Docket No. 09-750

In the Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICUS CURIAE* THE AMERICAN BAR ASSOCIATION SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Petitioners.[1] The ABA requests that the petition be granted so that attorneys can have the guidance of the Court on the scope of the work product privilege in light of legal and practical issues that have arisen since the Court last delineated this doctrine.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of nearly 400,000 spans all 50 states and other jurisdictions and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk pursuant to Rule 37.3.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

Throughout its history, the ABA has taken a leading role in developing standards governing the preservation of client confidences. In 1908, the ABA adopted its CANONS OF PROFESSIONAL ETHICS, providing in Canon 37 that "[i]t is the duty of a lawyer to preserve his client's confidences," which duty "outlasts the lawyer's employment." CANONS OF PROF'L ETHICS Canon 37 (1908, last am. 1963). The ABA further encouraged recognition of the attorney work product privilege in its *amicus* brief filed in *Hickman v. Taylor,* 329 U.S. 495 (1947).[3] In *Hickman*, the Court recognized the privilege, concluding that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510.

The ABA also advocated in favor of the work product privilege in its *amicus* brief in *Swidler & Berlin v. United States,* 524 U.S. 399 (1998).[4] In *Swidler*, one of the questions presented was whether, even after a client's death, an attorney's notes of an initial client consultation were work product protected as the attorney's "mental impressions." *Id.* at 403. In its brief, the ABA submitted that the privilege should apply even at this early stage, to enable counsel to elicit and protect pertinent client information that would shape the goals and strategies to be pursued in the

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[3] The Brief of the American Bar Association as *Amicus Curiae* in *Hickman* may be found at 1946 WL 62839.

[4] Brief of the American Bar Association as *Amicus Curiae* in *Swidler & Berlin* may be found at 1998 WL 208818.

matter. ABA *Amicus Curiae* Brief in *Swidler & Berlin*, 1998 WL 208818 at *27 (citing Fred Lane, LANE GOLDSTEIN TRIAL TECHNIQUE § 1.03 at 3 (3d ed. 1997)). The Court, however, held that the documents were protected by the attorney-client privilege and did not reach the work product issue. *Swidler*, 524 U.S. at 403 n.1.

More recently, to further the common goals of the attorney-client and work product privileges, the ABA established a task force to study and educate others on the role of both the attorney-client and the work product privileges. In 2005, after consideration of a report from this task force, the ABA House of Delegates adopted as ABA policy the task force's findings that, *inter alia*, the preservation of the attorney-client and work product doctrines are essential to maintaining the confidential relationship between client and attorney that is required to encourage clients "to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with the law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice, and (4) promote the proper and efficient functioning of the American adversary system of justice." ABA *2005 Report with Recommendation #111* (Policy adopted Aug. 2005) *available at* www.abanet.org/leadership/2005/annual/dailyjournal/111.doc.[5]

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[5] The ABA's House of Delegates ("HOD"), with more than 500 delegates, is the ABA's policymaking body. Recommendations may be submitted to the HOD by ABA delegates representing states and territories, state and local bar associations, affiliated

(footnote continued on next page)

The ABA recognizes that the distinction between attorney work product and discoverable materials generated in the ordinary course of business remains – to use the words of the *Hickman* Court – "one of the most hazy frontiers of the discovery process." *Hickman,* 329 U.S. at 513-14. The legal and practical issues that have arisen since *Hickman* was decided have rendered this distinction even more hazy, particularly with respect to dual purpose documents prepared by attorneys in connection with regulatory requirements and evolving business practices. Adding to this uncertainty is the emergence of the split among the circuits on the standards for applying the work product privilege. This uncertain environment adversely affects the ability of attorneys to provide their clients with responsible legal counsel. The ABA, therefore, supports the present petition for writ of certiorari because of the interest of its members in having a uniform and effective rule for determining the work product privilege.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be granted to resolve the conflict in the lower courts on the scope of the attorney work product privilege to documents that are prepared both in the ordinary course of business and in anticipation of litigation.

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organizations, sections and divisions, ABA members, and the Attorney General of the United States, among others. Recommendations that are adopted by the HOD become ABA policy. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html.

The ABA asserts that the privilege should not be limited to materials prepared solely "for use in litigation," Petition for Writ of Certiorari at 21a, United States v. Textron, No. 09-750 (Dec. 24, 2009), but should also encompass those that are prepared to serve both a business and a litigation purpose, whether or not a claim is ever threatened or filed.

Dual purpose work product documents have resulted from a number of legal and practical considerations that have not been considered by the Court in its previous work product rulings. These include the investigations and assessments required by the Sarbanes-Oxley Act of 2002 and "FIN 48," a financial accounting standard adopted in 2006. Further, today's businesses, and even the IRS, rely increasingly on counsel to evaluate proposed activities or practices and assess legal ramifications, including litigation risks, before making business decisions. Clients also rely on their counsel to conduct investigations of occurrences, recognizing that litigation may arise but often having the goal of avoiding litigation while ensuring compliance with laws and corporate policies. Although clients' needs for attorney investigation and counsel is greater than ever, the current circuit split has created an uncertain environment for attorneys practicing in a variety of contexts.

