Most Courts Focus on the Four Corners of Withheld Documents, Despite Barko: Part II

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In his August 20, 2014 “Privilege Points” release, Tom Spahn recommends articulating on the face of documents the primary purpose for communications that contain privileged or work product protected information:

Last week's [Privilege Point](#) noted that many courts look for evidence of privilege protection on the face of withheld documents. The same is true in the work product context.

In [Schaeffler v. United States](#), Judge Gorenstein rejected a taxpayer's work product claim for an Ernst & Young memorandum proposing refinancing and restructuring steps — because "the memorandum does not specifically refer to litigation." No. 13 Civ. 4864 (GWG), 2014 U.S. Dist. LEXIS 72710, at *46 (S.D.N.Y. May 28, 2014). About one month later, another court rejected a litigant's work product claim, noting both that lawyers only received copies of the withheld emails and that "within the emails themselves there is not a single mention of a forthcoming tribunal." [Hamdan v. Ind. Univ. Health N., LLC](#), No. 1:13-cv-00195-WTL-MJD, 2014 U.S. Dist. LEXIS 86097, at *16 (S.D. Ind. June 24, 2014).

Both in the attorney-client privilege and work product contexts, lawyers should train their clients, and discipline themselves, to articulate on the face of their emails the "primary purpose" for their communications: legal advice in the privilege context and litigation preparation in the work product context.