Courts Disagree About Basic Work Product Principles: Part II

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In his April 23, 2014 “Privilege Points” release, Tom Spahn discusses varying standards for triggering work product protection:

Last week's Privilege Point described three different levels of protection three courts provided to opinion work product in about a three-week period. Courts also disagree about many other work product doctrine elements.

In U.S. Nutraceuticals LLC v. Cyanotech Corp., the court noted that federal courts defining the required "anticipation" element hold "that litigation need not be imminent, but rather a 'real possibility' at the time the documents in question are prepared." Case No. 5:12-cv-366-Oc-10PRL, 2014 U.S. Dist. LEXIS 22739, at *6 (M.D. Fla. Feb. 19, 2014) (citation omitted). Nine days later, another court articulated two different and internally inconsistent standards in the same paragraph: (1) "there was real and substantial probability that litigation will occur at the time of the document's creation," and (2) "the threat of litigation must be 'real' and 'imminent.'" Black & Veatch Corp. v. Aspen Ins. (UK) Ltd., Case No. 12-2350-SAC, 2014 U.S. Dist. LEXIS 25908, at *18, *19 (D. Kan. Feb. 28, 2014) (citation omitted).

In addition to understanding the substantively different standards, lawyers should also recognize the risks of articulating the wrong standard. Clients contemporaneously noting in a document that they are facing the "real possibility" of litigation may have to explain that, at some later time, the litigation threat became "imminent."