The scope of the attorney work product privilege now depends on the jurisdiction in which a dispute arises or discovery is sought. To protect confidential information, clients who conduct multi-jurisdictional activities are motivated to adopt procedures consistent with the narrowest interpretation of the privilege, with the result that an overly restrictive

approach to dual purpose documents may threaten the free flow of confidential information from client to attorney necessary for the attorney to provide effective counseling and advocacy. Moreover, the circuit split has placed attorneys in the untenable position of deciding whether to create work product when it may be privileged in one jurisdiction but not in another.

Accordingly, the ABA supports the present petition for a writ of certiorari because the uncertainties resulting from the circuit split are undermining the goals of the work product privilege and, indeed, the ability of many attorneys to do their jobs effectively.

REASON FOR GRANTING THE WRIT

The different standards adopted by the circuit courts for determining whether materials are protected leave attorneys and their clients uncertain as to the scope of the work product privilege. As this Court has observed, however, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn v. United States*, 449 U.S. 383, 393 (1981).

The ABA submits, therefore, that the Court should grant the petition to clarify that the scope of the attorney work product privilege is not limited to materials prepared solely "for use in litigation," Pet. App. at 21a, but also encompasses materials that are prepared to serve both a litigation and a business purpose, whether or not a claim is ever threatened or filed.

A. THE CIRCUIT CONFLICT HAS CREATED UNCERTAINTY OVER THE APPLICABILITY OF THE ATTORNEY WORK PRODUCT PRIVILEGE TO DUAL PURPOSE DOCUMENTS.

1. Often there is no clear distinction between documents prepared in anticipation of litigation and in the ordinary course of business.

Fed. R. Civ. P. 26(b)(3) protects from discovery materials prepared "in anticipation of litigation." As the *Hickman* Court observed, however, the distinction between discoverable business documents and privileged attorney work product can be hazy. 329 U.S. at 513-14. Today, there is more uncertainty than ever due to the increasing number of dual purpose documents that are created both in anticipation of litigation and in the ordinary course of business.

For example, in today's business climate, clients often rely on their attorneys to evaluate proposed activities and assess litigation risks before they make business decisions. Clients also rely on their counsel to conduct confidential investigations of occurrences and incidents, including employee allegations of discrimination or harassment, recognizing that litigation may arise but often with the aim of avoiding litigation while ensuring compliance with employment and other laws and corporation policies.

Today's business environment also includes the requirements of the Sarbanes-Oxley Act of 2002, under which audit committees of public companies

must establish procedures for receiving and handling complaints "regarding accounting, internal controls or auditing matters" and confidential submissions by employees. 15 U.S.C. § 78j-1 (2009). These audit committees are frequently also charged with investigating whistleblower complaints. In performing these responsibilities, they typically rely on their attorneys to conduct internal investigations, and their attorneys create work product outlining the scope of potential claims and possible legal strategies before litigation is threatened or filed. *See* Memorandum from Corporate Counsel Consortium, The Auditor's Need For Its Client's Detailed Information vs. The Clients' Need to Preserve the Attorney-Client Privilege and Work Product Protection: The Debate, The Problems, and Proposed Solutions 5 (2004), *available at* http://www.acc.com/vl/public/PolicyStatement/loader.cfm?csModule=security/getfile&pageid=16222.

In addition, the assessment of litigation prospects has become commonplace in the context of audits and, in particular, possible tax liability, as the present case has shown. Under FASB Interpretation No. 48 ("FIN 48"), as adopted by the Financial Accounting Standards Board in 2006, public companies must determine whether it is more likely than not that a tax position will be sustained upon examination by or litigation with the IRS. FASB, *FASB Interpretation No. 48, Accounting for Uncertainty in Income Taxes* (June 2006) *available at* http://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175818746949&blobheader=application%2Fpdf. This determination entails an assessment of the strength

of the company's position in possible litigation. *See* Andrew Golodny, *Lawyers Versus Auditors: Disclosure to Auditors and Potential Waiver of Work-Product Privilege in* United States v. Textron, 61 TAX LAW. 621, 631 (2008); Michelle M. Henkel, Textron: *Its Impact on the Viability of the Work Product Privilege*, 2009 TAX MGMT. MEMORANDUM 515, 516 n.18.

The overlapping functions of these documents has created uncertainty as to whether they fall outside the scope of the plain language of Rule 23(b)(3) simply because they were prepared not only in anticipation of litigation but also to serve a business purpose.

2. There is a circuit split on how Rule 26(b)(3) should be applied to dual purpose documents.

In contrast to the outcome in the First Circuit's *Textron* decision, a study created by an attorney that assesses the likely results of an expected litigation is eligible for work product protection in the Second Circuit, even where the primary or ultimate purpose for making the study is to assess the desirability of a business transaction. *U.S. v. Adlman,* 134 F.3d 1194, 1195 (2d Cir. 1998). As noted by the Second Circuit, *id.* at 1200:

> If the company declines to make such analysis or scrimps on candor and completeness to avoid prejudicing its litigation prospects, it subjects itself and its co-venturers to ill-informed decisionmaking. On the other hand, a study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses

> cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation.

