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D.C. Circuit Rules That Disclosure To An Independent Auditor Does Not Waive Work Product Protection

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In the first U.S. Court of Appeals decision to address the issue, the D.C. Circuit ruled last week[2] that disclosure of work product to an independent auditor does not waive the protection of the work product doctrine—whether the disclosure is made in writing or orally. *United States v. Deloitte LLP*, 2010 WL 2572965 (D.C. Cir. June 29, 2010).

The case arose out of a subpoena enforcement action in which the government sought to compel Dow Chemical's independent auditor to produce several documents in connection with ongoing tax litigation. Two were prepared by the company's representatives (one by an accountant and an inside attorney, the other by outside counsel). The government conceded that these documents qualified as work product, but argued that work product protection was waived by disclosure to the auditor. The Court of Appeals disagreed, reasoning that the independent auditor was not a potential litigation "adversary" of the company, and that the company had a reasonable expectation of confidentiality in light of the auditor's professional confidentiality obligation.

The D.C. Circuit also addressed the scope of the work product doctrine and the related federal discovery rule. The third document at issue was prepared by the independent auditors themselves, in the course of their audit work, and summarized a meeting with the company's counsel and employees concerning potential litigation. The court ruled that the work product doctrine could protect those portions of the document that reflected the "thoughts and opinions" of the company's attorneys developed in anticipation of litigation—even though the document was not prepared by the attorneys (or company personnel), and reflected thoughts and opinions of counsel communicated in oral, not written, form.

Importantly, the D.C. Circuit adhered to the "because of" litigation test for determining whether a document was prepared "in anticipation of litigation". As the Court noted, this is the test used in most of the circuits (including the Second Circuit). This decision thus stands in contrast to the First Circuit's 3 to 2 *en banc* decision in *United States v. Textron* (see our August 25, 2009 memorandum), which held that the work product doctrine did not protect tax accrual work papers because they were not "prepared *for use* in possible litigation." The D.C. Circuit noted that, under the "more lenient" "because of" test, material generated in anticipation of litigation may also be used for ordinary business purposes (such as an audit) without losing its protected status.

The D.C. Circuit's reasoning in *United States v. Deloitte*, particularly if followed by other circuits, will help protect the confidentiality of corporate counsel's oral and written communications with auditors about pending or anticipated litigation.

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[2] This memo was originally issued July 8, 2010.