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## Auditor's report discoverable

### Not covered by work product, attorney-client privilege

Published: 12:16 pm Thu, December 27, 2012  
By Sylvia Hsieh



JUDGE JUDITH DEIN

Evidence related to an audit performed by an outside accounting firm in a lawsuit over a computer software licensing agreement is subject to discovery, a U.S. magistrate judge has ruled.

The plaintiff argued that the information sought by the defendant — including drafts of the audit report and emails concerning the audit — could be withheld pursuant to the work product doctrine and the attorney-client privilege.

Judge Judith G. Dein disagreed and granted the defendant's motion to compel discovery.

"The record before this court does not support a determination that [the] audit materials were prepared for litigation," Dein wrote. "[The accounting firm] was not retained for the purpose of rendering legal advice."

The 39-page decision is *Columbia Data Products, Inc. v. Autonomy Corporation Limited, et al.*, Lawyers Weekly No. 02-584-12. The full text of the ruling can be found by clicking here.

'Assume the worst'

Scott McConchie of Griesinger, Tighe & Maffei in Boston, local counsel for the defendant, said the ruling underscores the importance of transparency when a party hires an expert that the other side was led to believe was independent, not partisan.

The defendant's lead attorney, Gregory L. Doll of Los Angeles, said his client was unaware that the auditor was hired by litigation counsel, not in-house counsel, and was not acting as an independent party.

"They were an expert in disguise," Doll said.

Doll said the case sends the message "that if you do something that you believe is privileged, you are going to waive the privilege if you put it in the complaint."

Jonathan I. Handler, a complex commercial litigator at Day Pitney in Boston who was not involved in the case, said he advises clients in all different circumstances involving work product and attorney-client privilege to assume the worst.

"If you use an outside expert, or something someone in your company does, in order to make a claim, assume all of that is going to come out," Handler said.

Lawyers said Dein's ruling does not depart from established law but helps further clarify issues of privilege, work product and waiver.

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"Oftentimes, practitioners think if something is cloaked as an attorney-client privilege or work product, it's automatically privileged," said John R. Baraniak Jr., who practices in Choate, Hall & Stewart's major commercial litigation group in Boston. "This clearly reminds us that just because an expert might be used in litigation down the road, if it serves as a business purpose, it's not going to be work product."

An outside expert is often brought in to perform an investigation before a full-blown dispute, and the client later wants to use the expert in order to sue, Handler said.

An example is in the purchase or sale of a business, in which the purchase price may include a percentage of future profits.

"The issue is whether the client is engaged in the regular course of business or something in anticipation of litigation. That's a difficult line," Handler said.

In *Columbia Data Products*, the plaintiff argued that it did not matter that the audit was performed under the license agreement because it was also performed "in anticipation of litigation."

But the judge said the audit materials did not fall within the scope of work product under the 1st Circuit test that documents prepared both for a business purpose and "because of" existing or expected litigation are considered work product. The judge also examined a more recent 1st Circuit ruling, *United States v. Textron Inc. & Subsidiaries*, which applied a narrower test that asks whether the documents were "prepared for use in possible litigation."

"In general, the 'because of' test is more loose because it encompasses multiple purposes, whereas the 'for use' test doesn't encompass something you did for multiple reasons, only one of which was in anticipation of litigation," Handler said.

The *Columbia Data Products* ruling, which analyzed the audit documents under both standards, is helpful to lawyers because "not a lot of federal cases get into the nuts and bolts of the standard from a practical standard," he added.

Zachary C. Kleinsasser of Greenberg Traurig in Boston represented the plaintiff. He did not return a call seeking comment.

'Misuse of software'

The plaintiff in the case, software company Columbia Data Products, alleged that defendant Autonomy Corp. and its predecessor company, Iron Mountain, sold products containing Columbia's software but failed to make royalty payments for them under a licensing agreement.

Before Columbia sued, it exercised its right under the parties' license agreement to hire an independent accounting firm to audit the defendant's books and records to assess how much was owed in royalty fees for the alleged misuse of its software.

PriceWaterhouseCoopers performed the audit, which concluded that the defendant owed more than \$23 million in unpaid royalty fees.

When the defendant challenged the validity of the audit, the plaintiff withheld documents, including drafts of the audit report, emails between PriceWaterhouseCoopers and the plaintiff, and emails between the employees of the plaintiff about the audit.

The defendant brought a motion to compel discovery.

The judge said that the materials were not protected by work product or attorney-client privilege.

"Indeed, the record demonstrates that the audit report and communications relating to the audit were intended only for [the plaintiff]'s internal use, and not for the purpose of litigation. ... Although [plaintiff] may have believed that litigation was a real possibility, and its decision to retain litigation counsel stemmed from that belief, the record demonstrates that the audit was conducted to determine how much, if anything, [the defendant] owed under the License Agreement, not for litigation purposes," Dein wrote.

Dein went on to say that the auditor's role was described repeatedly to the defendant as that of an independent auditor whose sole purpose was to conduct a royalty audit pursuant to the parties' license agreement.

"What is missing, however, is any evidence that [the auditor] participated in, much less

facilitated or translated, the lawyers' provision of legal advice to their client," the judge said. "Thus, [the auditor] was not retained for the purpose of rendering legal advice."

Dein went further and said that, as a matter of fairness, disclosure was required.

"[The plaintiff] has put the audit report, the audit process, and [the auditor]'s status as an independent auditor directly at issue in this litigation. Under such circumstances, full disclosure is only fair," she concluded.

CASE: *Columbia Data Products, Inc. v. Autonomy Corporation Limited, et al.* Lawyers Weekly No. 02-584-12

COURT: U.S. District Court

ISSUE: Is an audit performed by an outside accounting firm under the terms of a license agreement discoverable?

DECISION: Yes, because the audit was intended for business purposes, not for litigation, and there was no evidence the auditor participated in the lawyer's advice to its client

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