Where Do Courts Look When Determining Whether a Litigant has Proven Attorney Client Privilege or Work Product Protection?: Part II

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In his January 16, 2013 “Privilege Points” release, Tom Spahn discusses pointers for transmitting material that requires protection of the attorney-client privilege.

Last week's Privilege Point described some courts' reliance on affidavits or some other extrinsic evidence when assessing a protection claim – rather than a review of the documents themselves. Other courts take exactly the opposite position.

In County of San Mateo v. CSL Ltd. (In re Plasma-Derivative Protein Therapies Antitrust Litig.), the court dealt with defendant Baxter's withholding of a document described as a "draft set of key messages for an upcoming investor conference." Nos. 09 C 7666 & 11 C 1468, 2012 U.S. Dist. LEXIS 159368, at *10 (N.D. Ill. Nov. 7, 2012) (internal citation omitted). In support of its privilege claim, Baxter supplied a declaration from the company's Corporate Vice President of Investor Relations. She stated that she prepared the document at the General Counsel's request "for the purpose of seeking legal advice from and discussing legal issues with senior in-house counsel about the messages we could convey to investors." Id. at *10-11. The court found the affidavit unconvincing, labeling it a "self-serving declaration, drafted more than five years after the fact." Id. at *11. Instead, the court looked only at the document and its forwarding email. The court noted that the Vice President's claimed purpose was "not apparent from the face of the document or the [forwarding] email." Id. In rejecting Baxter's privilege claim, the court reiterated that "[t]here is nothing in the body of the email or the document – other than the inclusion of lawyers on the distribution list – to suggest that [the Vice President] was soliciting legal advice." Id.

Because some courts do not give much weight to affidavits (even labeling them "self-serving" – which seems axiomatic), lawyers should encourage their clients to articulate the basis for any protection in the documents themselves. For instance, a cover email forwarding a draft document to a lawyer for review should explicitly indicate that the sender requests legal advice about the attached draft.