Court Examines Withheld Work Product in Assessing the Adversary's “Substantial Need” to See It

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In his June 27, 2012 “Privilege Points” release, Tom explains how Courts determine whether there is a “substantial need” that renders work product material discoverable:

Unlike the attorney-client privilege, the work product doctrine provides only a qualified protection from discovery. In the case of fact work product, the adversary can obtain a litigant's work product if it establishes "substantial need" for the work product, and the inability to obtain the "substantial equivalent" of the work product without "undue hardship." Fed. R. Civ. P. 26(b)(3)(A)(ii).

The "substantial need" element focuses on the work product's importance to the adversary's claims or defenses. Some courts hear the adversary's argument in the abstract, while other courts actually look at the withheld work product. In Louis Vuitton Malletier v. Texas International Partnership, Civ. A. No. H-10-2821, 2012 U.S. Dist. LEXIS 67140, at *15 (S.D. Tex. May 14, 2012), the court rejected defendants' argument that they had "substantial need" for correspondence related to plaintiff's investigation of counterfeit products. The court explained that it "has reviewed the documents in camera, and the documents do not contain admissible evidence crucial to Defendants' case." Id. Because defendants did not have "substantial need" for the documents, the court did not address the other two requirements for overcoming plaintiff's work product protection.

Not all courts review the withheld work product in this way, but doing so in some situations makes great sense.