two privileges are not coextensive, although courts and counsel mistakenly conflate them. *Smith v. Texaco Inc.*, 186 F.R.D. 354, 357 (E.D. Tex. 1999).

[7]Of course, a court could find that a document contains protected attorney-client communications that were later waived, but it could still immunize the document from discovery by virtue of the work product doctrine after determining that it was prepared in reasonable anticipation of litigation or for trial. Nonetheless, the two analyses must remain independent of each other.

[8]*In re Cendant Corp. Sec. Lit.*, 343 F.3d 658, 664 (3d Cir. 2003).

[9]*See, e.g.*, *Pac. Gas & Elec. Co. v. United States*, 69 Fed. Cl. 784, 790 (2006) ("narrowly construed").

[10]*Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2002), *Doc 2002-7987*, *2002 TNT 65-10* (emphasis in the original and quoting *United States v. Arthur Young*, 465 U.S. 805, 816 (1984)).

[11]*See In re Grand Jury Subpoena Dtd.*, 750 F.2d 223, 224 (2d Cir. 1984) (stating that "it is axiomatic that the burden is on a party claiming the protection of a privilege to establish those facts that are the essential elements of the privileged relationship").

[12]Fed. R. Civ. P. 26(b)(3).

[13]*United States v. Roxworthy*, 457 F.3d 590, 594 (6th Cir. 2006), *Doc 2006-15129*, *2006 TNT 155-7*.

[14]Fed. R. Civ. P. 26(b)(3)(B). *See also Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981) (finding that opinion work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship).

[15]*United States v. Am. Tel. & Tel. Co.*, 86 F.R.D. 603, 627 (D.D.C. 1979); Paul R. Rice and Geoffrey C. Hazard Jr., *Special Masters' Guidelines for the Resolution of Privilege Claims*. The *Restatement of the Law Governing Lawyers* offers a definition of litigation that is equally dependent on the presence of adversity:

> Litigation' includes civil and criminal trial proceedings, as well as adversarial proceedings before an administrative agency, an arbitration panel or a claims commission, and alternative-dispute-resolution proceedings such as mediation or mini-trial. . . . In general, a proceeding is adversarial when evidence or legal argument is presented by parties contending against each other with respect to legally significant factual issues.

**(Footnote continued on next page.)**

General or incomplete claims of work product protection do not suffice. The applicant must meet its burden for each document by producing detailed privilege log entries, affidavits, and even the document itself.[16] The Federal Rules of Civil Procedure mandate that applicants expressly make the claim of privilege and that they ''describe the nature of the documents, communications, or tangible things not produced or disclosed'' so other parties, including courts, can sufficiently evaluate the claim.[17] The requirement in the federal rules for explicit claims reflects a concern for judicial efficiency and cost saving, a concern shared by the courts themselves, which express strong preferences for specific claims, particularly in the form of detailed privilege logs.[18]

Courts have developed two tests for ascertaining whether an applicant can be said to have prepared a document in anticipation of litigation. The lesser-used ''primary motivating purpose'' test inquires whether the document was created primarily or exclusively to assist in future litigation. The narrower of the two tests, it effectively denies protection to documents that were created with an eye toward litigation but whose ''primary, ultimate, or exclusive purpose'' assists nonlitigation purposes.[19] The more widely used test[20] does not consider whether litigation was the primary, secondary, or tertiary purpose for a document's creation, but whether ''in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.''[21] This ''because of'' test closely reflects rule 26(b)(3), which covers materials prepared for trial as well as those prepared in anticipation of litigation.[22] Under either causality test, the focus is on why the entire document was prepared, not on why certain paragraphs or sentences within the document were written. While the latter might be evidence of the former, it is not by any means determinative. The contents of a document are not protected work product unless the document in its entirety was prepared with the requisite nexus to anticipated litigation.

Under the because of test, an applicant must do more than establish a subjectively reasonable expectation of litigation for a court to grant it work product immunity. Besides demonstrating a subjective belief that litigation was a real possibility, the applicant must also show that the belief was objectively reasonable.[23] The mere mention or fear of being sued is not enough,[24] nor is the remote possibility of future litigation.[25] Rather, for a court to grant work product immunity, the applicant must demonstrate a more immediate showing[26] of anticipated litigation, an ''actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation.''[27] Indeed, applicants have been required to prove a ''genuine fear''[28] of future litigation, a ''real possibility,''[29] a ''strong prospect,''[30] a ''substantial possibility,''[31] or a ''significant and substantial threat''[32] that is ''imminent''[33] and ''more likely than not''[34] to occur.

Even if the applicant demonstrates that it possessed a reasonable prospect of litigation when it created a document, the document will not receive work product immunity if it was otherwise prepared ''in the ordinary course of business or . . . would have been created in essentially similar form irrespective of litigation.''[35] In fact, the drafters of rule 26(b)(3) explicitly excluded from immunity ''materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to

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*Restatement (Third) of the Law Governing Lawyers*, section 87 cmt. h (2000).

[16]*See, e.g.*, *CSC Recovery Corp. v. Daido Steel Co. Ltd.*, 1997 U.S. Dist. LEXIS 16346, at *7-8 (S.D.N.Y. 1997) (citing cases).

[17]Fed. R. Civ. P. 26(b)(5)(A)(i) and (ii).

