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IRS Fraud Investigations: Taxing the Work Product Doctrine

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IRS FRAUD INVESTIGATIONS: TAXING THE WORK PRODUCT DOCTRINE

INTRODUCTION

One of the most perplexing and far-reaching aspects of a potential tax fraud case involves the federal government's desire to procure information prepared by the taxpayer's attorney in anticipation of possible litigation.[1] Such information may be factual in nature,[2] or may consist of mental impressions, conclusions and legal theories of the attorney,[3] or may be a combination of both.[4] The government may try to obtain this information through pre-trial discovery procedures with respect to a pending civil[5] or criminal[6] action involving tax fraud. More recently, the government has sought this information during the investigation stages of fraud cases by utilizing the Commissioner's summons[7] or the grand jury subpoena.[8] Taxpayers' counsel have resisted these efforts, with limited success, on the basis of the "attorney-client privilege"[9] and the "work product" doctrine.[10] Consequently, an irreconcilable conflict between two com-

1. Commenting on a recent decision, *In re* Special Sept. 1978 Grand Jury (II), 640 F.2d 49 (7th Cir. 1980), an attorney viewed the court's position on the work product doctrine as promoting a very dangerous rule which "will have a serious impact on the practice of law." Tybor, *Work-Product Privilege Curbed*, NAT'L L.J. 3, 16 (May 19, 1980). The extent to which a party may inspect documents developed by his opponent in the preparation of a case is perhaps the most troublesome discovery question in any litigation. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2021 (1970). The work product doctrine, defined in note 10 *infra*, has been criticized as producing a jungle of conflicting opinions. *Id.* at §2023 n.1.

2. Work product material other than pure legal opinion is referred to by some courts as ordinary work product. *In re* Subpoena of Murphy, 560 F.2d 326, 334 (8th Cir. 1977); United States v. Bonnell, 483 F. Supp. 1070, 1078, 80-1 U.S.T.C. ¶9170 (D. Minn. 1979). Interview questionnaires and lists of interviewees have been classified as ordinary work product. United States v. Amerada Hess Corp., 619 F.2d 980, 80-1 U.S.T.C. ¶9160 (3d Cir. 1980).

3. This is routinely referred to by the courts as "opinion work product." *See, e.g., In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1231 (3d Cir. 1979). Opinion work product is considered the most sacrosanct of all forms of work product. *Id. See generally* Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333 (1978).

4. If a document contains both ordinary and opinion work product, and the party seeking discovery has made a sufficient showing of necessity to compel disclosure of the ordinary work product but insufficient to require disclosure of the opinion work product, the opinion part may be deleted before relinquishing the document. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1232 (3d Cir. 1979). For a discussion of the showing of necessity required for disclosure of each kind of work product, see notes 30-32 and accompanying text, *infra*.

5. See text accompanying notes 64-91 *infra*.

6. See text accompanying notes 92-98 *infra*.

7. See text accompanying notes 115-152 *infra*.

8. See text accompanying notes 153-191 *infra*.

9. The attorney-client privilege is beyond the scope of this paper. For a discussion distinguishing the attorney-client privilege from the work product doctrine, see text accompanying notes 35-41 *infra*.

10. The work product doctrine provides a qualified immunity from pre-trial discovery for documents and other tangibles prepared by or for counsel in anticipation of litigation or for trial. FED. R. CIV. P. 26(b)(3).

peting policy considerations has developed which remains unresolved by the courts. The availability of broad discovery methods, insuring efficient operation of the adversary system,[11] must be balanced against the protection of an attorney's independent trial preparation, or work product.[12]

In the context of tax fraud litigation, the work product doctrine is further complicated by the following factors. First, civil and criminal tax fraud cases are governed by different discovery and work product rules.[13] Second, if the litigation involves the civil fraud penalty,[14] the applicable work product rule is determined by the forum the taxpayer chooses to oppose the fraud charge.[15] The Tax Court, Court of Claims and federal district courts have different rules of procedure.[16] Third, and perhaps of greatest significance, is the split in the federal courts[17] over the availability of the work product doctrine as a shield against compliance with an administrative summons or a grand jury subpoena.[18] The United States Supreme Court has not yet taken a stand on this issue.[19]

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11. "Discovery makes it possible for one side to appropriate the product of the opposing party's efforts to marshal evidence for trial . . . [which] can reveal the attorney's legal strategy, his intended lines of proof, and sometimes his evaluation of the strengths and weaknesses of his case." F. JAMES AND G. HAZARD, CIVIL PROCEDURE §6.10 (2d ed. 1977). *See also* text accompanying notes 46-47 *infra*.

12. "[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." Hickman v. Taylor, 329 U.S. 495, 512 (1947). See text accompanying notes 48-49 *infra*.

13. See text accompanying notes 64-99 *infra*.

14. See text accompanying notes 64-91 *infra*.

15. The taxpayer may dispute the civil fraud penalty in the Tax Court before tendering payment. Alternatively, the taxpayer may pay the penalty and litigate the issue in the federal district court or the Court of Claims. See notes 72-76 and accompanying text, *infra*. For choice of forum considerations in general, see Crampton, *Forum Shopping*, 31 TAX LAW. 321 (1978).

16. See text accompanying notes 77-91 *infra*.

17. As to grand jury proceedings most courts agree that the work product doctrine is available to preclude disclosure. *See, e.g., In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979); *In re* Grand Jury Subpoena (General Counsel, John Doe, Inc.), 599 F.2d 504, 79-1 U.S.T.C. ¶9405 (2d Cir. 1979); *In re* Subpoena of Murphy, 560 F.2d 323 (8th Cir. 1977); *In re* Grand Jury Proceedings (Duffy), 473 F.2d 840 (8th Cir. 1973); *In re* Grand Jury Subpoena Duces Tecum (Rice), 483 F. Supp. 1085, 80-1 U.S.T.C. ¶9178 (D. Minn. 1979); *In re* Grand Jury Proceedings, 73 F.R.D. 647 (M.D. Fla. 1977); *In re* Grand Jury Investigation (Sturgis), 412 F. Supp. 943 (E.D. Pa. 1976); *In re* Rosenbaum, 401 F. Supp. 807 (S.D.N.Y. 1975); *In re* Terkeltoub, 256 F. Supp. 683 (S.D.N.Y. 1966). *Cf.* United States v. Nobles, 422 U.S. 225, 238 n.12 (1975). But the courts are split on whether or not the work product doctrine is applicable to IRS summonses. *See, e.g.*, United States v. Upjohn Co., 600 F.2d 1223, 79-2 U.S.T.C. ¶9457 (6th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3594 (March 18, 1980), and United States v. McKay, 372 F.2d 174, 67-1 U.S.T.C. ¶12,449 (5th Cir. 1967), which held that work product was not applicable in summons enforcement proceedings. *Contra*, United States v. Amerada Hess Corp., 619 F.2d 980, 80-1 U.S.T.C. ¶9160 (3d Cir. 1980); United States v. Brown, 478 F.2d 1038, 73-1 U.S.T.C. ¶9427 (7th Cir. 1973); United States v. Bonnell, 483 F. Supp. 1070, 80-1 U.S.T.C. ¶9170 (D. Minn. 1979); United States v. Lipshy, 79-2 U.S.T.C. ¶9628 (N.D. Tex. 1979).

18. See text accompanying notes 100-114 *infra*.

19. *United States v. Upjohn Co.* is currently pending before the United States Supreme

The current controversy regarding the work product doctrine is typically triggered by an internal corporate investigation.[20] Large corporations, increasingly concerned over possible illegal payments to foreign governments and officials during contract negotiations,[21] have initiated internal investigations into these matters. The corporation may utilize inside or outside attorneys to investigate its practices and determine possible exposure to future litigation, including federal and state securities law violations or shareholder derivative suits. Frequently, limited disclosure is made to the Securities and Exchange Commission under a voluntary disclosure program.[22] Any payments to foreign governments or officials that were deducted as ordinary and necessary business expenses under section 162 of the Internal Revenue Code, would become nondeductible if found to be illegal bribes or kickbacks.[23] Information on these payments is thus of great interest to the Internal Revenue Service (IRS). Accordingly, the Commissioner's summons, or a grand jury subpoena in criminal investigations, has been utilized to obtain corporations' investigation reports, resulting in considerable litigation over the discoverability of these reports.[24]

After disccussing the work product doctrine in general, this paper will examine the various discovery procedures and correlative work product exceptions available in tax fraud litigation. Particular attention will focus on the work product doctrine as a viable defense to the enforcement of the Commissioner's administrative summons and the grand jury subpoena. Finally, recommendations to protect an attorney's work product during a tax fraud investigation will be proposed.

