

***First Wednesday — A Monthly Discussion of Employment Law
Issues and Other Hot Topics for Management***



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Jeff is a Shareholder of Thoits, Love, Hershberger & McLean, specializing in employment law and commercial litigation. He can be reached at (650) 327-4200 or jsnyder@thoits.com.

Good News for Lawyers Responding to Clients' Auditors

For the first time ever, a California Appellate Court has held that an attorney's response to a company's outside auditors, written in response to a routine audit request for information about pending litigation, is protected by the attorney work product doctrine. The attorney's disclosure of the response to the client's auditors did not waive the protection. As a result, the attorney's response was not discoverable by adverse parties in litigation. This case, *Laguna Beach County Water District v. Superior Court of Orange County*, decided December 15, 2004 (04 C.D.O.S. 11096), establishes a new rule of law in California.

Attorneys are often asked by corporate clients to respond to the corporation's outside auditors regarding any pending or threatened litigation. These inquiries are made annually as part of a routine financial audit, typically conducted by the corporation's CPA firm. The attorney will respond directly to the CPA on behalf of their mutual client. The attorney has a professional duty to provide the auditors a candid response about any known pending or threatened litigation matters. In the hands of a litigation adversary, this candid response could potentially be used against the client in the very litigation that is discussed in the audit inquiry response letter. This was exactly the situation in the recent case involving the Laguna Beach County Water District.

The issue presented to the court was whether the Water District's lawyer, by sending letters containing his opinions to the District's outside auditors, waived the right to assert the attorney work product protection as to those letters. In deciding this issue of first impression, the California Court of Appeal upheld the work product protection. While attorneys may have taken it for granted that their audit inquiry response letters had always retained their protected character, this case establishes a new rule of law involving a legal issue of continuing public interest.

Attorney work product is defined in California as "any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories" and trial preparation material. This information is ordinarily privileged (and, therefore, not discoverable) unless there has been a waiver of the protection. The purpose of the work product doctrine is to protect attorney information from adverse parties, rather than against all others outside the bounds of a recognized confidential relationship. Thus, work product protection is not waived except by a disclosure wholly inconsistent with the purpose of the privilege. An attorney responding to an audit inquiry must necessarily provide his or her opinions and conclusions, or "work product," about pending litigation matters.

In the Water District case, the attorney appropriately labeled his audit inquiry response letters as "attorney-client and attorney work product communication." Furthermore, disclosure of the information was not casual, unthinking or even voluntary. The attorney would not have sent those letters but for his client's auditor's request and a legal requirement imposed by at least good faith, if not a more stringent duty, to comply with the request. The attorney's response had to be candid and complete. There was no showing that the letters would be disclosed beyond the CPA firm. Thus, there was no waiver.

While this case offers practitioners a level of comfort that these letters will be protected from discovery under California law, federal courts have come down on both sides of the issue. One federal court found an audit inquiry response letter was protected by the federal work product rule because it was "comprised solely of an attorney's opinion" and "an audit letter is not prepared in the ordinary course of business but rather arises only in the event of litigation. It is prepared because of the litigation,

and it is comprised of the sum total of the attorney's conclusions and legal theories concerning that litigation." However, other federal courts have allowed discovery of these letters because the federal rule on work product protection is narrower than California's rule. Under the Federal Rules of Civil Procedure, work product protection only extends to documents "prepared in anticipation of litigation or for trial." Compare that to California's work product rule, which also protects the attorney's impressions, conclusions, opinions or theories while acting in a non-litigation capacity.

In summary, this new case is very helpful to California lawyers who respond to audit inquiries on behalf of their corporate clients. These response letters should be plainly marked "attorney-client and attorney work product communication," and their distribution limited to the CPA firm and mutual client.

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Jeffrey A. Snyder
Thoits, Love, Hershberger & McLean
245 Lytton Avenue, Suite 300
Palo Alto, California 94301-1426
Telephone: (650) 327-4200
Facsimile: (650) 325-5572
E-mail: jsnyder@thoits.com

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& McLEAN
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