[18]*See, e.g.*, *United States v. Constr. Prod. Research Inc.*, 73 F.3d 464, 474 (2d Cir. 1996), *cert. denied*, 519 U.S. 927 (1996) (denying protection to documents when the applicant's privilege log did not provide enough information to support the privilege claim). One commentator explains courts' preference for specific assertions of privilege as a judicial desire to ''readily test the validity of the assertion. Absent such identifying indicia, courts will order documents produced, often without bothering to review the disputed document. If a party does not sufficiently value the privilege to prove it, why should a court bother to sustain the assertion of the privilege?'' Edna Selan Epstein, *The Attorney-Client Privilege & the Work Product Doctrine* 648 (4th ed. 2001).

[19]*United States v. Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998), *Doc 98-7109*, *98 TNT 36-15*.

[20]At least 9 of the 13 federal circuits have adopted the test. *See, e.g.*, *Maine v. United States*, 298 F.3d 60 (1st Cir. 2002); *Adlman*, 134 F.3d 1194; *In re Grand Jury Proceedings*, 604 F.2d 798 (3d Cir. 1979); *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co. Inc.*, 967 F.2d 980 (4th Cir. 1992); *Roxworthy*, 457 F.3d 590; *Binks Mfg. Co. v. Nat'l Presto Indus. Inc.*, 709 F.2d 1109 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987); *United States v. Torf* (*In re Grand Jury Subpoena*), 357 F.3d 900, 907 (9th Cir. 2003); *Senate of P.R. v. Dep't of Just.*, 823 F.2d 574 (D.C. Cir. 1987).

[21]Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, *Federal Practice and Procedure: Civil* 343 (1994).

[22]*See Adlman*, 134 F.3d at 1198 (noting that Fed. R. Civ. P. 26(b)(3) ''sweeps more broadly'' than limiting protection to materials prepared to assist at trial).

[23]*In re Sealed Case*, 146 F.3d 881, 884 (D.D.C. 1998).

[24]*United States v. KPMG LLP*, 316 F. Supp.2d 30, 41 (D.D.C. 2004), *Doc 2004-9558*, *2004 TNT 87-12*.

[25]*In re Grand Jury Subpoena*, 220 F.R.D. 130, 147 (D. Mass. 2004).

[26]*Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974).

[27]*Nat'l Union Fire Ins. Co.*, 967 F.2d at 984.

[28]*Equal Employment Opportunity Comm'n v. Lutheran Soc. Serv.*, 186 F.3d 959, 968 (D.D.C. 1999).

[29]*Equal Rights Ctr. v. Post Props. Inc.*, 247 F.R.D. 208, 210 (D.D.C. 2008).

[30]*Briggs & Stratton Corp. v. Concrete Sales & Serv.*, 174 F.R.D. 506, 509 (M.D. Ga. 1997).

[31]*Sec. & Exch. Comm'n v. World-Wide Coin Invest. Ltd.* 92 F.R.D. 65, 66 (N.D. Ga. 1981).

[32]*SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 484 (D. Pa. 2005).

[33]*World-Wide Coin*, 92 F.R.D. at 66.

[34]*S.D. Warren Co. v. E. Elec. Corp.*, 201 F.R.D. 280, 285 (D. Me. 2001).

[35]*See, e.g.*, *Adlman*, 134 F.3d at 1202.

litigation, or for other nonlitigation purposes,''[36] even if they may be useful in the event of litigation.[37] Applicants can prevent discovery of these ''dual purpose'' documents only if they can show that the documents would not have been created in the absence of pending or possible future litigation.[38]

Refusing to immunize business purpose documents from discovery upholds the work product doctrine's underlying function of protecting the adversarial process. Similarly, denying immunity for documents created to comply with regulatory requirements respects traditional work product parameters.[39] Although these disclosure documents may be prepared with a high probability of litigation in mind, the prospect of litigation is too premature to justify work product protection.[40] In the tax regulatory context, the work product doctrine has not protected audit opinion letters,[41] tax opinion letters,[42] accountant worksheets,[43] tax accrual workpapers,[44] tax pool analyses,[45] or documents prepared by a company's in-house counsel to assist outside auditors in preparing financial disclosure statements.[46] Courts deny protection to these tax documents because an applicant prepares them ''with an eye on its business needs, not on its legal ones,'' and because business imperatives rather than ''the press of litigation, call these documents into being.''[47]

Finally, if the applicant meets its burdens, the party seeking discovery has one last opportunity to pierce the immunity by showing substantial need.[48] To meet its own burden, the opposing party must demonstrate that it is unable, without undue hardship, to otherwise obtain the substantial equivalent of the materials.[49] Moreover, in the same way an applicant must prove the elements of work product privilege for each document,[50] the party seeking discovery must prove substantial need and undue hardship specifically. A court may still award immunity despite a sufficient showing of good cause if the documents contain opinion work product. In that case, the party seeking discovery must demonstrate more than an ordinary showing of substantial need and undue hardship to overcome the privilege.[51]

### B. The Court's Burden

Courts are responsible for determining whether the parties have met their burdens. The applicability or inapplicability of the work product doctrine ''must be supported by district court findings on the circumstances of preparation and purpose of the documents.''[52] Those findings require courts to do considerably more than simply rely on the applicant's asserted reasons for creating the documents. Rather, courts must ''determine with specificity'' the applicant's underlying motivation in preparing the materials.[53] This responsibility obligates courts to require that applicants produce sufficient document indexes and privilege logs,[54] to order production of redacted materials,[55] and to craft detailed protective orders.[56] Once an applicant produces a privilege log, the party seeking discovery can show that the log does not plausibly establish the privilege, or it can show good cause or exception to overcome the privilege. It has become common practice for courts at that point to conduct in camera inspections of the documents.[57]

A court's gatekeeping analysis is inherently temporal, and it compels judges to ask and answer for each purportedly privileged item, ''Why did the applicant prepare this material?'' By its nature, that inquiry prompts the court to revisit the moment the document was created and to glean its author's intent. A document's contents are irrelevant in and of themselves[58]; they inform the analysis only to the extent they assist the

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[36]*Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993) (quoting Fed. R. Civ. P. 26(b)(3), Advisory Committee Note).