THE WORK PRODUCT DOCTRINE — IN GENERAL

Traditionally, the work product doctrine has afforded attorneys qualified protection against the broad pre-trial discovery available in civil litigation. The doctrine is based on an English equivalent and is derived from common

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Court (oral arguments were heard on November 5, 1980). One of the questions certified is whether the work product of attorneys prepared in contemplation of possible litigation is protected against involuntary disclosure in response to an IRS summons. 48 U.S.L.W. 3594 (March 18, 1980). On brief, the government conceded that the work product doctrine was applicable to IRS summons enforcement proceedings. Nevertheless, the government asserted that the summons should be enforced because the requisite showing of need had been established. Brief for respondent at 48, United States v. Upjohn Co., 48 U.S.L.W. 3594 (March 18, 1980).

20. *See generally* Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel*, 35 BUS. LAW. 5 (1979).

21. See Foreign Corrupt Practices Act of 1977, 15 U.S.C. §78m(b)(2) (Supp. I 1980).

22. *See Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices*, 94th Cong., 2d Sess., 6-13 (May 1976).

23. I.R.C. §162(c) provides: "[n]o deduction shall be allowed under subsection (a) for any payment made, directly or indirectly, to an official or employee of any government, or of any agency or instrumentality of any government, if the payment constitutes an illegal bribe or kickback or, if the payment is to an official or employee of a foreign government, the payment would be unlawful under the laws of the United States if such laws were applicable to such payment and to such official or employee."

24. See text accompanying notes 115-152 *infra*.

law.[25] In 1947, work product protection was formulated as an American rule by the United States Supreme Court in the landmark case, *Hickman v. Taylor*.[26] The *Hickman* decision was later codified in rule 26(b)(3) of the Federal Rules of Civil Procedure. It is unclear whether work product is properly classified as a privilege or an immunity from discovery.[27] Courts have recognized two types of work product: (1) statements or documents prepared by or for counsel which contain factual information,[28] and (2) mental impressions and legal opinions of the attorney, known as "opinion work product."[29] Work product is considered a qualified protection because disclosure is compelled upon the requisite showing of necessity.[30] A greater showing of necessity is required to obtain an attorney's opinion work product,[31] and there is some authority indicating that opinion work product is absolutely protected.[32] The work product doctrine may be waived[33] and, therefore, disclosure obtained without the prerequisite showing of necessity. The Supreme Court recently extended protection of work product to criminal prosecutions in *United States v. Nobles*.[34]

Although the attorney-client privilege is beyond the scope of this paper, it is important to distinguish work product from the attorney-client privilege because they tend to be overlapping concepts.[35] The attorney-client privilege extends to legal advice sought from a professional legal advisor in his capacity as such. Such communications made in confidence by the client are permanently protected from disclosure by himself or by the legal advisor, unless this protection is waived.[36] The attorney-client privilege, limited to communications between client and attorney, is narrower than the protection afforded work product,[37] which precludes disclosure of a myriad of non-client and non-attorney communications.[38] In addition, the courts tend to narrowly construe

25. Hickman v. Taylor, 329 U.S. 495, 510 n.9 (1947).

26. 329 U.S. 495 (1947).

27. C. WRIGHT & A. MILLER, *supra* note 1, §2025.

28. See note 2 *supra*.

29. See note 3 *supra*.

30. 329 U.S. at 511; FED. R. CIV. P. 26(b)(3). *E.g.*, United States v. Amerada Hess Corp., 619 F.2d 980, 80-1 U.S.T.C. ¶9160 (3d Cir. 1980); United States v. Brown, 478 F.2d 1038, 73-1 U.S.T.C. ¶9427 (7th Cir. 1973).

31. 329 U.S. at 512 (rare situation justifying production of opinion work product). FED. R. CIV. P. 26(b)(3) states: "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

32. *E.g., In re* Grand Jury Proceedings (Duffy), 473 F.2d 840, 848 (8th Cir. 1973); United States v. Bonnell, 483 F. Supp. 1070, 1078, 80-1 U.S.T.C. ¶9170 (D. Minn. 1979); *In re* Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 949 (E. D. Pa. 1976).

33. United States v. Nobles, 422 U.S. 225, 239 (1975) (testimonial use of work product constituted waiver).

34. 422 U.S. 225, 236 (1975).

35. Although the attorney-client privilege and the work product doctrine spring from similar common law origin, under contemporary law work product is a separate doctrine, and broader than the attorney-client privilege. *In re* Subpoena of Murphy, 560 F.2d 326, 337 (8th Cir. 1977).

36. 8 J. WIGMORE, EVIDENCE §2292 (McNaugton rev. ed. 1961).

37. 422 U.S. at 238 n.11; *In re* Subpoena of Murphy, 560 F.2d 326, 337 (8th Cir. 1977).

38. 422 U.S. at 238-39.

the scope of the attorney-client privilege because it provides an absolute bar to trustworthy evidence.[39] Thus, work product is a valuable fail-safe device when used in conjunction with the attorney-client privilege to protect against disclosure of non-privileged information. Another advantage of work product is that it may be asserted by either the client or the attorney,[40] whereas the attorney-client privilege may be claimed only by the client.[41]

In response to the broad discovery methods of the Federal Rules of Civil Procedure, the Supreme Court developed the attorney work product rule in *Hickman v. Taylor*[42] to limit pre-trial discovery to conform with traditional notions of adversary competition. *Hickman* involved a suit against the owners of a tugboat for the death of a crew member who drowned when the tug sank. Through the use of interrogatories, the plaintiff attempted to procure, as a matter of right, the production of oral and written statements of witnesses, including the attorney's notes and mental impressions, gathered by the defendant's counsel in preparation for possible litigation.[43] The plaintiff's attorney requested the material to prepare for the examination of witnesses and to ensure a comprehensive investigation.[44]

In determining the permissible bounds of discovery, the *Hickman* Court examined the conflicting policy considerations and concluded that a balancing of these policies was required.[45] The Court stated that the purpose of pre-trial discovery was to enable the parties to uncover the true facts, thereby promoting full and adequate trial preparation and judicial economy.[46] Consequently, mutual knowledge of all relevant facts was viewed as an essential ingredient of proper litigation.[47] Of greater importance to the *Hickman* Court, however, was the historical role of attorneys in our system of jurisprudence as promoters of justice and protectors of their clients' interest.[48] In the performance of his various duties, a lawyer must be permitted to work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.[49] Accordingly, the work product of the attorney in *Hickman* was held outside the limits of discovery absent a legitimate need for the information.[50]

Subsequent to the *Hickman* decision, the federal courts dealt with work product on a case-by-case basis, yielding inconsistent results.[51] Rule 26(b)(3),[52]

39. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1235 (3d Cir. 1979).

40. FED. R. CIV. P. 26(b)(3); *In re* Grand Jury Proceedings (FMC Corp.), 604 F.2d 798 (3d Cir. 1979).

41. Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967). *See* J. WIGMORE, *supra* note 36, §2321.

42. 329 U.S. 495.

43. *Id.* at 498-99.

44. *Id.* at 513. Apparently, the information the petitioner sought was readily available from other sources. *Id.* at 509. The Court suggested that production might be justified where the witnesses are no longer available or can be reached only with difficulty. *Id.* at 511.

45. *Id.* at 497.

46. *Id.* at 506-07.

47. *Id.* at 507.

48. *Id.* at 511.

49. *Id.* at 510-16.

50. *Id.* at 513.

51. C. WRIGHT & A. MILLER, *supra* note 1, §2022.

enacted in 1970, clarified much of the confusion generated during the post-*Hickman* period and expanded the work product doctrine to a limited extent.[53] Material protected from discovery by rule 26(b)(3) included documents or other tangible things prepared in anticipation of litigation or for trial by or for another party or his representative. The fact that the particular litigation has not formally commenced is not determinative. Protection from discovery is warranted if the material was prepared with a view toward potential litigation,[54] although the litigation cannot be so remote or speculative that it is considered unlikely.[55] Documents produced in the regular course of business do not constitute work product. Documents prepared by non-lawyers for the proper purpose, however, are considered work product.[57] For example, an accountant's workpapers prepared for counsel in anticipation of potential tax fraud litigation would be protected as work product.[58] There is conflicting authority concerning whether or not work product can be discovered after termination of the litigation for which it was prepared.[59]

52. FED. R. CIV. P. 26(b)(3) reads: "*Trial Preparation: Materials.* Subject to the provisions of subdivision (b) (4) of this rule [relating to experts], a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

53. C. WRIGHT & A. MILLER, *supra* note 1, §2023.

54. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1229 (3d Cir. 1979); *In re* Grand Jury Proceedings (Duffy), 473 F.2d 840, 847 (8th Cir. 1973); United States v. Lipshy, 492 F. Supp. 35, 79-2 U.S.T.C. ¶9628 (N.D. Tex. 1979); *In re* Grand Jury Proceedings, 73 F.R.D. 647, 653 (M.D. Fla. 1977). "Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus, the test should be 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." C. WRIGHT & A. MILLER, *supra* note 1, §2024.

