Do Corporations Enhance Their Work Product Claims by Sending Post-Accident Reports to Outside Counsel?

Thomas E. Spahn (tspahn@mcguirewoods.com) is a partner with McGuireWoods LLP in Tysons Corner, Virginia. Tom practices as a commercial litigator and regularly advises clients on ethics issues including conflict of interest, confidentiality, and dealing with corporate wrongdoing. He is a frequent lecturer on legal ethics and privilege issues, and among numerous other publications is the author of The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide published by the Virginia Law Foundation. Tom has spoken at more than 1,000 CLE programs throughout the United States and in several foreign countries, and has served on the ABA Standing Committee on Ethics & Professional Responsibility.

In his July 30, 2014 “Privilege Points” release, Tom Spahn discusses accident reports and work product:

The work product doctrine can protect documents created in anticipation of litigation — as long as they were motivated by that litigation. The doctrine does not protect documents created in the ordinary course of business, or pursuant to some external or internal requirement. In essence, litigants must prove that they did something different or special because they anticipated litigation.

In Hooke v. Foss Maritime Co., Case No.13-cv-00994-JCS, 2014 U.S. Dist. LEXIS 50741 (N.D. Cal. Apr. 10, 2014), defendant claimed work product protection for documents created after plaintiff suffered job-related injuries. After noting that the defendant's internal processes required investigation reports after nearly every accident, the court turned to the company's argument that "the [post-accident] process is overseen in some way by the General Counsel." Id. at *11. The court surmised that "testimony that Internal Incident Investigation Reports are sent to outside counsel in the event that a litigation threat arises is apparently proffered to show its connection with anticipated litigation." Id. However, the court concluded that the testimony hurt defendant's work product claim — because it "actually reveals that those reports are created in substantially the same form regardless of the specific threat of litigation, and the reports are only sent to outside counsel if litigation actually becomes likely." Id. (emphasis added).

Some companies eventually regret their attempt to bolster a work product claim by involving lawyers in the post-accident process. Here, the supposedly helpful testimony instead confirmed that the company prepared the post-accident reports sought by plaintiff in the ordinary course of its business. Ironically, sending every post-accident report to a lawyer might have the same adverse effect — because the company could not prove that it did something different or special because it anticipated litigation.