[37]*See* Wright, Miller, and Marcus, *supra* note 21, at 346.

[38]*In re OM Group Sec. Litig.*, 226 F.R.D. 579, 587 (N.D. Ohio 2005) (citing *Maine*, 298 F.3d at 70).

[39]Epstein, *supra* note 18, at 532.

[40]*Id.*

[41]*See, e.g.*, *In re Raytheon Sec. Litig.*, 218 F.R.D. 354, 359 (D. Mass. 2003).

[42]*See, e.g.*, *Fid. Int'l Currency Advisor A Fund LLC v. United States*, No. 05-40151, Slip Op. 25 (D. Mass. Apr. 18, 2008).

[43]*See, e.g.*, *United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999), *Doc 1999-27605*, *1999 TNT 163-12*.

[44]*See, e.g.*, *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981), *cert. denied*, 454 U.S. 862 (1981). It should be noted that the Fifth Circuit has analyzed these issues using the primary purpose test. Courts applying the because of test to these kind of documents, however, should reach the same conclusions given the documents' exclusively regulatory purposes.

[45]*See, e.g.*, *United States v. El Paso Co.*, 682 F.2d 530, 542-44 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984).

[46]*See, e.g.*, *In re Royal Ahold Sec. & Erisa Lit.*, 230 F.R.D. 433, 435 (D. Md. 2005); *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985).

[47]*El Paso*, 682 F.2d at 543-544.

[48]Fed. R. Civ. P. 26(b)(3)(A)(ii). *See also Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (stating that ''where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had'').

[49]*Id.*

[50]*Va. Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 410 (E.D. Va. 1975).

[51]*See supra* note 14.

[52]*United States v. Rockwell Int'l*, 897 F.2d 1255, 1257 (3d Cir. 1990).

[53]*Id.* at 1266.

[54]*See* Epstein, *supra* note 18.

[55]*See, e.g.*, *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156 (E.D.N.Y. 1994) (ordering privileged portion of an otherwise unprivileged document to be redacted and produced).

[56]*See* Epstein, *supra* note 18, at 671. (''It is now standard operating procedure to produce documents, subject to a protective order.'')

[57]The use of in camera review has become so common among federal courts that failure to do so can result in a finding of plain error. *See, e.g.*, *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986).

[58]A document's contents can be relevant for purposes of determining the application of other privileges, such as the attorney-client privilege, which protects communications between a client and her attorney.

court in determining why the document was created in the first place. If a court determines that a document was prepared for nonlitigation purposes (that is, prepared irrespective of the prospect of litigation or prepared with an unreasonable prospect for litigation), the court cannot award work product immunity under the traditional parameters of the work product doctrine, and it must order discovery of the material.

### III. What Accrual Workpapers Are and Aren't

The work product doctrine protects from discovery documents prepared in anticipation of litigation. The party seeking work product immunity must demonstrate that the prospect of litigation was objectively reasonable at the time of the documents' creation and that the documents would not have been prepared in substantially the same manner regardless of the anticipated litigation. Courts, for their part, must scrutinize an applicant's motives for creating the documents, a duty that obligates them to verify that an applicant has met its burdens of proof.

The primary question before the *en banc* First Circuit in *Textron* is whether an applicant's tax accrual workpapers deserve work product protection. This section of the primer demonstrates that tax accrual workpapers never deserve work product immunity. They are disclosure documents, not litigation documents. They are prepared for regulatory purposes and never for litigation purposes. Moreover, it is never objectively reasonable for a taxpayer to anticipate litigation when creating tax accrual workpapers, because the nexus between preparation of the documents and the commencement of litigation is attenuated and laden with contingencies.

If the applicant prevails in *Textron*, the First Circuit will be responsible for expanding the work product doctrine beyond its historical role of protecting the adversarial process. This new, über privilege would safeguard every document analyzing the potential tax treatment of transactions, regardless of their connection to litigation. Work product immunity under First Circuit authority would henceforth protect from discovery not just all tax advice, but any advice — legal or otherwise — regarding potential litigation, no matter how unlikely.

#### A. Workpapers Never Deserve Immunity

Tax accrual workpapers are financial disclosure documents, not litigation documents. They support a corporate taxpayer's reserve for deferred or contingent tax liabilities and related representations in audited financial statements.[59] They also discuss all tax assets and liabilities reflected in the financial statements, including deferred tax assets and liabilities.

Taxpayers are required to prepare tax accrual workpapers, but not because of the prospect of litigation. Under federal securities law, public corporations must file annual financial statements with the Securities and Exchange Commission.[60] Independent auditors, in turn, must certify that those statements provide a fair representation of an entity's financial condition in compliance with generally accepted accounting principles.[61] Tax accrual workpapers are integral to the reporting process in that they indicate how much should go into the tax reserve account, a fund that reflects a company's potential future liability for additional taxes owed in the event of an adverse administrative or judicial determination over tax return positions.