55. Diversified Indus., Inc. v. Meridith, 572 F.2d 596, 604 (8th Cir. 1977). The threat of litigation must be real and imminent. *In re* Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 948 (E.D. Pa. 1976). *But see* United States v. Bonnell, 483 F. Supp. 1070, 1078, 80-1 U.S.T.C. ¶9170 (D. Minn. 1979) (litigation need only be a reasonable possibility for application of the work product doctrine).

56. *In re* Grand Jury Subpoena (General Counsel, John Doe, Inc.), 599 F.2d 504, 510-11, 79-1 U.S.T.C. ¶9405 (2d Cir. 1979).

57. United States v. Nobles, 422 U.S. 225, 239 (1975). *See also* 4 J. MOORE, FEDERAL PRACTICE ¶26.62[8] (2d ed. 1974).

58. *In re* Grand Jury Subpoena (General Counsel, John Doe, Inc.), 599 F.2d 504, 513, 79-1 U.S.T.C. ¶9405 (2d Cir. 1979).

59. The Eighth Circuit has held that the protection afforded work product is perpetual, extending beyond the termination of litigation for which the documents were prepared regardless of whether or not the later litigation involves unrelated issues. *In re* Subpoena of Murphy, 560 F.2d 326, 334-35 (8th Cir. 1977). The rule was applied equally to ordinary and opinion work product. *Id.* at 335 n.16. *See also* Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480 (4th Cir. 1973), *appeal after remand*, 509 F.2d 730 (4th Cir. 1974),

Work product may consist of "interviews, statements, memoranda, correspondence, briefs, mental impressions, (and) personal beliefs."[60] The work product rule does not, however, protect against compelled oral disclosure of information, not otherwise privileged, within one's personal knowledge as a result of exposure to work product materials.[61]

Rule 26(b)(3) provides that an attorney's work product is subject to discovery only if substantial need and undue hardship are shown.[62] The decisions considering what constitutes a sufficient showing to overcome the work product rule are not readily susceptible to generalization,[63] and will be discussed in the context of tax fraud litigation later in this paper.

THE CIVIL FRAUD PENALTY

Under section 6653(b) of the Internal Revenue Code, a civil penalty of fifty percent of the total tax underpayment may be assessed if any portion of the underpayment is due to fraud.[64] This is a significant weapon for the IRS to use against recalcitrant taxpayers.[65] For example, in a situation involving a $615,000 underpayment, of which $15,000 results from fraud, the civil fraud penalty would amount to $307,500.[66] A finding of fraud requires proof of specific intent to evade payment of tax,[67] that is, an intentional violation of a known legal duty.[68] If convicted of fraud in a criminal action, the taxpayer is generally held

cert. denied, 420 U.S. 997 (1975). *But see In re* Grand Jury Proceedings, 73 F.R.D. 647 (M.D. Fla. 1977) (work product materials prepared for a distinct and prior completed criminal litigation, were discoverable since the policies underlying work product regarding those documents had already been achieved).

60. Hickman v. Taylor, 329 U.S. at 511.

61. C. WRIGHT & A. MILLER, *supra* note 1, §2023.

62. FED. R. CIV. P. 26(b)(3) reads in part: "[O]nly upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

63. C. WRIGHT & A. MILLER, *supra* note 1, §2025.

64. I.R.C. §6653(b) reads: "Fraud — If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment." I.R.C. §6653(c) defines underpayment of income, estate or gift taxes as a §6211 deficiency modified to take into account only tax shown on a timely filed return. I.R.C. §6653(c)(1). *See generally* H. BALTER, TAX FRAUD AND EVASION ¶8.03 (4th ed. 1976); 10 J. MERTENS, LAW OF FEDERAL INCOME TAXATION §§55.09-.18 (rev. ed. 1976).

65. The civil fraud penalty applies to corporations. United States v. Auerbach Shoe Co., 216 F.2d 693, 54-2 U.S.T.C. ¶9673 (1st Cir. 1954); Irving S. Federbush, 34 T.C. 740 (1960).

66. While this may seem to be an extreme example, similar facts were present in United States v. Lowry, 61-1 U.S.T.C. ¶9350 (2d Cir. 1961).

67. The civil fraud penalty will be imposed in situations involving intent to evade tax by fraudulent acts. Rev. Rul. 56-54, 1956-1 C.B. 654. The term "fraud" is not defined in the Internal Revenue Code and courts have generally refused to develop a definition; instead, courts examine a variety of factors or "badges of fraud." H. BALTER, *supra* note 54, ¶8.03(9); J. MERTENS, *supra* note 64, §55.10.

68. This is the wilfulness standard required in criminal fraud cases. *See* United States v. Pomponio, 429 U.S. 10 (1976). The standard of proof in a civil fraud case is "clear and convincing evidence" rather than beyond a reasonable doubt required in criminal cases. Lawrence Sunbrook, 48 T.C. 55 (1967).

to be collaterally estopped from denying fraud in a subsequent civil suit.[69]

The civil fraud penalty is assessed and collected by the IRS[70] in the same manner as tax deficiencies.[71] The taxpayer can seek a redetermination of tax liability by the Tax Court before paying the penalty.[72] Alternatively, the taxpayer has the option of paying the tax and filing a claim for refund.[73] When the refund claim is denied by the IRS,[74] the taxpayer may sue for reimbursement in the appropriate federal district court or the Court of Claims.[75] Because the rules of procedure applicable to the Tax Court, Court of Claims and federal district courts differ,[76] particularly with regard to discovery, the protection of work product material varies with each court.

Tax Court

Tax Court Rule of Practice and Procedure 70(b) provides that discovery may concern any unpriviliged matter relevant to the subject matter of the pending case.[77] The note to rule 70(b) indicates that the general scope of discovery permissible in Tax Court proceedings is intended to parallel the Fed-

69. Worcester v. Commissioner, 370 F.2d 713 (1st Cir. 1966); Kisting v. Commissioner, 298 F.2d 264, 62-1 U.S.T.C. ¶9209 (8th Cir. 1962); Abraham Galant, 26 T.C. 354 (1956); J. Vincent Keogh, 34 T.C.M. 844 (1975). *See also* J. MERTENS, *supra* note 64, §55.18.

70. The civil fraud penalty may be assessed with a deficiency or separately.

71. Once the IRS has determined the civil fraud penalty is due, a notice of deficiency is issued under I.R.C. §6212(a). The taxpayer has 90 days (150 days if the taxpayer is outside the United States) from the date the deficiency notice is mailed to petition the Tax Court for a redetermination. I.R.C. §6213(a). With limited exceptions provided in I.R.C. §§6213(b), 6851, 6861, the IRS is precluded from assessing or collecting the deficiency until the notice of deficiency is mailed to the taxpayer *and* either: (1) the 90/150 day period has expired without petitioning the Tax Court, or (2) the decision of the Tax Court has become final. I.R.C. §6213(a). *See generally* 9 J. MERTENS, *supra* note 64, §§49.126-.138.

72. I.R.C. §6213(a). See note 71 *supra*.

73. I.R.C. §6402(a). A taxpayer must file a claim for refund within the later of (1) three years from date tax return was filed, or (2) two years from date tax was paid. I.R.C. §6511(a). Since section 6653(b) provides that the civil fraud penalty is an "addition to tax," a refund claim could be requested for the penalty. Although a claim for refund filed with IRS would seem illusory in this context, such a claim is the prerequisite for bringing a suit for refund. I.R.C. §7422(a).

74. The taxpayer may sue for a refund within two years from date notice of disallowance was mailed, or, if no decision is rendered by the IRS, after the expiration of six months from the date the claim was filed. I.R.C. §6532(a).

75. 28 U.S.C. §1346 (Supp. I 1979).

76. The Federal Rules of Civil Procedure apply to federal district courts; the Tax Court and Court of Claims have adopted their own rules of practice and procedure.

