PROGRAM MATERIALS
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Corporate Governance and Board Interaction

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West/Thomson Reuters: Corporate Governance and Board Interaction

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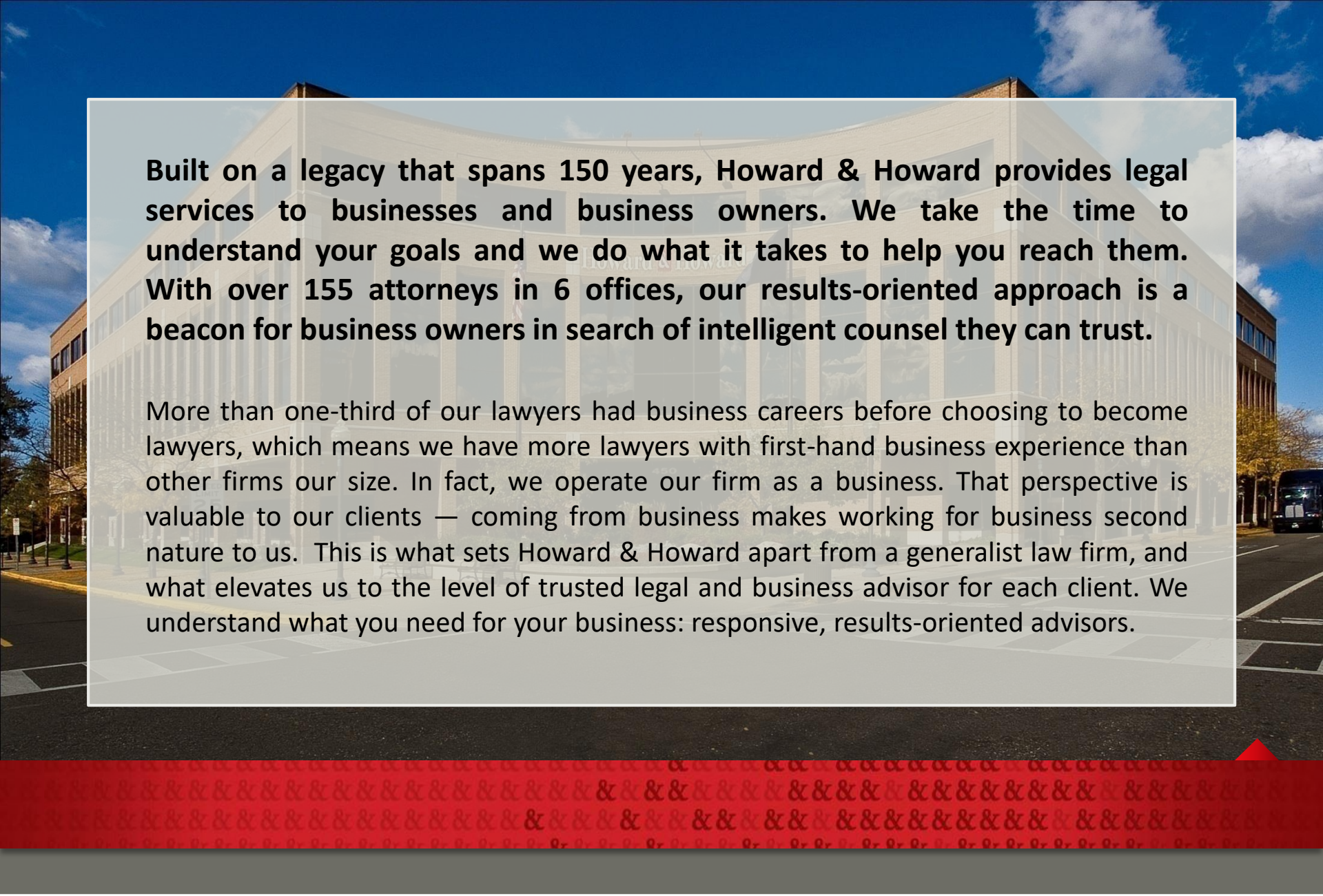

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AGENDA

- A (Very Little) Bit About Me
- Who Is the Client?
- What is Corporate Governance
- Implementation of policies and procedures for the board
- Setting a tone from the legal office
- Developing a rapport with the board
- Interactions with the board at board meetings and in between

A (VERY LITTLE) BIT ABOUT ME

Why Corporate Governance?

facebook

Cambridge Analytica

SOME BASICS ABOUT IN-HOUSE COUNSEL

Who is the client?

