Courts Analyze "Trigger" Events in the Work Product Context

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In his June 13, 2012 “Privilege Points” release, Tom addresses work product protection: trigger events in anticipation of litigation:

The attorney-client privilege can protect communications between clients and their lawyers at any time, but the work product doctrine only protects documents created with litigation or in reasonable anticipation of litigation. A litigant claiming work product protection must point to some event that resulted in the requisite "anticipation." Such an event might be called a "trigger" event.

In ServiceMaster of Salina, Inc. v. United States, Case No. 11-1168-KHV-GLR, 2012 U.S. Dist. LEXIS 53399, at *8 (D. Kan. Apr. 17, 2012), the court rejected a company’s argument that most of its withheld documents deserved work product protection because they "were created after the IRS initiated an examination into Plaintiffs’ specific tax liabilities." The court concluded that "neither the audit nor IRS investigation processes make litigation imminent." Id. Six days later, another court analyzed a company's announcement that it was terminating a key executive retirement plan. The court found that the work product doctrine applied as of that time, because the announcement made it "very likely . . . that a Plan participant would bring suit or some other type of legal action would be initiated against [the company]." Edelstein v. Optimus Corp., No. 8:10CV61, 2012 U.S. Dist. LEXIS 56188, at *11 (D. Neb. Apr. 23, 2012).

The effect of a possible "trigger" event obviously depends on the court's "anticipation" requirement. Federal courts looking at the same rule apply different standards: the District of Kansas court required that the litigation threat be "real and imminent," while the District of Nebraska court used a "very likely" standard.