77. U.S.T.C.R. PRAC. & P. 70(b), in relevent part, reads: "*Scope of discovery.* The information or response sought through discovery may concern any matter not privileged which is relevant to the subject matter involved in the pending case. It is not ground for objection that the information or response sought will be inadmissible at the trial, if that information or response appears reasonably calculated to lead to discovery of admissible evidence, regardless of the burden of proof involved. If the information or response sought is otherwise proper, it is not objectionable merely because the information or response involves an opinion or contention that relates to fact or the application of law to fact." For a history of pre-trial discovery in the Tax Court, see Cook & Dubroff, *The United States Tax Court: A Historical Analysis*, 42 ALBANY L. REV. 161, 182-90 (1978).

eral Rules of Civil Procedure with certain exceptions.[78] One such exception relates to work product:

> The other areas, *i.e.*, the "work product" of counsel and material prepared in anticipation of litigation or for trial, are generally intended to be outside the scope of allowable discovery under these Rules, and therefore the specific provisions for disclosure of such materials in F.R.C.P. 26(b)(3) have not been adopted.

Thus, work product materials are absolutely protected from discovery under the Tax Court rules.[80] As a result, the Tax Court tends to narrowly construe what constitutes work product by limiting the scope of material "prepared in anticipation of litigation."[81] The litigation to date has involved taxpayers seeking discovery of government documents, such as the reports of special agents and appellate conferees,[82] which have been held not to constitute attorney work product.

Court of Claims

The discovery procedures of the Court of Claims are broader than those available in the Tax Court, but more restrictive than those in federal district courts.[83] Frequently, the party seeking discovery must obtain approval from the court as many discovery matters are discretionary.[84] The scope of discovery in the Court of Claims includes any unprivileged matter which is relevant to the subject matter of the pending action.[85] Although the Court of Claims does not seem to have addressed the work product doctrine to date, the court has applied the attorney-client privilege to protect from disclosure legal or advisory opinions of a taxpayer's attorney in connection with a refund suit involving section 957 of the Internal Revenue Code.[86] Conceptually, protection of work product would be afforded in the Court of Claims as material qualifiedly privileged and not discoverable unless good cause is shown as provided in rule 71(a)(2).[87]

78. George R. Lauve, 70 T.C. 1098 (1978).

79. *Id.*

80. Branerton Corp., 64 T.C. 191, 198 (1975). If materials are not work product, they are discoverable as a matter of right, even though opinions, mental impressions, reasonings, or conclusions may be contained therein. *Id.* at 198-99. *See also* 9 J. MERTENS, *supra* note 64, §50.110.

81. The Tax Court has limited the concept of "prepared in anticipation of litigation" in several cases. *E.g.*, Branerton Corp., 64 T.C. 191 (1975). *See generally* Newton, *The United States Tax Court — Should Discovery be Expanded*, 33 U. MIAMI L. REV. 611 (1979).

82. Branerton Corp., 64 T.C. 191 (1975); Nena L. Matau Dvorak, 64 T.C. 846 (1975); P.T. & L. Constr. Co., 63 T.C. 404 (1974). *Cf.* Saul Zaentz, 73 T.C. 469 (1979) (statement of legal authorities relied on by the Commissioner within the category of work product).

83. Newton, *supra* note 81, at 626-28.

84. CT. CL. R. 71(a)(2). Except for interrogatories, discovery may be utilized only by leave of court upon a showing of good cause. *Id.*

85. CT. CL. R. 71(b)(1).

86. Ampex Corp. v. United States, 207 Ct. Cl. 1014, 75-2 U.S.T.C. ¶9600 (1975).

87. *See* Centron Elec. Corp. v. United States, 207 Ct. Cl. 885 (1975) (opinions, conclusions and recommendations are not protected against discovery when relevance and need are shown).

Federal District Courts

The Federal Rules of Civil Procedure apply to civil litigation in district courts. Thus, the earlier discussion of general work product law sets forth the standards applicable to civil tax fraud cases in district courts.[88] Illustrative of the government's good cause requirement is *United States v. Brown*,[89] in which the IRS sought disclosure of a memorandum summarizing notes and legal judgements of the taxpayer's attorney made at a meeting with the taxpayer's representative and accountant. The court found that the government had shown the requisite good cause by expressing a good faith belief that the document was necessary for a correct determination of the taxpayer's liabilities and that the information could not be obtained from any other source.[90] Under this standard it is apparent that the necessity requirement is not as significant a hurdle for the government in tax cases as it is for other civil litigants.[91]

In summary, three distinct work product rules apply to civil tax fraud cases. The Tax Court provides absolute protection against disclosure of an attorney's work product. The Court of Claims offers an intermediate level of protection requiring at least a showing of good cause to compel disclosure of work product. The least protection is afforded by the federal district courts which have established only a weak requirement of good cause.

CRIMINAL TAX FRAUD

A panoply of criminal sanctions exist to prosecute violations of the tax laws. Some are contained directly in the Internal Revenue Code,[92] while others are found in the general provisions of the federal criminal code.[93] The sanctions include both fines and imprisonment for felony or misdemeanor convictions. Criminal tax fraud violations are prosecuted in the federal district court by the United States Attorney General or the Department of Justice upon recommendation of the Intelligence Division of IRS.[94] Thus, the Federal Rules of Criminal Procedure apply to prosecutions for criminal tax fraud violations.

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88. See text accompanying notes 25-63 *supra*.

89. 478 F.2d 1038, 73-1 U.S.T.C. ¶9427 (7th Cir. 1973).

90. *Id.* at 1041.

91. United States v. Lipshy, 492 F. Supp. 35, 79-2 U.S.T.C. ¶9628 (N.D. Tex. 1979).

92. I.R.C. §7201 (attempt to evade or defeat tax); I.R.C. §7202 (willful failure to collect or pay over tax); I.R.C. §7203 (willful failure to file return, supply information, or pay tax); I.R.C. §7204 (fraudulent statement or failure to make statement to employees); I.R.C. §7205 (fraudulent withholding exemption certificate or failure to supply information); I.R.C. §7206 (fraud and false statements); I.R.C. §7207 (fraudulent returns, statements, or other documents); I.R.C. §§7208-7209 (offenses relating to stamps); I.R.C. §7210 (failure to obey summons); I.R.C. §7211 (certain false statements); I.R.C. §7212 (interference with the administration of internal revenue laws); and miscellaneous other offenses listed in I.R.C. §§7214-7217. *See generally* H. BALTER, *supra* note 64, ¶11.03; 9 J. MERTENS, *supra* note 64, §§55A.01-.36.

93. 18 U.S.C. §371 (1976) (conspiracy to defraud the United States); 18 U.S.C. §1001 (1976) (fake claims and false statements); 18 U.S.C. §1505 (1976) (obstruction of proper administration of justice); 18 U.S.C. §1621 (1976) (perjury).

94. 18 U.S.C. §1 (1976). *See* SPECIAL AGENT'S MANUAL §625 (1977).

Rule 16 specifically prohibits discovery of work product material by either the Government or the defendant.[95]

In *United States v. Nobles*,[96] the United States Supreme Court determined that the work product doctrine applied to criminal as well as civil cases. The Court noted that the policy considerations regarding the protection of work product were even more compelling in the criminal setting. Justice Powell, speaking for the majority stated: "The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."[97] Although the investigation report sought to be discovered in *Nobles* was found to be work product material, the Court concluded that the protection had been waived.[98]

An interesting but unresolved issue was posited by the decision in *Nobles*. The Court noted that rule 16 of the Federal Rules of Criminal Procedure was limited to matters involving discovery *before* trial and recognized the possibility that the permissible scope of discovery *during* trial might be governed by different standards.[99] Thus, it is conceivable that the Supreme Court may view discovery during the government's pre-trial investigation differently than discovery after litigation has commenced.

THE INVESTIGATION PROCESS

With increasing frequency, agencies of the federal government are seeking information from attorneys during the government's investigation of a client for possible civil and criminal violations of federal law.[100] If the attorney believes the material is privileged or protected as work product and refuses production, an administrative summons or grand jury subpoena may be used to compel disclosure. Thus, federal courts have been asked to determine the applicability of the work product doctrine outside of the traditional context of pre-trial discovery during a pending civil or criminal action. Diverse conclusions have been reached with regard to this novel issue.[101] Some clarification may be forthcoming from the Supreme Court, however, because one of the

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95. FED. R. CRIM. P. 16(b), (c). *See generally* Miller, *The Corporate Attorney-Client Privilege and the Work Product Doctrine: Protection from Compelled Disclosure in Criminal Investigations of a Corporation*, 12 U.S.F.L. REV. 569 (1978); Note, *"Work Product" in Criminal Discovery*, 1966 WASH. U.L.Q. 321.