- Always keep in mind

Rules of Professional Conduct 1.13 (a)

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Rules of Professional Conduct 1.13 (b)

- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

Rules of Professional Conduct 1.13 (f)

- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Rules of Professional Conduct 1.13 (g)

- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Upjohn warning

- Aka corporate Miranda warning
  - Arises from *Upjohn Co. v. United States*, 449 US 383
    - Case addressed privileged communications and what warning must be given
- Corporate counsel represents the corporation and not personal attorney for any employee

Up The Ladders Reporting

- Sarbanes Oxley Act Section 307
  - Requires attorneys "appearing and practicing before the [SEC]" report:
    - Material violation
      - To General Counsel or CEO
      - If not appropriate response, audit committee or another committee
- Final rule available at https://www.sec.gov/rules/final/33-8185.htm

Appearing before the Commission

- Section 205.2
  - Can be very broad
    - Does not mean actual appearing before
    - Examples

WHAT IS CORPORATE GOVERNANCE

Working definition

- Set of internal policies pursuant to which a company is controlled and directed, delegating certain functions to each of the stakeholders (board of directors, shareholders, and others)

NASDAQ

- The National Association of Securities Dealers Automated Quotations ("NASDAQ")
  - 2nd largest stock exchange in the world behind the New York Stock Exchange ("NYSE")
- Number of corporate governance requirements that every NASDAQ-listed company must meet. (http://nasdaq.cchwallstreet.com/nasdaq/main/nasdaq-equityrules/)
  - NYSE also has similar rules - https://www.nyse.com/publicdocs/nyse/listing/NYSE_Corporate_Governance_Guide.pdf

NASDAQ requirements

- “Requirements include rules relating to a Company's board of directors, including audit committees and Independent Director oversight of executive compensation and the director nomination process [and] code of conduct.”
- Audit Committee
- Compensation Committee
- Nominating Committee

Sarbanes-Oxley Act

- Primarily applies to public companies
- Enacted in wake of scandals end of 20th century (Enron, MCI WorldCom, etc.)
- Some provisions apply to all companies, even private
  - Section 802(a)

“”Commonsense Corporate Governance Principles’ for Private Companies” – Ellen Grady

Recommends private companies adopt the *Commonsense Corporate Governance Principles*

- Good governance and “effective oversight…may serve to increase long-term value.”

Commonsense Principles of Corporate Governance

- http://www.governanceprinciples.org/
- 13 prominent companies, including:
  - GM
  - GE
  - JPMorgan Chase
  - Verizon
  - Berkshire Hathaway

Federal Prosecution of Corporations: The Thompson and McNulty Memos

- Timeline/development:
  - Holder Memo- 1999
  - Thompson Memo- 2003
  - McNulty Memo- 2006
  - Filip Memo- 2008
  - Yates Memo- 2015
    - Has not been updated, but Rosenstein in November 2018 in a presentation stated they would continue to aggressively enforce.

- Address corporate governance and compliance programs
- McNulty made it a pre-existing one

Presenter to read NY Code

This code is required for all attorneys wishing to receive CLE credit in the state of NY and taking the program 'on-demand' at Celesq AttorneysEd Center either online or via CD

Please notate it carefully

The presenter will only be able to read the code twice and will not be able to repeat it or email it to you.

Thank you!

The Principles

- Overview

IMPLEMENTATION OF POLICIES AND PROCEDURES FOR THE COMPANY AND BOARD

List can be very long of policies and procedures

- Employment
- IT
- Ethics/Conflicts
- Board Rules
- Insider Trading
- SOX
- SEC reporting
- Etc.

Cyber

- Every company must consider
- Take steps to implement strong policies and procedures
- Recent news: when does one report?
  - *Equifax*
  - *Uber*
    - Challenges/potential liability for board?

Conflicts

- Must be strong
- Make it clear what duties board and executives have to the organization
- Make sure governing documents are clear

Committees of Board

- What do your governing documents require?
  - Some thoughts on committee structures
- What do the charters state?
  - Recall the NASDAQ slides
    - Some committees required
      - Have certain requirements

SETTING A TONE FROM THE LEGAL OFFICE

Many reasons

- Right thing to do
- Ethical obligations
- Legal reasons
- Etc.

Tone from the top

- Must be real
- Not tone deaf
- Enron was recognized for its ethics
  - Respect
  - Integrity
  - “moral and honest manner”

DEVELOPING A RAPPORT WITH THE BOARD

No "one size fits all"

- For Corporate Secretary, can be challenging
  - Amount of access
  - Amount of time to spend with them
  - Structure of board meetings
  - Role of GC/Corporate Secretary

INTERACTIONS WITH THE BOARD AT BOARD MEETINGS AND IN BETWEEN

Starting Points

- Governing documents
  - What do they say about meetings
    - Timing?
    - Notice?
- Committees
  - What committees do you have?
    - With cyber, etc., Risk Committee? Part of Audit Committee?
- Structure of Board meetings
  - Length
  - Location
  - Order

Preparing for the Board Meetings

- Meeting structure setting
- Agenda setting
  - C Suite
  - Committee/Board Chairs
- Working with CFO/CEO
- Working with consultants
- Board materials to Board at least five days ahead of meetings

The Board Meetings

- Committees first day?
- Executive sessions pre-arranged times?
- Who attends various meetings?

