Litigants Must Address the "Motivation" Work Product Element

Thomas E. Spahn (tspahn@mcguirewoods.com) is a partner with McGuireWoods LLP in Tysons Corner, Virginia. Tom practices as a commercial litigator and regularly advises clients on ethics issues including conflict of interest, confidentiality, and dealing with corporate wrongdoing. He is a frequent lecturer on legal ethics and privilege issues, and among numerous other publications is the author of The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide published by the Virginia Law Foundation. Tom has spoken at more than 1,000 CLE programs throughout the United States and in several foreign countries, and has served on the ABA Standing Committee on Ethics & Professional Responsibility.

In his January 30, 2013 “Privilege Points” release, Tom Spahn discusses the “motivation” work product element:

The work product doctrine rests on three basic elements: (1) there must be some "litigation" (this element normally includes arbitrations and adversarial government hearings, but not government investigations); (2) the litigant must be in such litigation or have reasonably "anticipated" it; and (3) the withheld document must have been "motivated" by that litigation. Some litigants forget the third element.

In Quality Time, Inc. v. West Bend Mutual Insurance Co., Case No. 12-1008-JTM-GLR, 2012 U.S. Dist. LEXIS 161703 (D. Kan. Nov. 13, 2012), the court addressed a work product claim in a first party insurance case. The defendant insurance company argued that the work product doctrine protected documents created after related state court litigation began. The court rejected the work product claim – explaining that even after litigation begins the work product doctrine "applies . . . to protect only those documents created because of the litigation." Id. at *31. The court noted that the defendant "does not address this equally important component of the work product doctrine." Id. As the court explained, "the ordinary course of business does not end with the commencement of litigation," and "the party resisting discovery on grounds of work product must show more than the creation of a document after commencement of litigation." Id. at *32.

Every court takes the same approach, but few articulate as bluntly the key "motivation" element of the work product doctrine protection.