

*Discovery*

## Audit Response Deemed Work Product Under California Law

*Rule varies among jurisdictions*

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In a matter of first impression, the California Court of Appeal held that the attorney work product doctrine protects from discovery a lawyer's response to a client's outside auditors. *Laguna Beach County Water District v. Superior Court of Orange County*. The court found that the response was "clearly work product" because it contained the attorney's "thoughts and ideas about pending actions." Disclosure to the outside auditor did not waive work product protection, the court concluded.

Under California law, a party waives the protection only by "a disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney's work product and trial preparation." California's protection, however, is more expansive than that of other jurisdictions

The federal work product doctrine, for example, protects only materials "prepared in anticipation of litigation or for trial." Under this rubric, some courts require only that the document be prepared "because of" possible litigation in order to qualify for protection. Others examine the document's "primary purpose" and grant protection only to documents prepared to assist in pending or possible litigation.

Even courts following the less restrictive "because of" test may exclude an audit response from protection on the ground that it was prepared in the ordinary course of business

Where the court concludes the response is work product, it must further consider whether disclosure to the auditor waives the protection. Commonly, courts will order in camera review of the response in reaching this decision. Federal cases addressing the issue are divided

between protecting responses and ordering their disclosure. *E.g.*, *In re Raytheon Securities Litigation*. Accordingly, lawyers drafting responses must understand that they may be discoverable

Lawyers responding to auditor inquiries must consult the ABA's Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, notes John W. Allen, Kalamazoo, MI, former Chair of the Ethics and Professionalism Committee of the ABA Tort Trial and Insurance Practice Section. Commonly known as the "Treaty," this statement embodies an agreement between the ABA and the American Institute of Certified Public Accountants establishing guidelines for responding to an audit inquiry. Lawyers must follow the Treaty

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in order to maximize the likelihood that their responses will retain work product protection. Says Allen, "In this day and age, it is an unacceptable risk to be drafting audit response letters without consulting the Treaty" □

#### Resources:

*Laguna Beach County Water District v. Superior Court of Orange County*, 124 Cal. App. 4th 1453 (2004)

*In re Raytheon Securities Litig.*, 218 F.R.D. 354 (D. Mass. 2003)

ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (Dec. 8, 1975), available at [www.abanet.org/buslaw/attorneyclient/policies/aicpa.pdf](http://www.abanet.org/buslaw/attorneyclient/policies/aicpa.pdf)

For more on audit response letters, see John W. Allen, *Navigating the Minefield—Ethical and Liability Risks in Auditor Response Letters after Sarbanes-Oxley*, 34 THE BRIEF 17 (Winter 2005)