96. 422 U.S. 224 (1975).

97. *Id.* at 238.

98. *Id.* at 239 (testimonial use of work product materials constituted a waiver of protection).

99. *Id.* at 236. The Nobles Court reasoned that FED. R. CRIM. P. 16 prohibited pre-trial discovery of work product but did not limit the broad discretion of the judge *at trial* as to evidentiary matters. *Id.* Even the *Hickman* Court recognized the need to disclose work product for impeachment purposes. 329 U.S. at 511.

100. This is particularly true of the Federal Trade Commission, Securities and Exchange Commission, and Internal Revenue Service.

101. *Compare* United States v. Upjohn Co., 600 F.2d 1223, 79-2 U.S.T.C. ¶9457 (6th Cir. 1979) *with In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979) *and* United States v. Brown, 478 F.2d 1038, 73-1 U.S.T.C. ¶9427 (7th Cir. 1973).

questions pending in *Upjohn Co. v. United States*[102] relates to the availability of work product to defeat an IRS summons.

Although a few cases have involved federal investigations of alleged criminal activity,[103] most recent cases concern internal investigations by corporations regarding possible corporate illegal payments.[104] Administrative agencies including the IRS desire a copy of the investigation report, usually prepared by outside counsel, as a means to short-cut the government's investigation. Understandably, the courts have found the balancing of competing interests to be particularly delicate and difficult under these circumstances.

While some decisions have focused on the requirement of material "prepared in anticipation of litigation,"[105] most courts are concerned with the showing of necessity that must be established by the government to overcome the work product doctrine.[106] The distinction between ordinary work product, which include questionnaires,[107] lists of interviewees,[108] reports prepared by non-lawyer investigators or accountants,[109] and opinion work product, which encompasses the mental impressions, conclusions, opinions and legal theories of the attorney contained in notes, memoranda, and reports,[110] has continued. Ordinary work product is discoverable if the dual standard of substantial need

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102. 600 F.2d 1223, 79-2 U.S.T.C. ¶9457 (6th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3594 (March 18, 1980). See note 19 *supra*.

103. *E.g.*, *In re* Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933 (6th Cir. 1980) (alleged false, fictitious or fraudulent statements to the Food and Drug Administration); *In re* Grand Jury Proceedings, 73 F.R.D. 647 (M.D. Fla. 1977) (undisclosed "serious allegations of grave criminal activity"); *In re* Grand Jury Investigation (Sturgis), 412 F. Supp. 943 (E.D. Pa. 1976) (alleged cover up by bank officials of violations of federal law); *In re* Grand Jury Subpoena (Rosenbaum), 401 F. Supp. 807 (S.D.N.Y. 1975) (obstruction of justice); *In re* Terkeltoub, 256 F. Supp. 683 (S.D.N.Y. 1966) (perjury).

104. *In re* Special Sept. 1978 Grand Jury (II), 646 F.2d 49 (7th Cir. 1980); United States v. Amerada Hess Corp., 619 F.2d 980, 80-1 U.S.T.C. ¶9160 (3rd Cir. 1980); *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979); *In re* Grand Jury Subpoena (General Counsel, John Doe, Inc.), 599 F.2d 504, 79-1 U.S.T.C. ¶9405 (2d Cir. 1979); United States v. Upjohn Co., 600 F.2d 1223, 79-2 U.S.T.C. ¶9457 (6th Cir. 1979); *In re* Grand Jury Proceedings (Duffy), 473 F.2d 840 (8th Cir. 1973); *In re* Grand Jury Subpoena Duces Tecum (Rice), 483 F. Supp. 1085, 80-1 U.S.T.C. ¶9178 (D. Minn. 1979); United States v. Bonnell, 483 F. Supp. 1070, 80-1 U.S.T.C. ¶9170 (D. Minn. 1979); United States v. Lipshy, 492 F. Supp. 35, 79-2 U.S.T.C. ¶9628 (N.D. Tex. 1979).

105. *In re* Grand Jury Subpoena (General Counsel, John Doe, Inc.), 599 F.2d 504, 79-1 U.S.T.C. ¶9405 (2d Cir. 1979); Diversified Ind., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977); United States v. Heiberger, 76-1 U.S.T.C. ¶9366 (D. Conn. 1976).

106. *E.g.*, *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979); United States v. Brown, 478 F.2d 1038, 73-1 U.S.T.C. ¶9427 (7th Cir. 1973); United States v. Upjohn Co., 78-1 U.S.T.C. ¶9277 (W.D. Mich. 1978).

107. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979); *In re* Grand Jury Subpoena (General Counsel, John Doe, Inc.), 599 F.2d 504, 79-1 U.S.T.C. ¶9405 (2d Cir. 1979). *Cf.* United States v. Upjohn Co., 600 F.2d 1223, 79-2 U.S.T.C. ¶9457 (6th Cir. 1979).

108. United States v. Amerada Hess Corp., 619 F.2d 980, 80-1 U.S.T.C. ¶9160 (3d Cir. 1980).

109. *In re* Grand Jury Subpoena (General Counsel, John Doe, Inc.), 599 F.2d 504, 79-1 U.S.T.C. ¶9405 (2d Cir. 1979). *See also* United States v. Nobles, 422 U.S. 225 (1975).

110. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979); United States v. Lipshy, 492 F. Supp. 35, 79-2 U.S.T.C. ¶9628 (N.D. Tex. 1979).

and undue hardship is met.[111] There is a split of authority whether opinion work product is absolutely protected from discovery,[112] or merely "rarely discoverable."[113] Furthermore, a fraud exception to the work product privilege has been recently recognized by a few courts.[114]

The Commissioner's Summons

For purposes of determining the income tax liability of a taxpayer, the IRS has broad authority to examine the relevant books and records of the taxpayer and others.[115] Summons power is provided by statute to assist in these examinations.[116] The person summoned must appear at the designated time and place, produce the materials requested if not privileged, and give testimony under oath.[117] Because of its broad scope, the summons is an important information gathering device for the IRS. The summons, however, is not self-enforcing and compliance must be ordered by a federal district court.[118]

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111. FED. R. CIV. P. 26(b)(3). The Federal Rules of Civil Procedure are clearly applicable to summons enforcement proceedings. United States v. Powell, 379 U.S. 48, 58 n.18, 64-2 U.S.T.C. ¶9858 (1964). At least one court has reasoned a rule similar to FED. R. CIV. P. 26(b)(3) must be applicable to grand jury subpoena enforcement proceedings. *In re* Grand Jury Subpoena (General Counsel, John Doe, Inc.), 599 F.2d 504, 509, 79-1 U.S.T.C. ¶9405 (2d Cir. 1979).

112. *In re* Grand Jury Proceedings (Duffy), 473 F.2d 840, 848 (8th Cir. 1973); United States v. Bonnell, 483 F. Supp. 1070, 1078, 80-1 U.S.T.C. ¶9170 (D. Minn. 1979); *In re* Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 949 (E.D. Pa. 1976).

113. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1231 (3d Cir. 1979); *In re* Subpoena of Murphy, 560 F.2d 326, 337 (8th Cir. 1977).

114. For a discussion of the fraud exception to work product, see text and accompanying notes 189-190 *infra*.

115. I.R.C. §7602, in relevant part reads: "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized — (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry; (2) To summon . . . [see note 116 *infra*]; and (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

The Eighth Circuit noted that "[t]he power of the IRS to investigate the records and affairs of taxpayers has long been characterized as an inquisitorial power, analogous to that of a grand jury, and one which should be liberally construed." United States v. Matras, 487 F.2d 1271, 1274, 73-2 U.S.T.C. ¶9801 (8th Cir. 1973).

116. I.R.C. §7602 (2) reads: "To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath as may be relevant or material to such inquiry."