Your Role

- Are you both GC and Secretary?
  - If bifurcated, GC should attend
- Participation by GC/Secretary in discussions?

Minutes

- Like Goldilocks and the 3 Bears
  - Should be just right
    - Not too detailed
    - Not too barebones
- Do not transcribe
- Be reflective
- Be careful labeling as “minutes” if meeting not duly called and held

In Between Meetings

- Draft minutes shortly after meetings occur
- Meetings with board members?
  - Regular and routine meetings okay
    - Make sure your CEO knows
    - What happens if the board member asks for a confidential meeting?

Board and Independent Counsel

- When does this come up?
- What is your role, if any?

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Resource Guide

- Model Rule 1.13- https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client/
- Rule 1.13 comments- https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client/comment_on_rule_1_13/
- *Upjohn* decision- **pdf is following this resource guide -** https://supreme.justia.com/cases/federal/us/449/383/
- "Up the Ladder" SOX 307- Final Rule- https://www.sec.gov/rules/final/33-8185.htm
- NASDAQ corporate governance and listing rules- http://nasdaq.cchwallstreet.com/nasdaq/main/nasdaq-equityrules/
- NYSE corporate governance guide- https://www.nyse.com/publicdocs/nyse/listing/NYSE_Corporate_Governance_Guide.pdf
- Sox 802- http://www.soxlaw.com/s802.htm
- Commonsense Governance Principles open letter- https://www.governanceprinciples.org
- Commonsense Principles- https://www.governanceprinciples.org/wp-content/uploads/2018/10/CommonsensePrinciples2.0.pdf

Resource Guide – Cont'd

- Holder Memo- https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF
- Thompson Memo- https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf
- McNulty Memo- https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf
- Filip Memo- https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf
- Yates Memo- https://www.justice.gov/archives/dag/file/769036/download

JUSTIA

Upjohn Co. v. United States, 449 U.S. 383 (1981)

Justia Opinion Summary and Annotations

Annotation

Primary Holding

Communications between all corporate employees and the company's counsel may be protected by the attorney-client privilege. Also, the work product doctrine may cover materials sought in an IRS summons.

Facts

When they were conducting an independent audit of a foreign subsidiary of Upjohn, accountants determined that it had made payments to government officials in foreign nations to solicit business from those governments. They told Upjohn's general counsel, Gerard Thomas, and he followed up with an internal investigation. Attorneys working with Thomas sent a questionnaire about the alleged payments to foreign general and area managers. They also interviewed many employees at various levels of the corporation. The company then voluntarily submitted a preliminary report about the payments to the SEC, which sent a copy to the IRS. In turn, the IRS began a tax audit and sent a summons to Upjohn that demanded all of the files that were relevant to the investigation. The IRS also sought the memoranda of interviews between the attorneys and the employees.

Upjohn cited the attorney-client privilege in refusing to produce the documents that were listed in the summons. It also argued that they were protected as the work product of their attorneys, who had prepared them in anticipation of litigation. The federal government filed a petition to enforce the summons, and the appellate court ruled that the attorney-client privilege did not apply to company employees below the level of senior management. It also ruled that the work product doctrine did not protect the interview memoranda and required them to be disclosed.

Opinions

Majority

- William Hubbs Rehnquist (Author)
- William Joseph Brennan, Jr.
- Potter Stewart
- Byron Raymond White
- Thurgood Marshall
- Harry Andrew Blackmun
- Lewis Franklin Powell, Jr.
- John Paul Stevens

The attorney-client privilege extends two-way protections that cover not only the lawyer's guidance but also information provided by the client to the lawyer that assist the lawyer in offering that guidance. It is plausible that employees below the most senior levels of the organization can take actions that create significant liability for the corporation, and they might have access to information that the company's lawyers would need to provide appropriate advice. Limiting the privilege to a certain control group of senior management inhibits low-level and mid-level employees from disclosing information to attorneys working for the corporation as a whole. Moreover, the privilege does not extend to the disclosures of underlying facts by the employees to the attorneys, so the government could gain access to the same information that was provided to the attorneys simply by interviewing the employees.

