Courts Focus on the Work Product Doctrine's "Motivation" Element

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In his March 4, 2015 “Privilege Points” release, Tom Spahn discusses litigation motivation as the key to work product protection:

The work product doctrine protection rests on three elements: (1) litigation; (2) anticipation; (3) motivation. In normal civil or criminal litigation, the first element presents an easy analysis. Most lawyers' attention focuses on the second element — whether their clients reasonably anticipate litigation. But the third element represents the real key to work product protection.

Even if the client is in the midst of litigation, or reasonably anticipates litigation, the work product doctrine only protects documents motivated by that litigation. In *Chevron Midstream Pipelines LLC v. Settoon Towing LLC*, Civ. A. No. 13-2809/c/w13-3197 SECTION: "A"(5), 2014 U.S. Dist. LEXIS 179284 (E.D. La. Jan. 5, 2015), Chevron in-house lawyers initiated and directed what they labeled a "legally chartered" root cause investigation after a fatal pipeline explosion. In analyzing the motivation element the court described as the "salient question" whether "'legally chartered' root cause analyses are different in kind than those 'other' root cause analyses routinely conducted by Chevron." *Id.* at *28. The court ultimately rejected Chevron's work product claim, pointing to: (1) deposition testimony by a Chevron engineer "who agreed in her deposition that the 'primary purpose of a root cause analysis' is to 'prevent a similar accident from happening again in the future',' and "that it is part of the Chevron ordinary course of business to conduct a root cause analysis' after an incident" (*id.* at *25); (2) Chevron Pipeline's President's statement in an employee newsletter that "[w]e are conducting root cause analyses of both incidents and will apply lessons learned. Our ultimate goal remains the same - an incident and injury-free workplace. " (*id.* at *27); (3) Chevron's failure to provide the court examples of Chevron's ordinary root cause analyses — noting that Chevron's argument that its ordinary "incident reviews" were different from its "legally chartered" investigation "would be more convincing if there was actually another root cause analysis from which to distinguish the legally chartered one." *Id.* at *29.

To satisfy the work product motivation element, companies must demonstrate that they did something different or special because they anticipated litigation — beyond what they ordinarily would do, or which they were compelled to do by external or internal requirements.