Northern District of California Decision Highlights Wisdom of Analyzing Both Privilege and Work Product Protection?

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In his January 29, 2014 “Privilege Points” release, Tom Spahn discusses the impact of disclosure to third parties on material protected by the attorney client privilege and the work product doctrine.

The attorney-client privilege provides absolute protection, but can be very difficult to create and easily lost. In contrast, work product protection can be overcome, but survives disclosure to friendly third parties.

In *Skynet Electronic Co. v. Flextronics International, Ltd.*, No. C 12-06317 WHA, 2013 U.S. Dist. LEXIS 176372 (N.D. Cal. Dec. 16, 2013), Skynet disclosed a memorandum prepared by Andrews Kurth to a Taiwanese patent "attorney." Defendants claimed that Skynet waived any privilege protection, because Taiwanese patent "attorneys" are not actually lawyers. *Id.* at *4. The court found it unnecessary to deal with the privilege issue, because it concluded that the memorandum also deserved work product protection, which survived the disclosure. The court acknowledged that privilege protection "ordinarily ceases to exist if confidentiality is destroyed by voluntary disclosure to a third person." *Id.* at *9. However, disclosing work product to a third party "does not waive work-product immunity, unless it has substantially increased the opportunity for the adverse party to obtain the information." *Id.* The court found that disclosure to the Taiwanese patent "attorney" "did not make it substantially more likely that defendants would discover it." *Id.* at *10.

Although the attorney-client privilege provides absolute protection, its fragility makes it more vulnerable to waiver. For this and other reasons, clients and their lawyers should also consider the possible applicability of the very different but sometimes more advantageous work product protection.