117. *Id.*

118. I.R.C. §7604. An IRS summons will be enforced upon a showing by the Commissioner that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within his possession, and that the administrative steps required by the Code have been followed. United

The Commissioner's summons has been referred to as a hybrid, neither civil nor criminal in nature.[119] Although the summons is frequently used for a combination of civil and criminal purposes,[120] it cannot be used solely for a criminal purpose.[121] Thus, a summons issued after the IRS has recommended prosecution to the Department of Justice will not be enforced.[122] Since the Federal Rules of Civil Procedure apply to summons enforcement proceedings,[123] it would be logical to conclude that work product protection would likewise be included. The courts, however, have found the work product doctrine problematic in the context of summons enforcement and have reached opposite conclusions in resolving this controversy.[124]

The first court to address this issue was the Fifth Circuit in *United States v. McKay*.[125] The *McKay* court declared that it was doubtful the work product doctrine applied to summonses and determined that in any case the subject appraisal report was not work product because it was not prepared in anticipation of possible litigation.[126] *McKay* was decided before work product was incorporated in rule 26(b)(3) of the Federal Rules of Civil Procedure and may be distinguishable for that reason. Recently, however, the Sixth Circuit agreed with *McKay* in *United States v. Upjohn Co.*[127] A footnote in *Upjohn*, citing cases unrelated to the work product doctrine, summarily dismissed the work product issue[128] as non-applicable to summons enforcement proceedings.[129] Apparently, the *Upjohn* court considered work product protection limited to circumstances involving pre-trial discovery which, of course, does not include

States v. Powell, 379 U.S. 48, 57, 64-2 U.S.T.C ¶9858 (1964). The district court has concurrent jurisdiction with the Tax Court to enforce an administrative summons issued by the IRS. United States v. Rollins, 78-1 U.S.T.C. ¶9432 (D. Del. 1978).

119. United States v. Bonnell, 483 F. Supp. 1070, 1080, 80-1 U.S.T.C. ¶9170 (D. Minn. 1979). *See* United States v. LaSalle Nat'l Bank, 437 U.S. 298, 309, 78-2 U.S.T.C. ¶9501 (1978) (criminal and civil elements of summons are inherently intertwined).

120. United States v. LaSalle Nat'l Bank, 437 U.S. 298, 78-2 U.S.T.C. ¶9501 (1978); Couch v. United States, 409 U.S. 322, 73-1 U.S.T.C. ¶9159 (1973); Donaldson v. United States, 400 U.S. 517, 71-1 U.S.T.C. ¶9173 (1971).

121. United States v. LaSalle Nat'l Bank, 437 U.S. 298, 78-2 U.S.T.C. ¶9501 (1978). *See generally* Nuzum, *LaSalle National Bank and the Judicial Defenses to the Enforcement of an Administrative Summons*, 32 TAX LAW. 383 (1979).

122. *See* Nuzum, *supra* note 121, at 399.

123. United States v. Powell, 379 U.S. 48, 58 n.18, 64-2 U.S.T.C. ¶9858 (1964). However, the application of these rules may be limited by the district court. United States v. May, 76-2 U.S.T.C. ¶9627 (6th Cir. 1976).

124. United States v. Amerada Hess Corp., 619 F.2d 980, 80-1 U.S.T.C. ¶9160 (3d Cir. 1980) (circuit courts are split on whether or not the work product rule applies to IRS investigations). See note 18 *supra*.

125. 372 F.2d 174, 67-1 U.S.T.C. ¶12,449 (5th Cir. 1967).

126. *Id.* at 176.

127. 600 F.2d 1223, 79-2 U.S.T.C. ¶9457 (6th Cir. 1979).

128. The Sixth Circuit found that the attorney-client privilege protected from disclosure communications between the attorney and the corporation's "control group of employees." 600 F.2d 1223, 1227-28, 79-2 U.S.T.C. ¶9457 (6th Cir. 1979).

129. 600 F.2d at 1228 n.13. It is interesting to note that the Sixth Circuit recently recognized the work product doctrine as a defense to the enforcement of a grand jury subpoena in a non-tax investigation. *In re* Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933 (6th Cir. 1980).

the summons stage of an investigation. In contrast, the Third[130] and Seventh[131] Circuits have determined that work product is applicable to summons enforcement proceedings. Reasoning that grand jury subpoenas, which have been uniformly defeated by the work product doctrine, and IRS summonses are closely analogous, they found no reason for a different rule for summons enforcement.[132]

The *Upjohn* case involved an IRS summons requiring production of the files relating to an internal corporate investigation, including questionnaires, memoranda and interview notes.[133] Disclosure was resisted on the grounds that such information was protected under the attorney-client privilege[134] and/or the work product doctrine. The corporation initiated the investigation in response to a report by its auditors that questionable payments had been made to foreign governments.[135] Approximately four million dollars in questionable payments were uncovered by the investigation and Upjohn claimed that only $700,000 affected its tax liability.[136] Seeking an explanation for this discrepancy, the IRS issued a summons to require production of the files relating to the investigation.[137] In response to the summons, Upjohn supplied the IRS with a blank questionnaire and a list of interviewees, but refused further disclosure.[138]

The district court in *Upjohn* found that the attorney-client privilege had been waived as a result of disclosures made to the Securities and Exchange Commission,[139] and that although the materials constituted work product, the Government had met its burden of establishing necessity.[140] The factors considered in deciding whether to compel disclosure were the importance of the requested information and the difficulty the party seeking discovery would face in obtaining substantially equivalent information from other sources if discovery was denied.[141] Because Upjohn refused to allow any of its employees to be interviewed as to the transactions which allegedly had no impact on the income tax return and many of the interviewees were in foreign countries, the district court found the Government had made the requisite showing of necessity.[142] Thus, disclosure was ordered. The Supreme Court granted certiorari in *Upjohn* and both the attorney-client privilege and work product questions

130. United States v. Amerada Hess Corp., 619 F.2d 980, 80-1 U.S.T.C. ¶9160 (3d Cir. 1980).

131. United States v. Brown, 478 F.2d 1038, 73-1 U.S.T.C. ¶9427 (7th Cir. 1973).

132. United States v. Amerada Hess Corp., 619 F.2d 980, 80-1 U.S.T.C. ¶9160 (3d Cir. 1980).

133. See note 18 *supra*.

134. Notably, it is anticipated that the Supreme Court will decide a significant issue regarding the attorney-client privilege for corporate clients in the *Upjohn* case: whether the "subject matter" versus the "control group" test is controlling.

135. 600 F.2d 1223, 1225 (6th Cir. 1979).

136. *Id.*

137. *Id.*

138. *Id.*

139. 78-1 U.S.T.C. ¶9277 (W.D. Mich. 1978).

140. *Id.*

141. *Id.* (quoting Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 43 (D. Md. 1974)).

142. *Id.*

were certified.[143] At least one other court has refused to classify as work product an internal investigation report involving a corporation's slush fund as work product, reasoning that the report was not prepared in anticipation of litigation.[144]

Recently, a federal district court was faced with a factual situation similar to that in *Upjohn*. In *United States v. Lipshy*,[145] a corporation conducted an internal investigation into allegations of illegal political contributions publicly made by a former high-ranking corporate officer. The IRS was conducting an examination of the corporation's tax returns at the time the accusations were made and other litigation was likely if the allegations were true. The court concluded that the report was prepared in anticipation of litigation and was, therefore, work product material.[146] Moreover, the court found the necessity requirement was not satisfied because the IRS showed no more than mere need, and the information was obtainable by other means. Accordingly, the summons requiring production of the internal investigation report was not enforced.

The necessity requirement was satisfied by the IRS, however, in *United States v. Amerada Hess Corp.*[147] In that case, an IRS summons was issued to require production of a list of interviewees. The list was originally attached to a report of an internal investigation into corporate payments to foreign countries. Because the list of interviewees was ordinary work product, a lesser showing of necessity was required to overcome the work product protection. The court stated:

> [T]he application of the [work product] rule depends upon the nature of the document, the extent to which it may directly or indirectly reveal the attorney's mental processes, the likely reliability of its reflection of witness' statements, the degree of danger that it will convert the attorney from advocate to witness, and the degree of availability of the information from other sources.[148]

Since the list of interviewees was viewed as containing minimal substantive content and presented none of the classic dangers addressed by the *Hickman* rule, the Government's purpose of avoiding the time and effort involved in compiling a similar list from other sources constituted a sufficient showing of need.[149]

Similarly, an earlier case enforced an IRS summons requiring the production of an attorney's memorandum summarizing his notes and legal judgments made at a meeting with the taxpayer's representative and accountant.[150] The court decided that the memorandum was work product, but reasoned that the

143. 48 U.S.L.W. 3594 (March 18, 1980). See note 19 *supra*.
144. Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977).
145. 492 F. Supp. 35, 79-2 U.S.T.C. ¶9628 (N.D. Tex. 1979).
146. *Id.* at 45.
147. 619 F.2d 980, 80-1 U.S.T.C. ¶9160 (3d Cir. 1980).
148. *Id.* at 987.
149. *Id.* at 988.
150. United States v. Brown, 478 F.2d 1038, 73-1 U.S.T.C. ¶9427 (7th Cir. 1973).

