

Case Notes

Work Product Protection Not Waived by Disclosure to Auditors

United States v. Deloitte LLP, 2010 U.S. App. LEXIS 13226 (D.C. Cir. June 29, 2010)

In a decision of interest to attorneys and accountants alike, the United States Court of Appeals for the D.C. Circuit recently upheld protection for attorney work product disclosed to an auditor during its audit.

During discovery in a case involving the tax treatment of two partnerships owned by Dow Chemical Company, the government subpoenaed documents from Dow's independent auditor, Deloitte & Touche LLP. Deloitte withheld from production three documents identified by Dow as attorney work product. The district court denied the government's motion to compel, and the government appealed.

The first document at issue was a memorandum prepared by Deloitte summarizing a meeting between Dow employees, Dow's outside counsel, and Deloitte employees regarding the possibility of litigation over one of the partnerships and the impact of this possibility on the audit. The government argued that this memorandum did not qualify as work product because it was prepared by Deloitte rather than by Dow or its counsel, and because it was generated as part of the routine audit process rather than in anticipation of litigation. The court rejected both arguments.

First, the court held that under *Hickman v. Taylor*, 329 U.S. 495 (1947), "the question is not who created the document or how they are related to the party asserting work product protection, but whether the document contains work product—the thoughts and opinions of counsel developed in anticipation of litigation." (*Id.* at *11–12.) Accordingly, the fact that the memorandum was prepared by an auditor did not preclude its treatment as work product. Second, the court concluded that the memorandum's immediate purpose of facilitating an audit did not negate its work product status: "a document can contain protected work-product material even though it serves multiple purposes, so long as the protected material was prepared because of the prospect of litigation." (*Id.* at *18.) The court remanded for the district court to review the memorandum in camera to determine whether it should be withheld in its entirety or produced in redacted form.

The second and third documents at issue were a memorandum prepared by Dow employees and a tax opinion prepared by Dow's outside counsel, both of which had been disclosed to Deloitte for its audit. The government conceded that these documents were work product but claimed that Dow waived work product protection by disclosing them to its auditor. Noting that the work product doctrine "promotes the adversary process by insulating an attorney's litigation

preparation from discovery,” the court stated that “disclosing work product to a third party can waive protection if ‘such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party’s adversary.’” (*Id.* at *22 (quoting *Rockwell Int’l Corp. v. U.S. Dep’t of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001))).

The government contended that Deloitte was a potential adversary as well as a conduit to other adversaries. The court rejected both arguments. First, the court held, “as an independent auditor, Deloitte cannot be Dow’s adversary. Even the threat of litigation between an independent auditor and its client can compromise the auditor’s independence and necessitate withdrawal.” (*Id.* at *23 citing AICPA Code of Professional Conduct § 101.08.) Framing the question as “not whether Deloitte could be Dow’s adversary in any conceivable future litigation, but whether Deloitte could be Dow’s adversary in the sort of litigation the Dow Documents address” (*Id.* at *24), the court answered that question in the negative.

The court further held that Dow had a reasonable basis to believe that Deloitte would keep the disclosed material confidential “because Deloitte, as an independent auditor, has an obligation to refrain from disclosing confidential client information.” (*Id.* at *28–29 (citing AICPA Code of Professional Conduct § 301.01).) In addition, the court rejected the government’s invocation of *United States v. Arthur Young*, 465 U.S. 805, 818 (1984), which declined to protect accountant work product from disclosure, because the information at issue here was not an auditor’s interpretation of its client’s financial statements, but an attorney’s thoughts and opinions developed in anticipation of litigation. As a policy matter, the court held that finding waiver on facts such as these “could well encourage the sort of ‘[i]nefficiency, unfairness and sharp practices’ that *Hickman* sought to avoid. For example, it might discourage companies from seeking legal advice and candidly disclosing that information to independent auditors.” (*Id.* at *32.)

The court’s decision reinforces that disclosure of attorney work product to an auditor within the context of an audit engagement should not operate as a waiver of that work product protection.

—[Amelia Toy Rudolph](#), Atlanta, GA