On the other hand, an IRS summons remains subject to the work product doctrine, which is a traditional limitation on discovery. Congress did not show any intent to preclude the use of the doctrine in its laws and legislative history regarding the IRS summons. These materials fall within the definition of work product based on oral statements and reflect the mental processes used by the attorneys in evaluating the communications. Applying a standard of substantial need or undue hardship is insufficient to support releasing these materials under Federal Rule of Civil Procedure 26 and Hickman v. Taylor (1947). There must be a much higher standard of necessity to overcome the work product doctrine, essentially requiring that the party seeking discovery show that it had no other means to obtain the materials.

Concurrence

- Warren Earl Burger (Author)

Case Commentary

The decision's discussion of this long-standing evidentiary privilege stresses the importance of candid communication between parties and lawyers, which facilitates the judicial system, encourages compliance with the law, and helps produce more accurate results. The case did not fully address what must be shown to compel disclosure of an attorney's opinions, despite their status as work product, but it appears likely to be allowed when the attorney's own thoughts and actions are at issue.

Syllabus Case

U.S. Supreme Court

Upjohn Co. v. United States, 449 U.S. 383 (1981)

Upjohn Co. v. United States

No. 79-886

Argued November 5, 1980

Decided January 13, 1981

449 U.S. 383

Syllabus

When the General Counsel for petitioner pharmaceutical manufacturing corporation (hereafter petitioner) was informed that one of its foreign subsidiaries had made questionable payments to foreign government officials in order to secure government business, an internal investigation of such payments was initiated. As part of this investigation, petitioner's attorneys sent a questionnaire to all foreign managers seeking detailed information concerning such payments, and the responses were returned to the General Counsel. The General Counsel and outside counsel also interviewed the recipients of the questionnaire and other company officers and employees. Subsequently, based on a report voluntarily submitted by petitioner disclosing the questionable payments, the

Internal Revenue Service (IRS) began an investigation to determine the tax consequences of such payments and issued a summons pursuant to 26 U.S.C. § 762 demanding production of, *inter alia,* the questionnaires and the memoranda and notes of the interviews. Petitioner refused to produce the documents on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. The United States then filed a petition in Federal District Court seeking enforcement of the summons. That court adopted the Magistrate's recommendation that the summons should be enforced, the Magistrate having concluded, *inter alia,* that the attorney-client privilege had been waived, and that the Government had made a sufficient showing of necessity to overcome the protection of the work product doctrine. The Court of Appeals rejected the Magistrate's finding of a waiver of the attorney-client privilege, but held that, under the so-called "control group test," the privilege did not apply

"[t]o the extent that the communications were made by officers and agents not responsible for directing [petitioner's] actions in response to legal advice . . . for the simple reason that the communications were not the 'client's'."

The court also held that the work product doctrine did not apply to IRS summonses.

Held:

1. The communications by petitioner's employees to counsel are covered by the attorney-client privilege insofar as the responses to the

Page 449 U. S. 384

questionnaires and any notes reflecting responses to interview questions are concerned. Pp. 449 U. S. 389-397.

(a) The control group test overlooks the fact that such privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice. While in the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same, in the corporate context, it will frequently be employees beyond the control group (as defined by the Court of Appeals) who will possess the information needed by the corporation's lawyers. Middle-level -- and indeed lower-level -- employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client

with respect to such actual or potential difficulties. Pp. 449 U. S. 390-392.

(b) The control group test thus frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client. The attorney's advice will also frequently be more significant to noncontrol employees than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. P. 449 U. S. 392.

(c) The narrow scope given the attorney-client privilege by the Court of Appeals not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem, but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. Pp. 449 U. S. 392-393.

(d) Here, the communications at issue were made by petitioner's employees to counsel for petitioner, acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. Information not available from upper-echelon management was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. Pp. 449 U. S. 394-395

2. The work product doctrine applies to IRS summonses. Pp. 449 U. S. 397-402.

(a) The obligation imposed by a tax summons remains subject to the traditional privileges and limitations, and nothing in the language

Page 449 U. S. 385

or legislative.history of the IRS summons provisions suggests an intent on the part of Congress to preclude application of the work product doctrine. P. 449 U. S. 398.

(b) The Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work product doctrine. The notes and memoranda sought by the Government constitute work product based on oral statements. If they reveal communications, they are protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal

attorneys' mental processes in evaluating the communications. As Federal Rule of Civil Procedure 6, which accords special protection from disclosure to work product revealing an attorney's mental processes, and *Hickman v. Taylor,* 329 U. S. 495, make clear, such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. P. 449 U. S. 401.

600 F.2d 1223, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined, and in Parts I and III of which BURGER, C.J., joined. BURGER, C.J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 449 U. S. 402.

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Oral Argument - November 05, 1980

Opinion Announcement - January 13, 1981