‘Comcast’ ruling wake-up call for transactional lawyers

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Raising a potentially troubling issue of importance for transactional attorneys in all jurisdictions, the Supreme Judicial Court denied the protection of the attorney-client privilege to an in-house attorney seeking to invoke it in relation to reports by non-attorney consultants on issues of law.

In Commissioner of Revenue v. Comcast Corp., 453 Mass. 293 (2009), the court determined that the privilege did not apply because the points of law were not necessary or essential for the attorney to understand the client's situation as to a specific transaction.

After Comcast, a cautious transactional attorney not acting within the sphere of work-product protection has only two viable options: seek advice on issues of law only from other attorneys and never from non-attorneys, or seek non-attorney consultant help only when the consultation is indisputably essential to the understanding of a client's situation.

The second option calls for exercise of considerable caution.

‘Comcast’ facts

The Comcast ruling stems from the decision by an in-house attorney for U.S. West to seek consulting advice related to the tax implications of the forced liquidation of certain shares of stock of an affiliate of his employer.

The U.S. West in-house counsel was an experienced tax attorney but not admitted in Massachusetts and, as a result, not familiar with some aspects of Massachusetts tax law relevant to the proposed stock sale.

The in-house attorney retained an outside accounting firm, Arthur Andersen, to assist in selecting the best vehicle for the transaction, subsequently deemed a corporate trust. A corporate trust was formed, the assets of the affiliate were transferred to the trust, and the stock was then sold.

To evaluate various alternative structures of the transaction and possible litigation risks, Andersen provided the attorney with six memoranda, five drafts and one final memorandum. Those materials discussed Massachusetts tax law and analyzed the tax consequences of the various options along with the litigation risks of each.

The stock sale transaction yielded a capital gain of approximately $500,000. Under Massachusetts law at the time of the transaction, corporate trusts were exempt from filing a state excise tax return. The trust filed a federal tax return but asserted it was exempt from filing a Massachusetts corporate excise tax return.

Two years later, the trust was dissolved and all its assets transferred to U.S. West. The Massachusetts commissioner of revenue subsequently audited Comcast, the successor of U.S. West.
As part of the audit, the commissioner issued a subpoena to Comcast that included the six Andersen memos. Comcast refused to disclose the memos, timely asserting they were protected from disclosure by both the attorney-client privilege and by the work-product doctrine. The commissioner moved to compel disclosure.

The trial court ruled that the Andersen memoranda were protected from disclosure by both the work-product protection and the attorney-client privilege. The commissioner appealed, however, and the SJC accepted the appeal for direct review.

The SJC held that the Andersen memos were protected from disclosure by the work-product doctrine, but also ruled that the attorney-client privilege, on the facts presented, did not alone protect those communications from disclosure.

Privilege only for 'necessary' materials

As to the attorney-client privilege, the SJC in Comcast as an initial matter stated that because the communications at issue were between U.S. West and a non-attorney and non-client, the traditional attorney-client privilege did not apply.

Comcast also argued, however, that the communications were protected from disclosure in the alternative by what is known as the derivative attorney-client privilege.

That privilege is described in United States. v. Kovel, 296 F.2d 918 (2d Cir. 1961).

The derivative attorney-client privilege may apply when the use of a non-client accountant or consultant is necessary to assist an attorney for effective work with his client.

The reasoning is that an accountant or similar outside consultant is sometimes necessary for an attorney to develop adequate understanding of the client's issues in the same way that a foreign-language translator is sometimes needed by a lawyer to understand and be understood by a client not fluent in the attorney's native tongue. In the latter case, the lawyer's communications with the translator are protected by the derivative attorney-client privilege.

For derivative attorney-client privilege to attach, the information sought from the non-client must be necessary for the effective consultation between the client and the lawyer, not merely useful or convenient.

A communication from a non-client consultant is not protected as "necessary" unless it is "nearly indispensible" or "serves a special purpose" in the provision of the advice (Cavallaro v. United States, 284 F.3d 236, 249 [1st Cir. 2002]). It is not enough that the non-client consultant is useful or that the non-attorney consultations improve the attorney's ability to represent the client.

Applying these tests, the SJC held that the U.S. West in-house counsel sought information from Andersen that was not necessary to understanding the situation of the client. The U.S. West in-house counsel was a tax attorney who possessed the knowledge and expertise to effectively communicate to the client as to the tax consequences of the sale without aid from a non-attorney.

The non-attorney consultant materials included information about Massachusetts tax-filing requirements. The materials were not necessary to understand the client's position but were merely useful to understand Massachusetts tax law. On that basis, the Andersen materials were ruled not privileged, and the derivative
attorney-client privilege therefore did not apply.

The Comcast court expressly noted that if the attorney had engaged a Massachusetts tax attorney rather than a non-attorney consultant to provide the same tax law information, the attorney-client privilege would have fully protected the communications from disclosure. The consulted Massachusetts attorney in that instance would have been advising a client.

No disclosure ordered

The Comcast court, despite finding no attorney-client privilege, did not order disclosure because the defendant timely and correctly asserted the protections applicable to work product.

The work-product doctrine protects from disclosure documents received from a representative of a client other than an attorney if the documents are prepared in anticipation of litigation.

That protection from disclosure can be overcome if a party demonstrates a substantial need for the information contained in the document, and that substantially equivalent information cannot be obtained by other means without undue hardship.

If the information sought, however, is the mental impression, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation, then the materials are "opinion" work product and are given increased and potentially absolute protection from disclosure.

The threshold work-product protection inquiry is whether the document sought was prepared "in anticipation of litigation." In Comcast, the SJC adopted a "because of" test: "Was the document prepared because of existing or expected litigation?"

The Andersen memoranda were protected from disclosure because they contained analysis by Andersen intended to inform U.S. West as to litigation risks. The record showed "little doubt" that U.S. West "had the prospect of litigation in mind when it directed preparation of the Andersen memoranda." Actual anticipation of possible litigation thus gave rise to work-product protection.

The SJC in Comcast went on to rule that the Andersen memos contained the mental impressions, conclusions, opinions and legal theories of Andersen and therefore constituted highly protected "opinion" work product.

Narrower privilege?

Prior to Comcast, many transactional attorneys may have believed their communications with non-attorney consultants were protected from disclosure if initiated by the lawyer to help him formulate protected advice as to the transaction.

Comcast is a jarring wake-up call for transactional attorneys in all jurisdictions.

The attorney-client privilege is very possibly narrower than previously believed. All cautious transactional attorneys should now assume that all non-litigation communications with non-attorney consultants may be subject to forced disclosure unless deemed necessary to the lawyer's understanding of the client's situation.

Where an outside non-attorney consultation involves legal analysis or issues of law, and if litigation is not
anticipated, Comcast teaches that because no attorney-client privilege may exist, there is a clear and harsh risk of forced disclosure.

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