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ACC FILES AMICUS TO UPHOLD LAWYER-CLIENT WORK PRODUCT CONFIDENTIALITY
Association of Corporate Counsel Advocates Privilege and Promotes Corporate Responsibility

Washington, D.C. (January 27, 2010) – The [Association of Corporate Counsel](#) (ACC) filed an *amicus curiae* brief in support of a petition for *certiorari* in the U.S. Supreme Court today in the matter of [Textron v. U.S., Supreme Court Docket No. 09-750](#).

ACC urges the U.S. Supreme Court to clarify the proper application of the lawyer work product doctrine by addressing the First Circuit's departure from well-established precedent recognizing that: 1) attorney work product also protects documents prepared with an eye toward avoiding litigation or 2) for matters where litigation could arise in the future, the documents are protected, even if no case is filed when the work product was created.

[ACC Senior Vice President and General Counsel Susan Hackett](#) says, "It is the work-product doctrine that gives attorneys the protection to be upfront in analyzing and advising clients on legal risk, and gives clients the confidence to encourage and include lawyer assessment of the best path for the company to take, without the overarching concern that the attorney's work product will be produced in discovery and thus be used against the company later."

ACC argues that if the Supreme Court does not accept this case and overturn the First Circuit's ruling, company executives stand to be less informed than they should be about the legal risks of business decisions. The inevitable result will be a reduction in effective self-policing and a rise in mismanaged transactions, with litigation inevitably following. Hackett notes in the brief, "No attorney should be considering how to limit his legal advice to counter this dilemma, and no company (nor its stakeholders) should suffer the consequences of a chilled attorney-client relationship, especially since improved corporate governance is one of the central public-policy objectives of the day."

[ACC President Frederick J. Krebs](#) adds, "Unless reversed, this decision will deprive corporate leaders of the detailed legal assessment needed to make good decisions, and will undermine efforts at improving corporate compliance, transparency and accountability."

TEXTRON BACKGROUND

This is the third brief filed by ACC in this closely watched dispute between the government and Textron which is endeavoring to assert attorney-work product protections to tax-related documents prepared by the company's in-house lawyer.

Previously, when the Textron matter was originally appealed to the First Circuit, a panel of the court wrote an opinion that supported the company's right to protect the attorney's work product material and denied the IRS access to the lawyer's work papers. Upon appeal by the government, the First Circuit en banc overturned their own panel's decision and ruled that such documents are not entitled to work product protections, suggesting they were not prepared "in anticipation of litigation," but rather as part of the company's regular business decision-making process.

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Specifically, ACC asserts that the First Circuit decision is flawed on two grounds:

1) The First Circuit's decision derails the sensible development and practical application of the work-product doctrine. Other courts have recognized that modern corporations constantly rely on their attorneys for preventive legal advice: that is, an evaluation of the litigation and regulatory risks of business decisions before they are undertaken.

2) The First Circuit's decision undermines important efforts by in-house and outside counsel to promote preventive compliance and important financial accounting and disclosure functions necessary to assure corporate responsibility, accountability and transparency.

Other amicus briefs filed in this matter were submitted by the American Bar Association (ABA), the U.S. Chamber of Commerce, Council on State Taxation (COST), the Defense Research Institute (DRI), Financial Executives International (FEI), New England Legal Foundation, Product Liability Advisory Council (PLAC), Reed Smith and United States Steel, Tax Executives Institute (TEI) and the Washington Legal Foundation.

ACC recognizes the strong support provided by its outside appellate counsel: Seth Waxman, Paul R.G. Wolfson and Shiva Nagaraj of the Washington, D.C. offices of [WilmerHale](#).

To read the amicus briefs and recent decision in their entirety, check the links below:

- [ACC Brief for *amicus curiae* in Support of Petitioner, *Textron v. US*, 1/27/10](#)
- [Textron petition for cert., *Textron v. US*, 12/09](#), filed by Kannon Shanmugan of Williams & Connolly
- [U.S. v. *Textron Decision in the First Circuit*](#)
- [ACC-U.S. Chamber Amicus Brief in *US v. Textron*, 4/22/09](#)
- [ACC-U.S. Chamber Amicus Brief in *US v. Textron*, 4/8/08](#)

WORK PRODUCT BACKGROUND

ACC has long promoted the protection and importance of the attorney-client privilege and work product doctrine in corporate legal practice settings. While attorney-client privilege provides a more clearly defined client right and expectation, attorney work product serves an equally important – and some in-house counsel would say, more important — role in facilitating the important public policy goals of assuring corporate legal compliance and responsibility, even as the parameters of work product protections evolve. Privilege and work product protections serve different but important functions, and while their protections sometimes overlap, the two are not substitutes for each other: protecting the attorney-client privilege alone is not sufficient to promote preventive legal analysis. The attorney-client privilege protects communications between attorneys and clients, but the legal and factual analysis created to support preventive advice will often derive from a lawyer's own thinking about the interpretation of the legal issues that impact the client's decisions (and not his direct communications back and forth with executive management or the board). The attorney-client privilege is thus of limited benefit in this context; the work product doctrine is crucial to encouraging meaningful and candid review of the client's possible paths.

About ACC:

The Association of Corporate Counsel (ACC) is the world's largest organization serving the professional and business interests of attorneys who practice in the legal departments of corporations, associations and other private-sector organizations around the globe. ACC promotes the common interests of its members, provides resources to help save time, money and effort, contributes to their continuing education and provides a voice on issues of global importance. With more than 25,000 members in over 70 countries, employed by over 10,000 organizations, [ACC's community](#) connects its members to the people and resources necessary for both personal and professional growth. By in-house counsel, for in-house counsel.[®]