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

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In his January 23, 2013 “Privilege Points” release, Tom Spahn discusses how to demonstrate that privilege or work product protection is warranted.

The last two Privilege Points noted that some courts assess a privilege or work product claim by relying on extrinsic evidence such as affidavits, while other courts look primarily or exclusively at the withheld documents themselves. Most courts examine both the documents and extrinsic evidence.

In Graff v. Haverhill North Coke Co., Case No. 1:09-cv-670, 2012 U.S. Dist. LEXIS 162013 (S.D. Ohio Nov. 13, 2012), a litigant claimed work product and privilege protection for documents created during a consultant's audit. In rejecting the work product claim for one audit, the court pointed to the documents themselves. Among other things, the company president's memorandum requesting the audit indicated that "the purpose of the audit was to assess general compliance with regulatory requirements and company policies." *Id.* at *15. Another company executive described the audit as "generic." *Id.* at *16. Thus, the documents themselves undercut the work product claim. In contrast, the court found that many of the documents deserved attorney-client privilege protection. Among other things, the court noted that the same executive who described the audit as "generic" had submitted an affidavit which "confirms that the audit was prepared to assist counsel with providing legal advice" to the company. *Id.* at *28.

Lawyers should always teach their clients to articulate the basis for a protection claim on the face of protected documents. Companies involved in litigation should also determine what a pertinent court will examine in assessing the company's withholding of protected documents. Most courts expect an affidavit or other extrinsic evidence.