Public corporations produce tax accrual workpapers even if they do not anticipate having to set aside a tax reserve. That is because they must justify to their auditors the absence of a contingent tax reserve. Also, corporate taxpayers create tax reserves even if they do not anticipate government challenges to their positions, such as deferred-tax reserves for noncontingent taxes. In other words, tax accrual workpapers are generated every year in a public corporation's ordinary course of business, and they are generated whether or not the company anticipated specific or potential litigation. In fact, if a public corporation failed to generate tax accrual workpapers in any given year, its auditors would be unable to issue it a bill of financial health in accordance with GAAP, the corporation could be delisted by its exchange, and it would cease to exist as a publicly traded entity.[62]

In its January 2009 opinion, a panel majority from the First Circuit revealed its confusion over the purpose and function of tax accrual workpapers. In particular, it found that corporate taxpayers create workpapers because of the prospect of litigation rather than because of regulatory requirements or business imperatives. According to the majority, any business or regulatory purpose for workpapers "derives from and is inextricably related to anticipating litigation."[63] The anticipation of these disputes, the court said, triggered business and financial accounting obligations.[64]

But the panel majority got it backwards. Litigation does not trigger a corporate taxpayer's financial reporting obligations; independent statutes and regulations do. The disclosure requirements in turn force the corporate taxpayer to evaluate which tax positions might be challenged, adjusted, and litigated. To that end, workpapers contain percentage determinations on the likelihood of

[59] *See* Announcement 2002-63, 2002-2 C.B. 72, *Doc 2002-14466*, *2002 TNT 117-12*.

[60] *See* 15 U.S.C. section 78l (registration requirements for securities) and section 78m (periodical and other reports); 17 C.F.R. section 210 et seq. (registration and disclosure requirements for asset-backed securities).

[61] *See* Financial Accounting Standards Board Interpretation No. 48, "Accounting for Uncertainty in Income Taxes — An Interpretation of FASB Statement No. 109" (2006); Statement of Financial Accounting Standards No. 5, "Accounting for Contingencies" (1975).

[62] *See, e.g., Arthur Young*, 465 U.S. at 818-819 and notes 13-14 (describing the connection between tax accrual workpapers, auditors' opinions, and a company's status as a publicly traded entity).

[63] *United States v. Textron*, No. 07-2631, Slip Op. 21 (1st Cir. Jan. 21, 2009).

[64] *Id.*

success of prevailing on the merits of specific tax positions. Those determinations themselves are not prepared in anticipation of litigation, but to evaluate the likelihood of litigation as required by federal securities law and GAAP. This is a vital distinction, because the former is eligible for work product immunity while the latter is not.[65] Nor is *Textron* a case in which the documents were created for both litigation and business purposes. Tax accrual workpapers are not dual purpose documents in the context of the work product doctrine[66]; there is zero litigation purpose to the documents. They may discuss the prospect of litigation, and they may contain analyses that might one day become the subject of litigation, but the documents themselves are not created for litigation purposes. Indeed, without independent financial reporting obligations, most corporate taxpayers would never create tax accrual workpapers, certainly not for litigation reasons.

Let me be clear: The First Circuit's *en banc* review in *Textron* involves the sufficiency of the applicant's disclosure, not the merits of the applicant's tax positions. Indeed, the applicant has stonewalled litigation to the point that the First Circuit is being asked to determine if the government is entitled to receive enough threshold information to perform its regulatory function of investigating whether the applicant has paid its fair share of taxes. Anticipating litigation over disclosure (which is itself unreasonable given the applicant's repeated efforts to frustrate the disclosure process) is not the kind of reasonable anticipation of litigation protected by the work product doctrine (unless the applicant or the court is prepared to take the position that lack of disclosure is tantamount to litigation, a position that ignores the underlying function of an administrative state, including, in this case, tax administration).

### B. Anticipation of Litigation Is Never Reasonable

To receive work product protection for a document, an applicant must demonstrate not only a subjective belief that litigation was likely at the time of the document's creation, but also that the belief was objectively reasonable.[67] The applicant must also expressly make the claim that it possessed an objectively reasonable anticipation of litigation, and courts must expressly verify that the applicant's anticipation of litigation was objectively reasonable enough to receive work product immunity.[68]

In creating tax accrual workpapers, an applicant can never possess an objectively reasonable belief that litigation is likely. The temporal connection between preparation of the documents and the commencement of litigation is too attenuated and fraught with uncertainty to support immunizing documents from discovery under the work product doctrine.

Both courts that have rendered decisions in *Textron* have demonstrated that an understanding of tax dispute resolution procedures is outside the general knowledge of federal courts. In particular, they proceed from the erroneous assumption that all disputes between taxpayers and the taxing agency over taxes owed are adversarial and thereby qualify as litigation for purposes of determining an applicant's reasonable anticipation of litigation. Both the district court and the panel majority failed to recognize that only a fraction of tax disputes involving business taxpayers and the government are adversarial and culminate in litigation.

