Courts Confirm Basic Work Product Principles

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In his March 26, 2014 “Privilege Points” release, Tom Spahn discusses the distinction between material prepared to prevent litigation and in anticipation of litigation:

The work product doctrine does not automatically apply just because a party anticipates litigation. A number of other principles limit the protection's applicability.

In *Telamon Corp. v. Charter Oak Fire Insurance Co.*, Case No. 1:13-cv-00382-RLY-DML, 2014 U.S. Dist. LEXIS 6583 (S.D. Ind. Jan. 17, 2014), the court found that neither the attorney-client privilege nor the work product doctrine protected materials created during a Barnes & Thornburg [plaintiff’s outside lawyers] internal investigation. Among other things, the court rejected the significance of the company's post-investigation meeting with the FBI – noting that the company "does not counter the fact that it was the results of its investigation that led [the investigator] and the lawyers to reach out to the FBI." *Id.* at *7. In other words, the company did not anticipate litigation at the beginning of the investigation, but rather at the end. Four days later, the Eastern District of New York affirmed a Magistrate Judge's earlier decision (reported in an earlier Privilege Point) denying privilege and work product protection for communications between a Duane Morris lawyer and her client's human resources employee. *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, No. 10-CV-0887 (PKC) (VMS), 2014 U.S. Dist. LEXIS 7695 (E.D.N.Y. Jan. 21, 2014). Among other things, the court noted that "Defendants acknowledge that this advice was intended, in part, to prevent Plaintiff from bringing claims of retaliation." *Id.* at *18. The court then stated another basic work product principle: "Legal advice given for the purpose of preventing litigation is different than advice given in an anticipation of litigation." *Id.*

Corporate clients and their lawyers should familiarize themselves with the work product doctrine's nuances. They cannot change the underlying facts, but in some situations they can forfeit possible work product protection by inarticulately stating their positions.