

D.C. Circuit Clarifies Scope of Work-Product Protection

Lawyers for the Profession® Alert

Lawyers for the Profession® Alert | 4 min read

Sep 14, 2010

U.S. v. Deloitte LLP and Dow Chemical Co., 09-5171 (D.C. Cir. June 29, 2010)

Brief Summary

The U.S. Court of Appeals for the District of Columbia Circuit upheld a company's assertion of work-product protection for three documents in the files of an outside independent tax auditor. The decision clarifies that the D.C. Circuit follows the majority of Circuits adopting the "because of" test for work-product, particularly regarding financial audits.

Complete Summary

Dow Chemical (the Company) challenged the United States government's tax assessment and hired an independent outsider auditor, Deloitte LLP (the Auditor), to review its tax returns. After litigation commenced, the government sought review of three documents that the Company had placed on its privilege log. The first was an analytical draft memo, prepared by the Auditor, which contained the thoughts and impressions of the Company's legal counsel. The second and third documents were given to the Auditor by the Company. One was a memo prepared by Company employees (an accountant and an in-house counsel), the other a tax opinion prepared by the Company's outside counsel. The government issued a third-party subpoena to the Auditor for those documents. The Company and the Auditor both objected to producing the three documents, arguing that each was protected by the work-product protection.

Without an *in camera* review, the district court denied the government's motion to compel, finding that all three documents were work-product. It held that the memo was work-product, although prepared by the Auditor, because the contents recorded the thoughts of the Company's counsel regarding the prospect of litigation. The district court also stated that as to the other documents, there was no waiver by giving the documents to the Auditor because the Auditor was not a potential adversary and it was not unreasonable for the Company to expect the Auditor to maintain confidentiality of the documents and the thoughts and impressions within them.

On appeal, the D.C. Circuit affirmed. The government argued that the work-product doctrine protects only those *documents prepared* by a party or a party representative. The Company countered that despite the Auditor's independent nature, the memo was prepared using the mental impressions of the Company's attorneys. The court reaffirmed that the protection extends not merely to documents but also to "intangible" things, such as the attorney's mental impressions. Moreover, the proper analysis should consider not simply the maker of the document in question but rather whether the document contains mental impressions of the attorney, prepared in anticipation of litigation.

Second, the government argued that the document was not work-product because it was prepared during an annual audit, not in anticipation of litigation. That is, that the document's function (rather than its content) determines whether it is work-product or not. The court disagreed, adopting the overwhelming majority rule that the test is not whether the document is prepared in anticipation of litigation, but rather whether it was prepared because of the anticipated litigation. (This is in contrast only to the 5th Circuit, which requires that the anticipation of litigation be the "primary motivating purpose" behind the document's creation.) Accordingly, the circuit court instructed the district court to analyze the Auditor memo and determine which sections contained the mental impressions of the Company's counsel and whether there were select portions that could be produced.

As for the second and third documents, those prepared by the Company itself, the government conceded that they were work-product, but it argued that the Company had waived the work-product protection when it disclosed them to the Auditor. The court disagreed, finding no waiver.

Unlike the attorney-client privilege, which ordinarily is waived through voluntary disclosure, the court stated that work-product is waived only in limited circumstances when the work-product is voluntarily disclosed to an adversary or a conduit to other adversaries. The government argued that the Auditor was an adversary because disputes sometimes arise between independent auditors and their clients. The court disagreed, concluding that the mere potential of litigation did not present sufficient tension between the parties to create an adversary relationship that would support a waiver. Instead, the circuit court found that the test is whether the Auditor could be the Company's adversary in the sort of litigation in the underlying suit. Because the present dispute was with the IRS, not a dispute with the Auditor, the circuit court found that the Auditor could not be considered a potential adversary with respect to the remaining documents in dispute.

The government also argued that the Auditor was a conduit to the Company's other adversaries. The circuit court found that the proper test hinged on whether there was a reasonable expectation that the recipient would keep the disclosed material confidential. This reasonable expectation could be found in common litigation interests between the disclosing party and the recipient or in a strong or sufficiently unqualified confidentiality agreement. Here, the circuit court found that the Company had this reasonable expectation of confidentiality because the Auditor had a professional obligation, found within the independent auditor's code of professional conduct, to

refrain from disclosing confidential client information. As such, the Company did not waive work-product protection for the remaining two documents when it voluntarily gave them to the Auditor.

Significance of Opinion

This decision clarifies the scope of work-product protection in important and recurring contexts. Significantly, the court reinforces the ability of companies to deal with independent outside auditors with a clearer eye on which communications may be protected from disclosure in anticipated litigation.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.