It cannot be emphasized enough that tax administration does not amount to an adversarial proceeding as defined in the context of the work product doctrine.[69] The Federal Rules of Civil Procedure provide work product protection to documents prepared with an objectively reasonable anticipation of litigation in mind. "Litigation" for purposes of work product analysis is generally understood to mean a proceeding in which the parties are allowed to cross-examine witnesses and to dispute the other side's legal interpretations.[70] An audit investigation or administrative challenge or proposed adjustment does not exhibit the elements of an adversarial proceeding. An audit, for instance, is at most an "antechamber to litigation"[71] — and not itself litigation[72] — whose purpose is "to assess the amount of tax liability through administrative channels" rather than to prepare for litigation.[73] Even documents prepared after an audit has commenced may not qualify as being prepared in anticipation of litigation,[74] but as part of the assessment and review process.[75] Indeed, if those documents were found to be in anticipation of litigation, "it is hard to see what would not be."[76] If documents prepared in connection with an audit

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[65]*See, e.g.*, *McFadden v. Norton Co.*, 118 F.R.D. 625, 632 (D. Neb. 1988) (denying immunity to report prepared in keeping with the applicant's prudent business policies of evaluating claims in house because it was prepared to determine whether to anticipate litigation rather than in actual anticipation of litigation); *Sec. & Exch. Comm'n v. Nat'l Student Mktg. Corp.*, 18 Fed. R. Serv. 2d 1302, 1310-1311 (D.D.C. 1974) (denying immunity for memoranda prepared by SEC staff during its investigation of a listed company and before preparation of a draft memorandum recommending that suit be filed); *Abel v. United States*, 53 F.R.D. 485 (D. Neb. 1971) (denying immunity for IRS reports and memoranda routinely prepared in each case and before filing of a lawsuit against a taxpayer, even though the documents at issue contained mental impressions, conclusions, and legal theories of IRS employees).

[66]*See supra* notes 35-37.

[67]*See supra* text accompanying notes 23-34.

[68]Fed. R. Civ. P. 26(b)(5)(A)(i) and (ii).

[69]*See* Bryan T. Camp, "Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998," 56 *Fla. L. Rev.* 1 (2004).

[70]*Supra* note 15.

[71]*Frederick*, 182 F.3d at 502.

[72]*See, e.g.*, *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 65 (7th Cir. 1980) (finding that at most, the audit materials were prepared with an eye toward a possible administrative proceeding before the IRS).

[73]*United States v. Baggot*, 463 U.S. 476, 480 (1983).

[74]*See, e.g.*, *Abel*, 53 F.R.D at 489 (rejecting the government's argument that all documents created after a taxpayer's return is selected for audit are prepared in anticipation of litigation and protected as work product).

[75]*Peterson v. United States*, 52 F.R.D. 317, 320 (S.D. Ill. 1971).

[76]*Id.*

investigation do not qualify as protected work product, neither should tax accrual workpapers prepared years before audit to comply with financial accounting and disclosure requirements. Nor should it matter that the workpapers contain descriptions of particularly aggressive tax transactions or even listed transactions[77] that the government would be more likely to challenge if discovered.[78]

Although corporate taxpayers are subject to annual audit through contiguous audit cycles, the IRS may never be able to identify a particular transaction to challenge, let alone litigate. Corporate tax returns are exceedingly complex. The audit documents at issue for the applicant in *Textron* filled nine four-drawer file cabinets, and its consolidated tax return exceeded 4,000 pages covering more than 190 different entities.[79] Buried in the return was an opaque reference to the nine sale-in, lease-out prohibited tax shelters entered into by one of the applicant's subsidiaries.[80] Given both the volume of materials and the complexity of the tax shelter transactions involved,[81] combined with the funding and personnel deficiencies that continue to plague the IRS,[82] there was no guarantee that the government would identify and evaluate the aggressive positions.[83] Even with sufficient resources, tax officials would still be faced with gaps in corporate taxpayers' records because of concealment of impermissible transactions,[84] the regulatory practice of allowing corporate taxpayers to dictate the audit agenda and include for examination conservative transactions while obscuring and omitting aggressive ones,[85] and other informational asymmetries.[86]

If the government identifies a potentially abusive transaction during audit, it may still be unable to assess the substance of the transaction without more information from the taxpayer. In recent years, legislative and regulatory antishelter efforts have attempted to facilitate transparency in tax compliance and to increase the flow of information from taxpayers to the government. The new Schedule M-3, for instance, helps the IRS locate relevant information on 1000-page tax returns by reconciling a corporation's financial accounting income (book income) with its taxable income, a reconciliation aimed at reducing tax avoidance opportunities. Similarly, taxpayers invested in tax shelters can comply with new reporting requirements by disclosing those transactions on Form 8271. But that reporting may still fail to provide the IRS sufficient information to evaluate the transaction. The applicant in *Textron* disclosed its nine SILO transactions on Form 8271, but the IRS examining agents were unable to understand the transactions from the information disclosed on the form.[87] In these cases of ambiguity, tax accrual workpapers help the IRS verify the accuracy and completeness of return positions, clarify turbid facts and data, reveal unidentified issues and positions, and expose information hidden from view on transaction documents.

Once the IRS locates and challenges a potentially abusive transaction, several levels of administrative review and dispute resolution remain available for the taxpayer and the IRS to resolve differences without resorting to litigation. The taxpayer can engage in negotiations over proposed adjustments to return positions, participate in conferences with IRS audit team managers, request accelerated resolution of its positions through the fast-track settlement program,[88] and seek an independent review of its positions before the IRS Office of Appeals.

