D.C. Court Takes an Expansive View of the Work Product Doctrine

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In his October 24, 2012 “Privilege Points” release, Tom Spahn discusses the requirement of a “specific claim” to invoke work product doctrine protection:

Last week’s Privilege Point noted that states adopt their attorney-client privilege protection principles in different places. Ironically, there is a greater degree of similarity among states' privilege protection than in the rules-based work product doctrine protection. One of the key debates among courts dealing with work product is the necessity for a specific claim. Courts requiring such a specific claim before recognizing work product protection normally would not protect documents such as the client’s manual on processing claims anticipated to result in litigation. It is easy to imagine how much a narrow approach could harm corporations trying to routinize their claims handling procedures.

In Soghoian v. United States Department of Justice, Civ. A. No. 11-1080 (ABJ), 2012 U.S. Dist. LEXIS 106142, at *19 (D.D.C. July 31, 2012), the court dealt with documents that included "internal presentations and discussions among DOJ attorneys that analyze the legal precedents and statutes applicable to the various methods of obtaining evidence from cell phones themselves and from phone carriers." The court agreed with plaintiff "that the documents in question do not relate to any specific claim or litigation," but noted that "the D.C. Circuit has not construed the privilege so narrowly as to protect only work product related to specific cases currently in litigation." Id. at *20.

Other courts would not protect such documents, because the government did not create them in connection with a specific claim likely to result in litigation. Unfortunately, because defendants generally do not know where they will be sued, they usually will not know in advance whether such documents will deserve protection under the presiding court’s interpretation of its work product rule.