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## D.C. Circuit: Documents Reflecting Client's Attorney Work Product Disclosed To Or Drafted By Independent Auditor Retain Work Product Protection

On June 29, 2010, in *United States v. Deloitte LLP*, the D.C. Circuit issued an important opinion on the disclosure of a client's work product to an auditor conducting a financial statement audit, holding that documents containing information prepared in anticipation of litigation by the client are entitled to attorney work product protection even if those documents are disclosed to—or drafted by—an auditor. The decision, which explicitly rejects contrary authority such as *United States v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009) (*en banc*), represents a strong re-affirmation of the work product doctrine and the limits of waiver of work product.

### Background

As part of ongoing federal tax litigation involving Dow Chemical Company ("Dow" or the "Company"), the United States served a non-party subpoena on Dow's independent auditor Deloitte & Touche LLP, seeking documents relating to two partnerships owned by Dow and its subsidiaries. Dow's auditor produced documents in response, but at the Company's request withheld three documents subject to the Company's claim of work product privilege: a memorandum prepared by an employee of the auditor, summarizing a meeting with Dow's counsel about the prospect of tax litigation ("auditor memorandum"), and two documents drafted by Dow's attorneys and provided to its auditor as part of the audit ("Company documents"). The United States filed a motion to compel, arguing that the auditor memorandum was not subject to work product protection because it had been prepared by Dow's auditor, and that the Company had waived its privilege over the the Company documents by disclosing them to its independent auditor.

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The district court held that all three documents were protected from disclosure. The auditor memorandum, even though it was prepared by Dow's auditor, qualified as work product because "its contents record the thoughts of Dow's counsel regarding the prospect of litigation." And the disclosure of the Company documents to Dow's independent auditor did not waive work product, the court ruled, because the auditor was not the Company's adversary and the Company had a reasonable expectation that its auditor would keep the documents confidential.

### Opinion of the D.C. Circuit

The D.C. Circuit affirmed the district court's two principal holdings: (1) that the work product doctrine may apply to documents prepared by an independent auditor based on information provided by a client's counsel, and (2) that disclosure of documents reflecting attorney work product to an independent auditor does not waive work product protection. The only issue on which the court of appeals reversed the district court was the factual finding that the auditor memorandum was "entirely" work product: the panel said that the district court should have reviewed the memorandum *in camera* before deciding that question, and it remanded the case for the sole purpose of allowing the district court to conduct that review.

### Work Product Doctrine

The court of appeals first noted that *Hickman v. Taylor*, 329 U.S. 495 (1947), defined "attorney work product" as covering both "tangible and intangible" information developed by an attorney in anticipation of litigation. The *Hickman* work product doctrine was "partially codified" in Federal Rule of Civil Procedure 26(b)(3), which protects "documents and tangible things that are prepared in anticipation of litigation ... by [a party's] representative." The court of appeals acknowledged that an independent auditor might not be considered a party's "representative" and that a document prepared by an auditor—even if it records an attorney's thoughts or opinions—might not be protected under Rule 26(b)(3), which covers only

"tangible" items. The court held, however, that *Hickman's* definition of work product is broader than Rule 26(b)(3) and that "thoughts and opinions of counsel" developed "in anticipation of litigation" constitute protected work product regardless of whether or how they are committed to paper or "who created the document or how they are related to the party asserting [privilege]."

A document is considered to have been prepared "in anticipation of litigation," under the standard followed by the D.C. Circuit (and most other circuits), if it was created "because of" the prospect of litigation. Thus, even if the primary "purpose" or "function" of a document is business-related—in this case, an annual audit of financial statements—the document is entitled to work product protection if its "content" was created because of the prospect of litigation. In this regard, the D.C. Circuit expressly rejected *Textron* and related opinions, which had apparently applied a more demanding "primary motivating purpose" test in assessing whether a document qualified as protected work product and on that basis refused to extend protection to tax accrual workpapers prepared principally for a financial statement audit.

Because the auditor memorandum recorded attorney opinion developed because of the prospect of the tax litigation, it could constitute work product. The court of appeals, however, remanded the case to allow the district court to conduct an *in camera* review of the memorandum to determine whether any portions of the documents did not constitute work product and could be disclosed.

### Waiver

Prior to the D.C. Circuit's opinion, "no circuit ha[d] addressed whether disclosing work product to an independent auditor constitutes waiver." The D.C. Circuit, joining the majority of district courts, rejected the government's characterization of an auditor as an "adversary" or "conduit to other adversaries" of the client, and held that disclosure to an auditor does not waive work product protection.

An independent auditor, the court of appeals explained, “cannot be [the client’s] adversary.” An auditor has a professional obligation to be “independent,” which precludes an adversarial relationship of any kind: “[e]ven the threat of litigation between an independent auditor and its client can ... necessitate withdrawal.” Moreover, the mere “possibility of a future dispute” between client and auditor—particularly when any such dispute would be unrelated to the subject matter of the documents at issue—does not “render [the auditor] a potential adversary for the present purpose.”

Nor could the Company’s auditor be deemed a “conduit to other adversaries.” First, the Company had not engaged in “selective disclosure” of the documents to some but not all potential adversaries. Second, the Company had a “reasonable expectation of confidentiality” in disclosures to its auditor because, the panel noted, “an independent auditor[ ] has a [professional] obligation to refrain from disclosing confidential client information.” Even though applicable ethical rules permit the auditor to comply with a valid subpoena or the auditor might be required to disclose information obtained from its client in certain circumstances (to the SEC, for example), none of these provisions *requires* the auditor to produce information which is subject to a claim of work product protection—at least before a judicial determination of the issue—or “significantly diminish[es]” Dow’s reasonable expectation that materials disclosed to its auditor would be held in confidence.

Notably, the court of appeals concluded its opinion by expressing concern over the government’s position. “The

government,” it said, “has not proffered any good reason for wanting the Dow Documents other than its desire to know what Dow’s counsel thought about the [prospects of litigation].” Forcing Dow’s auditor to disclose the documents in this circumstance would not only “discourage companies from seeking legal advice and candidly disclosing that information to independent auditors,” but could also “undercut the adversary process and let the government litigate ‘on wits borrowed from the adversary.’” (quoting *Hickman*, 329 U.S. at 516 (Jackson, J., concurring)).

### Impact

The opinion in *United States v. Deloitte* should provide corporations added comfort in maintaining the confidentiality of attorney work product shared with their auditors. A corporation that shares the results of an internal investigation or other legal analysis with an auditor in the course of an annual financial statement will be able to argue (relying on the D.C. Circuit’s reasoning) that any work product protection that attaches to a document is retained as it passes into the hands of an auditor. And the fact that an attorney’s opinions were reduced to writing by the audit firm will not preclude the client’s assertion of privilege over the contents of that document.

This decision must not be read too expansively, however. The court of appeals noted that its analysis was in large part “fact-intensive” and depended on the contents of the documents and communications. Only if those materials demonstrate that the information was prepared “because of the prospect of litigation” will they be entitled to protection.

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