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[77]Listed transactions are considered the same as, or substantially similar to, transactions identified by the IRS in published guidance as prohibited tax shelters. Taxpayers participating in a listed transaction must generally disclose the transaction to the IRS, register it, and, if applicable, maintain an investor list that must be made available to the IRS on request. *See* http://www.irs.gov/businesses/corporations/article/0,,id=204155,00.html.

[78]*See Fid. Int'l*, No. 05-40151, Slip Op. 26. ("The mere fact that the taxpayer is taking an aggressive position, and that the IRS might therefore litigate the issue is not enough.")

[79]Brief for the appellant at 12, *United States v. Textron Inc.*, No. 07-2631 (1st Cir. Jan. 25, 2008).

[80]SILO transactions, by form, purport to be a sale/leaseback with a tax-exempt entity, but in substance they amount to a sale of tax benefits.

[81]*See* Joint Committee on Taxation, "Investigation of Enron Corporation & Related Entities" 17 (JCS-3-03) (Feb. 2003), *Doc 2003-4185*, *2003 TNT 31-11* (stating that the complexity of corporate tax shelters "makes it exceedingly difficult for the IRS to timely identify and properly evaluate these transactions").

[82]For a discussion of the "resource gap" separating the government and the private bar, see Ventry, "Cooperative Tax Regulation," 41 *Conn. L. Rev.* 431, 453-467 (2008).

[83]Joshua D. Rosenberg, "The Psychology of Taxes: Why They Drive Us Crazy and How We Can Make Them Sane," 16 *Va. Tax Rev.* 155, 189 (1996) (writing that even in an audit, the IRS "may not notice whatever tax evasion the taxpayer may have engaged in").

[84]*See* Senate Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations, "The Role of Professional Firms in the U.S. Tax-Shelter Industry," S. Rep. No. 109-54, at 11 (2005) (stating that accounting firms in the 1990s and early 2000s "took steps to conceal their tax shelter activities from tax authorities and the public"); *Long Term Capital Holdings v. United States*, 330 F. Supp.2d 122, 211-212 (D. Conn. 2004), *Doc 2004-17390*, *2004 TNT 169-15* (describing the taxpayer's steps to conceal questionable tax benefits on tax forms designed to notify the IRS of differences in book income/loss and tax income/loss), *aff'd*, No. 04-5687 (2d Cir. 2005), *Doc 2005-19826*, *2005 TNT 187-16*; Graeme S. Cooper, "Analyzing Corporate Tax Evasion," 50 *Tax L. Rev.* 33, 100 (1994) (finding that businesses conceal tax-motivated transactions from their auditors).

**(Footnote continued in next column.)**

[85]JCT, "Study of Present Law Penalty and Interest Provisions, as Required by Section 3801 of the Internal Revenue Service Restructuring and Reform Act of 1998" 212 (JCS-3-99) (1999), *Doc 1999-25071*, *1999 TNT 142-72* (part 1) and *1999 TNT 142-73* (part 2).

[86]*See* Camp, *supra* note 69, at 4 and 51-77 (explaining how the "information asymmetry between taxpayers and government forms the basis for an inquisitorial system of tax administration," and how courts have long recognized this information asymmetry as a central justification for the expansive reading of the IRS summons power).

[87]Reply brief for the appellant at 16 n.7, *United States v. Textron Inc.*, No. 07-2631, (1st Cir. May 9, 2008).

[88]*See* Rev. Proc. 2003-40, 2003-1 C.B. 1044, *Doc 2003-13535*, *2003 TNT 107-12*; Announcement 2006-61, 2006-2 C.B. 390, *Doc 2006-15911*, *2006 TNT 163-5*.

Even at this late stage of review and resolution, the regulatory process is not yet adversarial and fails to approach ''litigation'' as contemplated under the work product doctrine. The relationship between the parties may later become adversarial, but not before the taxpayer has exhausted all levels of administrative review, and not merely because the IRS seeks an adjustment to the taxpayer's liability.[89]

Consider the relationship between the government and the applicant in *Textron*. During the applicant's last eight audit cycles, dating back to 1959, the government proposed thousands of adjustments to the taxpayer's reporting positions. Yet the parties resorted to litigation over disputed issues just three times.[90] In other words, less than 1 percent of all proposed adjustments were litigated. Those are bad odds and, more importantly, deficient for qualifying under the work product doctrine's objectively reasonable standard.

It is never reasonable as a matter of logic or mathematical probability for a taxpayer to anticipate litigation with the IRS when preparing tax accrual workpapers. It is highly unlikely that the government will identify an abusive transaction in a corporate taxpayer's consolidated return or that it will glean sufficient information from the return and disclosure documents to adequately evaluate the transaction's true substance and challenge it on the merits. Even if the government manages to identify, investigate, and dispute a particular transaction, the parties will manage to exhaust all avenues of dispute resolution over proposed adjustments only in exceedingly rare circumstances.

### C. The Work Product Doctrine on Steroids

Despite the infinitesimal odds that items in tax accrual workpapers will be the subject of litigation, two courts in the First Circuit have blessed the workpapers with work product protection.[91] Observers have noted that these decisions represent a ''huge, huge expansion of the work product doctrine'' because ''most taxpayers don't actually litigate.''[92] Indeed, if the *en banc* First Circuit in *Textron* follows those two earlier decisions and cloaks the applicant's tax accrual workpapers with work product immunity, it will create an entirely new privilege that expands the work product doctrine significantly beyond its historical role of protecting the adversarial process. It would also provide tax advisers and their clients a backstop to the attorney-client and tax practitioner-client privileges. And, as established below, it would effectively bestow on tax advice greater protection than other forms of legal advice.

