How Can Companies Satisfy the Work Product Doctrine's "Motivation" Element?: Part II

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In his October 16, 2013 “Privilege Points” release, Tom Spahn discusses the “Motivation” element of work product protection.

Last week's Privilege Point explained that companies claiming work product protection must meet the "litigation" and "anticipation" elements, and then satisfy the separate "motivation" element. That prerequisite for work product protection requires companies to demonstrate that the withheld documents were motivated by the anticipated litigation rather than by something else.

In *DiMaria v. Concorde Entertainment, Inc.*, Civ. No. 12-11139-FDS, 2013 U.S. Dist. LEXIS 112533 (D. Mass. Aug. 9, 2013), defendant tavern investigated a patron's death during an altercation. The tavern's Security Manual required preparation of an "'incident report'" the night of such a serious event. *Id.* at *2. The tavern's employees did not prepare the required report that night, but a few days later its lawyers took statements from several employees. The decedent's administrator argued that the tavern took those statements "'in the ordinary course of business' pursuant to the Safety Manual." *Id.* at *6* (internal citation omitted). The court disagreed – noting that the statements "constitute departures from the routine policy described in the Safety Manual," and that "the nature of the incident and its effects and counsel's immediate involvement further removed the situation from 'the ordinary course' of the defendant's business." *Id.* at *6-7.

As companies face an increasing number of external requirements, and laudably adopt safety-conscious internal requirements, they face a greater burden in satisfying the work product "motivation" element. In essence, companies must prove that they did something different or special because they anticipated litigation.