

Alert 10-175

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Litigation Alert

Disclosures to Independent Auditors – What's the Risk of Waiver?

5 things about attorney-client privilege and work product protection that you should consider during your next audit

It is unavoidable – public companies must disclose sufficient information to allow an independent accounting firm to perform the financial statement audits necessary for compliance with federal securities laws. The recent decision in *United States v. Deloitte LLP*, No. 09-5171, 2010 WL 2572965 (D.C. Cir. June 29, 2010) highlights the risks of such disclosures, and the fact that jurisdictions take a variety of distinct approaches when addressing the confidentiality of materials disclosed to auditors. As soon as you find yourself answering an outside auditor's questions about specific litigation risk, your warning bells should go off. Here is a checklist of five things to consider:

1. **Attorney-Client Privilege Will Be Waived** – Attorney-client privilege is almost universally deemed waived when otherwise confidential legal advice is shared with third parties, including independent auditors. Be aware that claims of attorney-client privilege can be substantially weakened by such a disclosure.
2. **Assess the Strength of Your Work Product Position** – In the right circumstances, the work product doctrine, as compared with the attorney-client privilege, provides a more secure, though still uncertain, source of confidentiality for disclosures to outside auditors. Bear in mind two points: (i) courts are split about whether work product protection is waived upon disclosure to auditors, so research your particular jurisdiction; and (ii) when evaluating the strength of your work product argument, honestly assess whether the materials at issue were prepared in anticipation of specific litigation – the touchstone for any claim of work product protection.
3. **Stick to the Facts** – Remember that work product protection, if available, applies to fact as well as to opinion work product, but the latter is entitled to greater protection than the former. Whenever possible, avoid disclosure of opinion work product to outside auditors.
4. **Control the Format of the Disclosures** – To the extent that outside auditors require more than pure facts, consider making an oral presentation to them as opposed to providing written materials; and, if you do provide written materials, the better practice is to provide existing materials that were, in fact, prepared in anticipation of the litigation at issue, as opposed to creating new documents (i.e., summary memos) for the auditors.
5. **Buttress Your Confidential Relationship With the Auditors** – Check to make

sure you have a detailed, written confidentiality agreement with your auditors. Emphasize that all disclosures are made for the limited purpose of use during the audit, and include a clause requiring the auditing firm to immediately notify your legal department if they are ever subpoenaed or asked to divulge your confidential information.

Providing adequate information for an independent audit while still protecting confidential legal information is a challenge. The checklist above will help you get started as you navigate the process, but you should feel free to contact a Reed Smith attorney for more individualized advice about your specific business needs, or to discuss in more detail the impact of the *United States v. Deloitte LLP* decision referenced above.

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