If the *en banc* court wishes to avoid being responsible for injecting the work product doctrine with steroids and creating a new, über privilege, it would do well to avoid the many mistakes of the district court and the First Circuit panel majority.

First, it should avoid equating discussion of the likelihood of litigation with an objectively reasonable anticipation of litigation. The earlier two decisions in *Textron* attributed inexplicable significance to the fact that the applicant's tax accrual workpapers ''identify and numerically evaluate a number of tax positions'' and that the ''analysis of each position was prepared by anticipating the possibility of litigation with the IRS arising over a dispute regarding that position.''[93] Without reviewing a single withheld document, both courts accepted at face value that those ''hazards of litigation percentages''[94] — the applicant's fabricated and loaded description of the contents of its tax accrual workpapers — were in fact created with an objectively reasonable anticipation of litigation.

Under traditional work product analysis, it is irrelevant that documents and tangible things discuss the likelihood of litigation, except insofar as the discussion was compelled by the anticipation of litigation. That is, the contents of an applicant's workpapers examining the hazards of litigation and the likelihood that specific tax positions will fail or prevail on the merits if challenged and litigated are themselves meaningless in determining whether to grant or deny work product immunity. The only thing that matters is if the document — whatever the content — arose from an objectively reasonable anticipation of litigation.

In other words, if the prospect of litigation were to induce an applicant to create a document that contained a lengthy discussion of, say, how to spell ''lex lata'' or even ''Lex Luthor,'' the document would be protected under the work product doctrine. However, if something other than the prospect of litigation induced an applicant to create a document (say, financial accounting disclosure requirements), then neither a discussion of ''lex lata'' nor ''Lex Luthor'' — nor even discussion of a taxpayer's impermissible reporting positions — would receive work product immunity.

This point bears repeating: The work product doctrine protects only those documents created with a reasonable anticipation of litigation in mind; it does not protect documents created for any other reason, even if they discuss litigation or its prospects. Similarly, plastering ''privileged and confidential'' on every page of every document does not itself bestow attorney-client or work

[89]To support its conclusion that administrative tax disputes rise to the level of litigation in the context of the work product doctrine, the First Circuit panel majority argues deterministically that ''the subject of these disputes will become the subject of litigation unless the dispute is resolved.'' *Textron*, No. 07-2631, Slip Op. 15. That may be true, but it does not make discussions taking place before the commencement of litigation necessarily tantamount to litigation. Those discussions must be examined individually against the requirements of the work product doctrine.

[90]*See Textron*, No. 07-2631, Slip Op. 6; *Textron*, 507 F. Supp.2d at 150-151.

[91]*See Textron*, 507 F. Supp.2d 138; *Textron*, No. 07-2631 (1st Cir. Jan. 21, 2009).

[92]Alison Bennett, ''Korb Says Government Unlikely to Yield on Textron; Practitioners Praise Court Ruling,'' 169 *Daily Tax Rep.* (BNA) K-1 (Aug. 31, 2007) (quoting Christopher Rizek, former Treasury associate tax legislative counsel).

[93]*Textron*, No. 07-2631, Slip Op. 29.

[94]*See Textron*, 507 F. Supp.2d at 143, 148, and 150; *Textron*, No. 07-2631, Slip Op. 8.

product protection on those documents. Rather, the documents must be shown both to reflect communications between a client and her attorney and to have been prepared in anticipation of litigation. The party seeking immunity under the two privileges must show that the elements have been met, and a judicial tribunal must verify the claims.

Second, the *en banc* court should also be wary of expanding the work product doctrine so far that it transforms the immunity into a backstop for other legal privileges. The district court in *Textron* determined that although the applicant's tax accrual workpapers were protected under the attorney-client and tax practitioner-client privileges, the applicant had waived both protections when it disclosed its workpapers to a third-party independent auditor.[95] However, under the district court's analysis, the work product doctrine saved the lost immunities because the workpapers analyzed the potential tax treatment of the applicant's reporting positions with percentages reflecting likely outcomes in the event of litigation. If corporate taxpayers and their tax professionals can achieve immunity under the guise of the work product doctrine simply by including discussions of likely litigation outcomes for tax positions, it is hard to imagine what tax advice — legal or nonlegal — would *not* qualify for work product protection. Moreover because it is harder to waive work product protection than other legal privileges, tax advice would receive greater protection than nontax legal advice.[96]

Never mind that the work product doctrine requires applicants to show more than a discussion of possible litigation outcomes to receive immunity. Also never mind that tax accrual workpapers analyze levels of certainty for a corporate taxpayer's reporting positions not because of any objectively reasonable prospect of litigation, but because federal securities law requires those determinations so taxpayers can calculate tax reserves accurately and fairly and so independent auditors can evaluate the calculations under GAAP. Lastly, never mind that these documents are prepared by nonlawyer tax practitioners as often and as capably as by tax attorneys and that unprotected accounting documents do not magically become protected litigation documents by virtue of being created by a lawyer rather than an accountant.[97] Even if a lawyer creates the document, the work product doctrine does not protect the lawyer's every mental impression or thought, but only those connected to an objectively reasonable anticipation of litigation.[98]

Third, courts are obligated to conduct a full work product analysis of allegedly protected documents before granting or denying work product immunity. In *Textron*, even though the government made a plausible showing that the applicant's tax accrual workpapers were not prepared in anticipation of litigation, there is no record indicating that any judge on either the district court or the First Circuit panel majority examined a single page of the workpapers before immunizing them from discovery.

