Does Work Product Protection Depend on a Lawyer's Involvement?

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In his July 10, 2013 “Privilege Points” release, Tom Spahn discusses whether a lawyer’s involvement is required to assure work product protection and indicates that the plain language of Rule 26 does not contain such a requirement.

Perhaps the most remarkable judicial disagreement about the work product doctrine involves the issue of a lawyer's involvement. The rule could not be any clearer. Federal Rule of Civil Procedure 26(b)(3)(A) protects documents prepared in anticipation of litigation or trial "by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." (Emphasis added).

Some courts apply the rule as written. In In re MI Windows & Doors, Inc., Prod. Liab. Litig., the court recognized that "even if no lawyer was involved, these notes would be protected by work product," because "[t]he work product immunity protects material prepared by non-lawyers in anticipation of litigation." MDL No. 2333, Case No. 2:12-mn-00001, 2013 U.S. Dist. LEXIS 63392, at *4 (D.S.C. May 1, 2013). About two weeks later, the Southern District of New York took the same approach. Vaher v. Town of Orangetown, No. 10 Civ. 1606 (KMK) (GAY), 2013 U.S. Dist. LEXIS 69559 (S.D.N.Y. May 15, 2013). However, two days after that, the Western District of Washington inexplicably took a different position. In Warren v. Bastyr University, No. 2:11-cv-01800-RSL, 2013 U.S. Dist. LEXIS 71269, at *7 (W.D. Wash. May 17, 2013), the court rejected defendant's work product argument – noting among other things that "there is no indication that an attorney requested, created, or reviewed the withheld" document. A few other courts have taken this puzzling approach. See, e.g., United States ex rel. Dye v. ATK Launch Sys. Inc., Case No. 1:06-CV-00039-CW, 2011 U.S. Dist. LEXIS 28536, at *15 (N.D. Utah Mar. 9, 2011) ("ATK agrees that the Wecker and Davidson Slides were not prepared at the direction of counsel, so the work product doctrine does not apply.")

Lawyers appearing in a court taking the narrow view face the awkward task of gently suggesting that the court actually read the rule.