Unlike the Attorney-Client Privilege, Work Product Doctrine Protection Can Be Overcome

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In his May 8, 2013 “Privilege Points” release, Tom Spahn reminds us that work product protection can be overcome:

Unlike the absolute attorney-client privilege, the work product doctrine provides only qualified protection to non-opinion work product. Fed. R. Civ. P. 26(b)(3)(A)(ii) indicates that an adversary can overcome the protection if it "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."

In Smith v. Coulombe, Case No. 2:11-cv-531-SU, 2013 U.S. Dist. LEXIS 14783 (D. Or. Feb. 4, 2013), the court found that plaintiffs could overcome the defendants' work product claim for materials generated during an investigation. The court held that the withheld documents "contain potentially critical evidence or information that could lead to critical evidence" – supporting the "substantial need" element. Id. at *17. A couple of weeks later, a court held that plaintiffs involved in an automobile accident could not overcome the work product protection for photographs taken by the trucking company's investigator. Laws v. Stevens Transport, Inc., Case No. 2:12-cv-544, 2013 U.S. Dist. LEXIS 22159 (S.D. Ohio Feb. 19, 2013). The court concluded that plaintiffs "have not argued that without the pictures, they are unable to present a case of either liability or damages." Id. at *10. Although the photographs were undeniably 'helpful to their case, . . . they have not shown that they are 'essential' or 'integral.'" Id. The court also questioned whether plaintiff could not obtain substantially equivalent evidence elsewhere. The court explained that "plaintiffs can still take pictures of the accident location," and also noted that "there is no allegation or proof that [plaintiff] has no recollection, or only a vague one, of the accident." Id. at *11-12.

Because the attorney-client privilege provides absolute protection, courts analyzing that doctrine never engage in analyses like these.