Court Holds that only a "Party" Can Create Protected Work Product

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In his June 5, 2013 “Privilege Points” release, Tom Spahn discusses who must be the creator of material to obtain work product protection of that material:

On its face, the federal work product rule and its state parallel rules protect only documents "prepared in anticipation of litigation or trial by or for another party or its representative[s]." Fed. R. Civ. 26(b)(3)(A) (emphasis added). However, all courts recognize that the rule does not limit protection to only litigation "parties," and most courts extend the protection even to a non-party that did not itself anticipate being involved in any litigation -- if denying the protection would frustrate the rule's purpose.

A small number of courts apply the rule's language literally. In Castro v. Sanofi Pasteur Inc., No. 13 C 2086, 2013 U.S. Dist. LEXIS 56287 (N.D. Ill. Apr. 19, 2013), defendant sought communications between the plaintiffs' law firm and Navigant Consulting. Plaintiffs sought to exclude from the scope of discovery its law firm's communication with Navigant before the plaintiffs hired the law firm. The court acknowledged the judicial debate about the meaning of "party," but ultimately concluded that "the rule means what it says." Id. at *7. The court denied plaintiffs' request "to modify the Court's prior order to reflect the date that non-party clients retained [plaintiffs' law firm] to investigate claims against [defendant]." Id. at *7-8.

Such a narrow reading of the rule could result in real mischief. For instance, a would-be plaintiff might threaten litigation against five companies, but sue only four of them -- and then seek what would otherwise be protected work product created by the company that plaintiff deliberately left out of its complaint.