

## Attorney Work-Product Protection for Taxpayer Information Used to Prepare an Expert Witness Report

---

September 9, 2020

The U.S. Court of Appeals for the Ninth Circuit recently held that in-house counsel's legal memos used to prepare an expert witness were partially protected from disclosure as attorney work product. In the course of an income tax examination of Sanmina Corporation, the IRS moved to enforce a summons requiring production of legal memoranda Sanmina's in-house attorneys prepared. *United States v. Sanmina Corp.*, 2020 WL 4558285 (9<sup>th</sup> Cir. Aug. 7, 2020). The Ninth Circuit rejected enforcement of the summons insofar as enforcement would have disclosed Sanmina's work-product describing its legal opinions and mental impressions, but Sanmina's victory was not easily achieved, having involved two appeals to the Ninth Circuit.

Sanmina had claimed a \$503 million worthless stock deduction for its investment in Sanmina International AG. Recognizing that the IRS probably would examine the deduction and that litigation might eventuate, Sanmina hired an economist employed by the law firm, DLA Piper, to prepare a report substantiating the worthlessness of the Sanmina International AG stock. To assist the economist, Sanmina gave to DLA Piper two in-house legal memoranda entitled "Memo draft: Stock and Debt Losses on Swiss-3600, March 11, 2009" and "Memo: Guarantee and Capital Contribution Agreement Concerning Sanmina International AG, July 2, 2006." (Swiss-3600 is Sanmina's internal designation for Sanmina International AG.) The titles of the memoranda might suggest that Sanmina planned to fund losses of Sanmina International AG, from which the IRS might infer that Sanmina International AG had future value and that the stock was not worthless. The economist's report cited the memoranda in a footnote. The IRS requested the memoranda, Sanmina refused, the IRS issued a summons, and enforcement litigation ensued.

Sanmina first argued that the memoranda were protected by attorney-client privilege. The Ninth Circuit rejected Sanmina's argument because the IRS was entitled to documents on which the economist based the worthless stock report. Sanmina was able to fall back on attorney work-product protection, which is not lost if disclosure of a document is provided to one who is not an adversary. Clearly, the DLA Piper economist retained to prepare the worthless stock report was not an adversary.

The Ninth Circuit determined that Sanmina implicitly waived work-product protection, ruling that Sanmina had to disclose factual recitations in the memoranda to avoid the IRS from being unfairly disadvantaged, but was not required to disclose the opinions and mental impressions in the memoranda. The Ninth Circuit observed that the IRS's attorneys could perform their own legal analysis of the facts rather than being provided with the opportunity to litigate "on wits borrowed from the adversary."

Sanmina had one more argument to protect its in-house legal memoranda from disclosure. Sanmina asserted that it sought legal advice from DLA Piper regarding the worthless stock deduction as well as an expert witness report from the firm's economist. The Ninth Circuit recognized that it is not unusual to provide a document to a law firm for dual legal and non-legal purposes. Nonetheless, the district court, in the proceeding below, had found that Sanmina's purpose in providing the in-house legal memoranda to DLA Piper was non-legal, a finding that the Ninth Circuit was unwilling to disturb.

**Continued**

---

Except in a case in which a taxpayer's opinions and mental impressions are in issue, disclosure of work-product to a third party, even if the third party is an expert witness hired by the taxpayer, is best avoided. Moreover, prudence suggests that a taxpayer refrain from using the same law firm for dual legal and non-legal purposes. Finally, in-house attorneys should remain sensitive to the risk that their legal memoranda might be discovered, and for that reason recitation of facts and analysis should not be so intertwined that disclosure of factual recitations also risks disclosure of opinions and mental impressions.

Please contact the authors or your Miller Canfield attorney with further questions.