Courts Disagree About Basic Work Product Doctrine Elements:
Part I

Thomas E. Spahn (tspahn@mcguirewoods.com) is a partner with McGuireWoods LLP in Tysons Corner, Virginia. Tom practices as a commercial litigator and regularly advises clients on ethics issues including conflict of interest, confidentiality, and dealing with corporate wrongdoing. He is a frequent lecturer on legal ethics and privilege issues, and among numerous other publications is the author of The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide published by the Virginia Law Foundation. Tom has spoken at more than 1,000 CLE programs throughout the United States and in several foreign countries, and has served on the ABA Standing Committee on Ethics & Professional Responsibility.

In his June 10, 2015 “Privilege Points” release, Tom Spahn discusses divergent views among courts on application of the work product doctrine:

The Federal Rules of Civil Procedure and most state court rules memorialize their basic work product doctrine in just one sentence. But courts take divergent views on what that sentence means.

Some courts apply work product protection only to documents that litigants will use to "assist" in litigation. Other courts protect documents created "because of" the litigation, even though they will not be used to "assist" in that litigation. In Deutsche Bank National Trust Co. v. WMC Mortgage, LLC, the court noted that under Second Circuit precedent "the phrase 'because of' trumps 'assist in' as the talisman by which a document's eligibility for attorney work product protection will be evaluated." Nos. 3:12-CV-933, -969, -1699, & 3:13-CV-1347 (CSH), 2015 U.S. Dist. LEXIS 49158, at *37-38 (D. Conn. Apr. 14, 2015). Three days later, in Byman v. Angelica Textile Services, Inc. (In re Sadler Clinic, PLLC), the court took the same approach — noting that "[n]umerous courts of appeals have specifically adopted the 'because of' test." Ch. 7 Case No. 12-34546, Adv. No. 14-03231, 2015 Bankr. LEXIS 1369, at *10 (Bankr. S.D. Tex. Apr. 17, 2015). But a month earlier, a Maine state court applying that state's work product rule (essentially identical to the federal rule) held that a party seeking work product doctrine protection "must demonstrate that the documents were prepared exclusively to assist in anticipated or ongoing litigation." Irving Oil Ltd. v. ACE INA Ins., No. BCD-CV-09-35, 2015 Me. Super. LEXIS 72, at *7 (Me. Super. Ct. Mar. 17, 2015).

The "because of" standard casts a far wider protective net than the "assist" standard. For instance, corporations communicating about how they might pay for an adverse judgment might create documents satisfying the former standard but not the latter. Next week's Privilege Point will address other work product variations.