Moreover, in *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 126 (D.C. Cir. 1987), the IRS relied on its counsel to analyze the litigation potential of a proposed system of statistical sampling for its corporate audit program for large accounts. After the IRS attorneys analyzed possible legal challenges, defenses and likely outcomes, the IRS concluded that the legal risks were reasonable and instituted the program. When litigation ensued, the D.C. Circuit concluded, "[Plaintiff] is seeking the agency's attorneys' assessment of the program's legal vulnerabilities in order to make sure it does not miss anything in crafting its legal case against the program. This is exactly the type of discovery the Court refused to permit in *Hickman*[]." *Id.* at 127. In a footnote, the D.C. Circuit noted, "The hardship the Court was concerned about in *Hickman* was an attorney's inability to obtain otherwise unavailable factual information, and not the inability to obtain an adversary's legal assessment of what the case might turn on." *Id.* at 128 n.4.

In the First Circuit, however, a lawyer's assessment of litigation is not protected by the work product privilege if it also satisfies a business objective. As a result, in the First Circuit and in other courts that follow its rule, a client that prudently relies upon counsel before making a business decision may be penalized by being forced to give its adversaries a roadmap of the strengths and weaknesses of its case if litigation does in fact occur. *See* Pet. App. at 21a. This circuit split has

exacerbated the uncertainty surrounding the application of the work product privilege to dual purpose documents. And, as shown below, this uncertainty also undermines the ability of lawyers to do their jobs effectively.

B. THE UNCERTAINTY REGARDING THE SCOPE OF THE ATTORNEY WORK PRODUCT PRIVILEGE UNDERMINES THE ABILITY OF ATTORNEYS TO COUNSEL THEIR CLIENTS EFFECTIVELY.

With the advent of Sarbanes-Oxley and enhanced auditing standards, clients' needs for attorney counsel, investigation, and analysis is greater than ever before. Yet both in-house counsel and attorneys in private practice have expressed wariness "of providing complete assessments of future legal trouble in a variety of areas, from product-liability litigation to patent disputes." Amir Efrati, *Rule in Tax-Auditing Case Puts Corporations on Edge*, WALL ST. J., Aug. 20, 2009. Other commentators have noted concern that adversaries "in any sort of litigation may seek to discover the opposing party's analysis of the business risks of the litigation, including the amount set aside in a litigation reserve fund." Nancy T. Bowen, William S. Lee & Robert C. Morris, *Newly Minted 'For Use In Possible Litigation' Test of* 'Textron' *May Have Far-Reaching Implications for Companies*, 78 U.S. L. Wk. 2199 (Oct. 13, 2009).

If clients are penalized by having to disclose their attorneys' assessments of litigation risks on the ground that this work product was created for a business purpose as well as "in anticipation of

litigation," they will become guarded in deciding how they will rely upon their lawyers. This result inevitably would "threaten to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392 (concerning the attorney-client privilege). *See also United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996) (the "valuable service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into ... informants").[6]

Clearly, the current circuit conflict has created an uncertain environment for attorneys practicing in a variety of business contexts. Further, because the scope of the attorney work product privilege depends on the jurisdiction in which a dispute arises or discovery is sought, attorneys with clients who conduct multi-jurisdictional activities may need to advise those clients to adopt the narrowest interpretation of the privilege that has been established in any jurisdiction in which they may be

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[6] *See also* ABA SECTION ON ANTITRUST LAW, COMMENTS OF THE ABA'S SECTION OF ANTITRUST LAW ON THE PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES FOR ORGANIZATIONS 5-7 (2005), *available at* http://www.abanet.org/antitrust/at-comments/2005/03-05/ussg-com-05.pdf (need to preserve work product privilege to allow lawyers to assist clients in complying with the law); Thomas Wilson, *The Work Product Doctrine: Why Have an Ordinary Course of Business Exception?*, 1988 COLUM. BUS. REV. 587, 587 (narrow construction of work product privilege "penalizes businesses that prudently investigate after incidents which may cause future liability").

subject to discovery or haled into court. Meanwhile, the attorneys themselves may be in the untenable position of deciding whether to create work product when it may be privileged in one jurisdiction but not in another.

This and other consequences of the circuit split significantly affect the ability of attorneys to provide their clients with full, effective legal counsel and the informed guidance that may be necessary to enable them to comply with their legal responsibilities in today's business environment. As Justice Jackson stated in his concurrence in *Hickman*:

> The primary effect of the practice advocated here [of permitting discovery of attorney work product] would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensible parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice . . . secondarily but certainly.

329 U.S. at 514-15 (Jackson, J., concurring).

CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association requests that the petition for writ of certiorari to the Court of Appeals for the First Circuit in *Textron v. United States* be granted.

Respectfully submitted,

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