strong public interest in enforcement of the IRS summons was relevant to the degree of necessity needed to compel disclosure. The Government's good faith belief that the memorandum was necessary for a correct determination of the taxpayer's liabilities and that the contents could not be obtained from any other source was a sufficient showing of necessity to overcome work product protection.[151]

Furthermore, if work product material which would otherwise be protected was disclosed to the IRS by an informant, the Government could use the information to seek other non-privileged information. Therefore, non-privileged "fruits" of work product have been held discoverable although the work product document itself would not have been.[152]

Grand Jury Investigations

Grand juries have inherently broad investigatory power to examine criminal violations of the law.[153] A grand jury is authorized to subpoena witnesses to testify and produce books, papers, documents and other objects.[154] In general, every witness that appears before the grand jury must testify as to everything he or she knows.[155] Several federal courts have recognized work product as an exception to this general rule.[156] Work product in grand jury proceedings has been declared "essentially coextensive with the work product doctrine applicable to civil discovery."[157] Documents prepared for previous unrelated litigation remain protected by the work product doctrine,[158] unless there is a strong showing to overcome the policy considerations favoring the doctrine.[159]

In re Grand Jury Proceedings (Duffy)[160] was the first decision to address the propriety of utilizing a grand jury subpoena to obtain attorney work product prepared in connection with a corporate investigation. The grand jury in that case sought information relating to the attorney's communications with non-employees of his corporate client. The material, gathered in preparation for anticipated litigation, concerned alleged bribes made by the corporation to public officials. The information requested included the attorney's personal recollections of the communications as well as summarizing notes and memoranda. The Eighth Circuit reversed the district court's subpoena enforcement because the information was opinion work product, which was absolutely pro-

151. *Id.* at 1041.

152. United States v. Bonnell, 483 F. Supp. 1070, 80-1 U.S.T.C. ¶9170 (D. Minn. 1979). *See also In re* Grand Jury Subpoena Duces Tecum (Rice), 483 F. Supp. 1085, 80-1 U.S.T.C. ¶9178 (D. Minn. 1979).

153. United States v. Calandra, 414 U.S. 338, 343-44 (1974).

154. FED. R. CRIM. P. 17. *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL §271 (1969).

155. *In re* Grand Jury Proceedings (Duffy), 473 F.2d 840, 846 (8th Cir. 1973). However, a broad range of common law privileges are available to grand jury witnesses. *Id.*

156. See note 18 *supra*. *See also* United States v. Nobles, 422 U.S. 225, 238 n.12 (1975).

157. *In re* Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 947 (E.D. Pa. 1976).

158. *In re* Subpoena of Murphy, 560 F.2d 326, 334-35 (8th Cir. 1977).

159. *In re* Grand Jury Proceedings, 73 F.R.D. 647 (M.D. Fla. 1977).

160. 473 F.2d 840 (8th Cir. 1973).

tected from disclosure.[161] The Eighth Circuit based the decision on its interpretation of *Hickman* and the fact that the information would not be discoverable if prepared by the government's attorneys.[162]

Since the Eight Circuit considered opinion work produce absolutely privileged, the showing of good cause or necessity required for disclosure was not addressed and the exact parameters of such a showing were expressly left open.[163] In dicta, the *Duffy* court stated that the good cause requirement could not be met in this case because the persons interviewed were known and accessible to the grand jury and there was no indication that the information could not be obtained directly from the interviewees.[164] Similarly, an attorney's file memorandum of a telephone conversation with a client regarding potential litigation was held to be absolutely privileged from disclosure demanded by a grand jury subpoena.[165]

In addition, the validity of grand jury subpoenas requesting work product arising from internal corporate investigations has been at issue in two recent cases, *In re Grand Jury Investigation (Sun Co.)*,[166] and *In re Grand Jury Subpoena (General Counsel, John Doe, Inc.)*.[167] In both cases, the grand jury subpoenaed questionnaires, notes and memoranda of interviews which were generated during a corporate investigation by outside counsel into possible illegal payments to foreign officials and governments.

In *Sun Co.*, a multi-national corporation retained a law firm to further investigate questionable payments uncovered during an internal audit and to render legal advice regarding potential legal obligations arising from the alleged illegal payments. Employees responded to questionnaires and outside counsel subsequently conducted follow-up interviews.[168] As a result of the investigation, it was recommended that the corporation amend its income tax returns and file form 8-K with the SEC disclosing all questionable payments. The disclosure to the SEC prompted in an investigation by the United States Attorney into a $235,000 contract renegotiation payment to a foreign government. A grand jury subpoena was issued to compel production of "interview memoranda, questionnaires, statements, or other recorded recollections" of the events regarding the foreign payment.[169] The corporation resisted the subpoena by alleging that the attorney-client privilege and the work product doctrine shielded the company from disclosure.[170]

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161. *Id.* at 848.

162. *Id.* (citing the Jencks Act, 18 U.S.C. §3500 (1976)). Discovery of the government's work product is beyond the scope of this paper.

163. *Id.* at 848-49.

164. *Id.* at 849.

165. *In re* Grand Jury Investigation (Sturgis), 412 F. Supp. 943 (E.D. Pa. 1976).

166. 599 F.2d 1224 (3d Cir. 1979).

167. 599 F.2d 504, 79-1 U.S.T.C. ¶9405 (2d Cir. 1979).

168. The Chairman of the Board sent questionnaires to 1877 managerial employees worldwide with instructions to return the completed questionnaires directly to outside counsel. The law firm conducted 265 telephone interviews and 90 personal interviews. 599 F.2d at 1227.

169. *Id.* at 1227-28.

170. The attorney-client privilege was not applicable to any of the documents since none of the interviewees were within the corporation's "control group." *Id.* at 1237.

Ruling that a necessary nexus between the creation of work product and the prospect of litigation must exist for the work product doctrine to apply,[171] the *Sun Co.* court determined the requisite connection was present because numerous suits could have resulted from the $235,000 payment.[172] Thus, the information requested was considered work product. Additionally, the questionnaires were classified as ordinary work product and the interview memoranda as opinion work product.[173] Although the Third Circuit did not consider opinion work product absolutely privileged, as did the *Duffy* court, specific considerations were enumerated which yielded this type of work product discoverable only in rare situations.[174] With regard to a deceased employee interviewed, the court decided the good cause requirement was satisfied and ordered disclosure of the correlative questionnaire and interview memorandum, deleting, however, the mental impressions, conclusions, opinions, or legal theories of the attorney.[175] Sufficient good cause was not shown for the balance of the work product, including information regarding the interview of a non-resident alien.[176] The court required the government to attempt to procure the interviewee's testimony directly before invading the privacy of the attorney's files.[177] The *Sun Co.* court conceded that the questionnaires might be discoverable as ordinary work product to impeach or corroborate testimony before the grand jury; but because no witnesses had been summoned the action was premature as to that issue.[178] The court did state that mere need to test the credibility of a witness would not be considered sufficient to overcome the protection of the interview memoranda as opinion work product.[179]

In *General Counsel,* two internal corporate investigations were conducted. The first was considered an internal investigation conducted by the management of the corporation in the regular course of business.[180] Consequently, the documents produced were not protected as work product even though the corporation's general counsel participated in the investigation.[181] A second broader

171. *Id.* at 1229.

172. *Id.* The court noted the possibility of criminal prosecutions, derivative suits, securities litigation, or litigation by Sun to recover the illegal payments. In addition, the government's argument that the attorney was acting as a legal advisor rather than investigator was rejected. The court relied on *Hickman* to conclude that an attorney may act in such a dual capacity when interviewing witnesses. *Id. But see* Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (opposite results on similar facts).

173. 599 F.2d at 1230.

174. The factors concerning disclosure were: (1) indirect disclosure of the attorney's mental processes may occur; (2) many factors enter into the reliability and accuracy of witness statements, obtained from an attorney; (3) the danger of converting attorney from advocate to witness exists; and (4) use of information is limited when witness is readily available. *Id.* at 1231.

175. *Id.* at 1231-32. The death of a witness was recognized as an exception to the work product doctrine in *Hickman.*

176. *Id.* at 1232. *But see* United States v. Upjohn Co., 78-1 U.S.T.C. ¶9277 (W.D. Mich. 1978) (opposite result on similar facts).

177. *Id.*

178. *Id.* at 1233.

179. *Id.*

180. 599 F.2d at 510-11.