As discussed above, a finding of protected work product "must be supported by district court findings on the circumstances of preparation and purpose of the documents."[99] These findings require that courts do more than rely on an applicant's self-serving assertions and that they verify both the subjective and objective reasons for which allegedly privileged materials were prepared. Indeed, courts must "determine with specificity" the underlying motivation for preparing the documents.[100] They typically fulfill that obligation by requiring applicants to produce detailed indexes and privilege logs,[101] ordering production of redacted documents,[102] formulating protective orders,[103] and even conducting in camera inspections of the documents.[104]

The district court in *Textron* never examined the applicants' purportedly privileged documents. Instead, it based its findings of fact on the pleadings, affidavits submitted by the parties, and the evidence presented at a hearing.[105] The record indicates that the applicant produced a privilege log listing its withheld documents.[106] But the log never became part of the record,[107] the applicant never identified specific issues in its workpapers as being the subject of pending or potential litigation,[108] and the court neglected to review a single withheld document or to identify specific documents as

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[95]*See Textron*, 507 F. Supp.2d at 151-152.

[96]Waiver of the attorney-client privilege merely requires disclosure of confidential client communications to a third party, while waiver of the work product privilege requires disclosure to an adversary, real or potential (*United States v. MIT*, 129 F.3d 681, 687 (1st Cir. 1997), *Doc 97-32547*, *97 TNT 231-13*), or a conduit to a potential adversary (*In re Raytheon Sec. Litig.*, 218 F.R.D. at 360).

[97]*See Frederick*, 182 F.3d at 500 (stating that a taxpayer cannot "be allowed, by hiring a lawyer to do the work that an accountant, or other tax preparer . . . normally would do, to obtain greater protection from government investigators than a taxpayer who did not use a lawyer as his tax preparer would be entitled to. To rule otherwise would be to impede tax investigations, reward lawyers for doing nonlawyers' work, and create a privileged position for lawyers in competition with other tax preparers — and to do all this without promoting the legitimate aims of the attorney-client and work product privileges").

**(Footnote continued in next column.)**

[98]Indeed, the work product doctrine "is not an umbrella that shades all materials prepared by a lawyer." *El Paso*, 682 F.2d at 542.

[99]*Rockwell Int'l*, 897 F.2d at 1257.

[100]*Id.* at 1266.

[101]*See* Epstein, *supra* note 18.

[102]*See supra* note 55.

[103]*See supra* note 56.

[104]*See supra* note 57.

[105]*Textron*, 507 F. Supp.2d at 141.

[106]*See* reply brief for the appellant at 69, *Textron*, No. 07-2631 (noting claimed, although unproduced, document in the applicant's privilege log).

[107]*Id.*

[108]*See Maine*, 298 F.3d at 69 (finding that the general possibility of litigation does not justify work product protection and holding that an applicant must make the correlation between each withheld document and the litigation for which the document was created) (quoting *Church of Scientology Int'l v. United States*, 30 F.3d 224, 237 (1st Cir. 1994)).

being prepared in anticipation of litigation.[109] By ignoring the applicant's failure to expressly make the claim of privilege for each document as required under the federal rules,[110] the district court failed to fulfill its fact-finding duty of examining each document "with specificity"[111] before awarding or denying work product immunity. For its part, the First Circuit panel majority rubber-stamped the district court's deficient work product analysis.[112]

## IV. Conclusion

Work product immunity is reserved for documents that are prepared with an objectively reasonable anticipation of litigation in mind. A corporate taxpayer's tax accrual workpapers never qualify for work product protection because they are never prepared with an objectively reasonable eye toward litigation. Corporate taxpayers create tax accrual workpapers because federal securities law requires them to do so. These documents exist solely for financial accounting and disclosure purposes. They may contain analyses or discussions that in other contexts could justify an award of work product protection. But in the context of financial accounting and disclosure documents, those analyses and discussions are created exclusively for regulatory purposes, and should never be cloaked with work product immunity.

Corporate taxpayers and their tax advisers may wish that the work product doctrine did more than protect materials and tangible things prepared in anticipation of litigation and that the immunity blanketed other kinds of documents. But it does not. If tax advisers and their clients want the protection of the work product doctrine, they must meet the doctrine's requirements. If they cannot satisfy the elements of the privilege, they are not entitled to create an entirely new category of protection. Nor, for that matter, are courts obligated to validate that new category.

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[109]*See* brief for the appellant at 21 n. 7, *Textron*, No. 07-2631 (stating that the applicant did not submit the documents that it claimed were privileged for in camera review).

[110]*See supra* note 17.

[111]*Rockwell Int'l*, 897 F.2d at 1257.

[112]*See, e.g., Textron*, No. 07-2631, Slip Op. 21 and 29 (finding summarily that "the district court has already conducted such analysis [assessing whether the applicant prepared its tax accrual workpapers in anticipation of litigation or for regulatory purposes] and has concluded that the workpapers were created because of both purposes").