Decisions Highlight Important Differences Between the Work Product Doctrine and the Attorney-Client Privilege: Part I

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In his November 27, 2013 “Privilege Points” release, Tom Spahn discusses important differences between the attorney-client and work product doctrine:

The work product doctrine varies dramatically from the attorney-client privilege in many important respects. Because the protections have different strengths and weaknesses, clients and their lawyers normally should consider both protections when withholding communications or documents.

The attorney-client privilege can apply whenever clients and their lawyers communicate about the former's request for legal advice – even in the absence of litigation or anticipated litigation. In contrast, the work product doctrine applies only when clients are in or anticipate litigation. In United States v. Veolia Environment North America Operations, Inc., Civ. No. 13-mc-03-LPS, 2013 U.S. Dist. LEXIS 153245 (D. Del. Oct. 25, 2013), the court assessed work product protection for documents a corporation created in connection with its $4.5 billion worthless stock deduction. Although companies obviously prepare tax returns in the ordinary course of their business, the court pointed to the following factors (among others) in extending work product protection to the documents: the "sheer size" of the deduction; the "fact that the Taxpayer was already under audit by the IRS for its prior year returns"; the company's retention of "outside counsel Cleary Gottlieb"; the company's request for a private letter ruling interpreting pertinent regulations; and the company's application to participate in the "IRS PFA program" which is intended "to address issues that are likely to be disputed in post-filing audits." Id. at 14-15 (citation omitted).

Companies and their lawyers should remember that the work product doctrine can only apply at certain times, in contrast to the attorney-client privilege. Next week's Privilege Point will describe two other ways in which the work product doctrine provides less protection than the attorney-client privilege.