181. *Id.* at 511. The court found that the corporation did not establish that the first

investigation was conducted by outside counsel. Based on information disclosed to the SEC, a grand jury began an investigation into possible violations of federal law arising out of questionable foreign payments.[182] The grand jury subpoenaed documents of both investigations, including questionnaires, notes taken at all interviews, memoranda relating to all interviews, all summaries and reports and all accountant's workpapers,[183] for the purpose of determining which witnesses would be granted immunity. The court found the questionnaires, notes and memoranda were clearly work product materials and noted differing degrees of necessity were required for disclosure, depending on the kind of work product.[184] Furthermore, the necessity alleged by the government in *General Counsel* was declared insufficient to compel disclosure of any of the work product.[185] Consequently, all the information generated by the second investigation was protected to the extent it was work product material. Likewise, accountant's workpapers prepared under the direction of general counsel to aid in the investigation were protected as work product.[186] As a final matter, the Second Circuit instructed the district court to peruse borderline documents to determine if they were work product.[187]

Most recently, the Seventh Circuit in *In re Special September 1978 Grand Jury II*[188] enforced a subpoena issued to a law firm in connection with a grand jury investigation of alleged campaign contributions by a tax-exempt organization. Although the materials were determined to be work product, the court relied on a general client fraud exception[189] to the work product doctrine to prevent assertion of the privilege by the client and to compel disclosure of information other than opinion work product. The court remanded the issue of opinion work product for a determination of whether there was any extraordinary need which would justify disclosure. The ruling was based on public policy considerations favoring disclosure when the client has used his

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investigation was professional activity by the corporation's general counsel with non-attorney senior officials acting as the agents of attorneys. "Participation of the general counsel does not automatically cloak the investigation with legal garb." *Id.*

182. The questionable payments were made in 21 countries and amounted to $1,806,000. Initially, the grand jury investigation involved alleged violations of customs law, mail fraud and conspiracy. Criminal tax fraud was included later. *Id.* at 507-08.

183. *Id.* at 507.

184. *Id.* at 512.

185. The government's only showing of necessity was that the information was needed to determine which witnesses to grant immunity. The court rejected this argument as "far-fetched," since the government always has to confront this problem as part of the normal bargaining role of the prosecutor. *Id.* at 513. The court was also influenced by the fact that the defendant had cooperated fully with the United States Attorney with the exception of the work product request. *Id.* at 512.

186. *Id.* at 513.

187. *Id.*

188. 640 F.2d 49 (7th Cir. 1980).

189. In general, two elements are required to establish a fraud exception to work product: (1) the client was engaged in or planning a criminal or fraudulent scheme when advice of counsel was sought to further the scheme, and (2) the work product documents bear a close relationship to client's existing or future scheme to commit a crime or fraud. *In re* Subpoena of Murphy, 560 F.2d 326, 338 (8th Cir. 1977).

attorney to engage in fraud.[190] Concurrently, the court held that tax returns and tax documents relating to the organization's tax-exempt status were not prepared in anticipation of litigation and were therefore not work product.[191] Instead, the court concluded that at most the documents were prepared with a view toward administrative procedure before the IRS. Thus, a restrictive concept of work product was adopted by the Seventh Circuit.

RECOMMENDATIONS

Because the ultimate goal of the work product doctrine is to protect the privacy of an attorney's litigation files and to preserve the integrity of our judicial system,[192] some protection of work product must be afforded during a tax fraud investigation. Consequently, the courts are confronted with the problem of protecting work product without unduly hampering the investigation of the IRS or a grand jury. In light of the government's broad investigatory powers, including the administrative summons and the grand jury subpoena, the Government should be required to establish substantial need for the work product in lieu of obtaining the information from other sources.[193]

The amount of work product disclosure is another concern. Traditionally, a lesser showing of necessity was required for the disclosure of ordinary work product than for disclosure of opinion work product. Hence, it might be helpful to segregate the factual information gathered during an internal investigation, separating that which would be classified as ordinary work product, from that which would be classified opinion work product.

Prepared in Anticipation of Litigation

The preferred method of conducting an internal investigation into alleged violations of laws is to engage outside counsel to investigate and render legal advice as to potential litigation which could arise out of the activity investigated. This approach would avoid the conclusion reached by the *General Counsel* court that an investigation conducted by internal management with the assistance of general counsel, but in the regular course of business, was not prepared in anticipation of litigation and, consequently, was not work product.[194] In addition, specifying at the outset of an internal investigation the general types of litigation likely to result would lend further support to the classification of the investigation's documents as work product.

Although the Seventh Circuit determined in *In re Special September 1978 Grand Jury II* that documents relating to tax-exempt status and tax returns

190. 640 F.2d 49. This case has been criticized because the work product doctrine was pierced by the government's allegation of fraud without providing the taxpayer an opportunity to explain. Tybor, *supra* note 1, at 16.

191. 640 F.2d 49.

192. Hickman v. Taylor, 329 U.S. at 510-16.

193. *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979); *In re* Grand Jury Proceedings (Duffy), 473 F.2d 840 (8th Cir. 1973); United States v. Lipshy, 492 F. Supp. 35, 79-2 U.S.T.C. ¶9628 (N.D. Tex. 1979).

194. *In re* Grand Jury Subpoena (General Counsel, John Doe, Inc.), 599 F.2d at 510-11, 79-1 U.S.T.C. ¶9405 (2d Cir. 1979).

were not work product because they were not prepared in anticipation of litigation, such an inquiry must necessarily be made on a case-by-case basis. Undoubtedly, documents relating to tax matters may be considered to be prepared in anticipation of litigation if it is shown that an item is frequently challenged by the IRS and litigation is likely to result based on past dealings with, or policies of, the Government.

Necessity or Good Cause Requirement

In general, the mere showing of need by the Government is not sufficient to justify disclosure of an attorney's work product. Several courts have been impressed with the degree of cooperation afforded the Government in investigations, notwithstanding a refusal to produce work product.[195] Accordingly, to avoid unnecessary conflict, it is advisable to supply the Government with a blank questionnaire and a list of interviewees if an internal investigation was conducted.[196] Moreover, such a disclosure further protects work product since several courts have held that the good cause requirement could not be met when the interviewees were known and accessible to the Government and the Government made no attempt to conduct an investigation of their own.[197] In essence, the Government must show that the information was needed for a proper purpose and could not be obtained from another source.

Disclosure of ordinary work product will be required if (1) an interviewee has died, (2) it is needed for impeachment purposes, or (3) the client is engaged in ongoing fraud. Nevertheless, appropriate precautions should be taken to prevent disclosure of opinion work product in such instances. Methods for protecting opinion work product from disclosure include: (1) initially segregating ordinary work product from opinion work product, (2) deleting opinion work product from the document, and (3) *in camera* inspection of borderline documents. As recommended earlier, segregating ordinary work product from opinion work product when documents are prepared eliminates future disclosure problems. Information clearly representing opinion work product should be deleted by counsel prior to disclosure of the documents. An *in camera* inspection of borderline documents should be made by the court to determine whether they contain opinion work product which would be protected from disclosure.[198]

CONCLUSION

Various work product protections are available during the pre-trial discovery phase of a pending civil or criminal tax fraud case. A case-by-case approach is employed by the courts in balancing countervailing policy considera-

195. *E.g., In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979).

196. This approach was utilized by Upjohn's attorneys.

197. *E.g., In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979); *In re* Grand Jury Proceedings (Duffy), 473 F.2d 840 (8th Cir. 1973).

198. The Second Circuit in *General Counsel* remanded the case to the district court for an *in camera* inspection to determine whether certain documents contained work product. 599 F.2d at 513.

tions. Broad discovery methods are considered essential to the full development of relevent facts in federal litigation. Adequate safeguards to ensure thorough preparation and presentation, however, require a certain degree of privacy for an attorney's litigation files. This second consideration is most compelling in criminal cases, where mental thought processes of an attorney are protected vigorously. A strong showing of need is required to overcome this concern for an attorney's privacy.

The work product doctrine becomes more attenuated when applied during the investigation stages of a tax fraud case. The policy favoring broad pre-trial discovery is displaced by the broad investigation powers granted to the government by virtue of the administrative summons and the grand jury subpoena. No other party to litigation has comparable powers and, therefore, such access to work product material is normally not available prior to the commencement of litigation. At the minimum, a greater showing of need by the government should be required. Accordingly, disclosure to the government of work product prepared in anticipation of litigation, whether or not actually pending, should not be compelled absent highly relevant information which is unobtainable from other sources. To conclude otherwise would undermine the concept of privacy and enable the government "to perform its functions either without wits or on wits borrowed from the adversary."[199]

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199. Hickman v. Taylor, 329 U.S. at 516 (Jackson, J., concurring).