Does Work Product Protection Depend on a Specific Case or Claim?

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In his April 24, 2013 “Privilege Points” release, Tom Spahn discusses whether work product protection applies where there is no particular claim or proceeding identified.

Fed. R. Civ. P. 26(b)(3) provides protection for "documents and tangible things that are prepared in anticipation of litigation or for trial." Courts have debated whether the term "litigation" includes administrative proceedings, arbitrations, etc. Even in the context of traditional civil litigation, federal courts disagree about whether a litigant must point to a specific anticipated case or claim – rather than a general anticipation of litigation.

In Prowess, Inc. v. Raysearch Laboratories AB, Civ. Case No. WDQ-11-1357, 2013 U.S. Dist. LEXIS 21449 (D. Md. Feb. 11, 2013), the court rejected a litigant's work product claim for documents prepared in connection with a patent prosecution. The court pointed to deposition testimony by a patent attorney that he always prepares applications "with the mindset that there would be a potential for litigation." Id. at *24. The court concluded that "no specific litigation was anticipated when the document was created," and that "work product protection only extends to documents created because a specific litigation is anticipated." Id. at *23-24. A few weeks later, the District of Columbia district court reached the same conclusion about a Department of Homeland Security memorandum that "reflects advice and direction on how to handle 'cases of the types specifically contemplated.'" Judicial Watch, Inc. v. United States Dep't of Homeland Sec., Civ. A. No. 11-00604 (CKK), 2013 U.S. Dist. LEXIS 27589, at *53 (D.D.C. Feb. 28, 2013) (internal citation omitted). The court acknowledged that "[w]hile the memorandum may be, in the literal sense, 'in anticipation of litigation' – it simply does not anticipate litigation in the way the work-product doctrine demands" – because it was not "relevant to any specific, ongoing or prospective case or cases." Id.

Courts sometimes rely on this doctrine to deny corporate litigants' work product claims for process-related documents, such as those describing how the company will handle future product liability or employment discrimination claims, etc. Lawyers should carefully review such documents, knowing that a court might not protect them.