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Litigation

Unintended consequences of employing the 'work product' label: A primer


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As any lawyer who has reviewed documents in litigation can tell you, usually at least one document custodian (probably an attorney) will put a "work product" or "attorney work product" label on all of his or her documents.

This indiscriminate labeling of documents as "work product" is usually done to be on the safe side and protect documents from disclosure.

Lawyers may fail to realize two very important points: (1) not every document created by a lawyer may properly be called "work product"; and (2) labeling documents "work product" may trigger document preservation obligations. Failing to recognize these obligations may have unintended and potentially severe consequences.

Work product doesn't apply unless litigation is anticipated

The prolific use of the "work product" or "attorney work product" label on documents indicates many attorneys believe simply creating a document - creating "attorney work product" in the literal sense - provides that document with some sort of protection from disclosure.

It does not.

The work product doctrine protects *only* those documents created in anticipation of litigation. (F.R.C.P. 26(b)(3)).Of course, if the document also embodies a confidential communication between attorney and client, the document would likely be protected by the attorney-client privilege.

What does this mean, practically? "In anticipation of litigation" is generally interpreted to contain both a temporal and a motivational element. That is, the document must have been created both (1) before or during litigation (temporal), and (2) with an eye towards litigation (motivational).

Regarding the temporal element of this doctrine, a lawsuit need not have been filed, but there must be some likelihood that litigation will follow. Compare *U.S. v. Roxworthy*, 457 F.3d 590, 597-98 (6th Cir. 2006) (legal opinion prepared by independent auditing firm regarding potential tax liability was made in anticipation of litigation, though no adverse action had been taken against company), *with Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109 (7th Cir. 1983) (memoranda prepared by in-house counsel summarizing facts related to underlying business dispute were not prepared in anticipation of litigation because correspondence between parties to date had not included threats of litigation).

As to the motivational requirement, the fact that litigation ultimately occurs is not sufficient to bring every document pertaining to the potential litigation within the protection. Instead, many courts will ask whether the document was prepared because of the litigation.

When a document was created for more than one purpose, the issue is whether the *primary* motivation for the creation of the document was litigation, or some other business purpose. If the primary purpose for the document's creation is not directly related to litigation, work-product protection will be denied. However, the fact that litigation does not in fact ensue is not fatal to the claim, if the document was otherwise prepared in anticipation of litigation.

As a separate matter, the document may or may not be protected by the attorney-client privilege, but adding "work product" to a non-litigation-related document adds no extra protection to the document, and, in fact, may trigger preservation obligations, as discussed below.

Link between anticipating litigation and preserving documents

Attorneys must understand the bounds of the work product doctrine because the "work product" label may be viewed as an assertion the party creating the document anticipated litigation as of the date of the document's creation.

At the moment a party anticipates litigation, a duty arises under the ethical rules and the criminal law to preserve relevant documents and other evidence. See ABA Model Rules of Professional Conduct Sect. 3.4(a); 18 U.S.C. Sect. 1519.

The leading case of *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) is instructive. The court said, "[o]nce a party *reasonably anticipates litigation*, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."(emphasis added)). Id. at 431.

The court went on to address counsel's duty, explaining that "[a] party's discovery obligations do not end with the implementation of a 'litigation hold' - to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents." *Id.* at 432.

Failure to fulfill these duties can lead to severe consequences. In *Zubulake*, the court authorized an instruction allowing the jury to draw an adverse inference that the evidence destroyed was unfavorable to the defendant's position. *Id*. at 437. In addition, the court ordered the defendant to pay for any additional depositions required by the late production of evidence to the plaintiff. Finally, the court noted that the defendant would suffer a self-imposed sanction because its employees had been prepared for depositions without the benefit of recently-recovered e-mails. The plaintiff was free, the court explained, to contrast the employees' deposition testimony with the inconsistent statements contained in the e-mails.

A federal judge in the Southern District of New York clearly articulated the connection between a party reasonably anticipating litigation and a duty to preserve evidence. In *Anderson v. Sotheby's, Inc. Severance Plan*, No. 04 Civ. 8180, 2005 U.S. Dist. LEXIS 23517 (S.D.N.Y. Oct. 11, 2005), the judge held that a company withholding documents based on work product grounds has a corresponding duty to preserve all pertinent documents *as of the same date that document was created*. *Id.* at *15-16. In other words, document preservation measures must have been implemented by the earliest date on a document the litigant claims as work product on its privilege log.

The relationship between anticipating litigation and preserving documents was also implicitly recognized in *Samsung Electronics Co., Ltd. v. Rambus, Inc.*, 439 F. Supp. 2d 524 (E.D. Va. 2006), which dealt primarily with evidence spoliation issues.

Significantly, the judge borrowed the standard for determining when a client anticipates litigation for purposes of the work product doctrine and applied it to determining when a party anticipates litigation to the degree that it should preserve relevant evidence.

The judge explained that "[t]he determination of when a party anticipated litigation is necessarily a fact intensive inquiry, and a precise definition of when a party anticipates litigation is elusive. One helpful analytical tool is the more widely developed standard for anticipation of litigation under the work product doctrine." *Id.* at 542.

Practice tips

When drafting documents, attorneys must carefully ensure litigation truly is anticipated before affixing the "work product" label to a document. Understanding the doctrine's reach can prevent an attorney from unintentionally triggering document preservation obligations.

The following practice tips can help counsel avoid any unintended pitfalls.

- Do not affix a "Work Product" label to every document that you draft. Instead, add the label only when you truly anticipate litigation.

- Keep an open dialogue with your colleagues and clients regarding whether you anticipate that litigation will ensue.

- Consider documenting when you anticipate litigation in a memorandum

- One you truly anticipate litigation, make sure that you begin preserving documents accordingly.

To be sure, whether a document contains potential work product sometimes can be a difficult question. With a basic understanding of the doctrine, however, a lawyer can make a more reasoned judgment about whether to label a document as work product and can avoid a finding that the party failed to preserve evidence.

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