

“Attorney Work Product” Labels May Trigger Document Preservation Obligations

Labeling documents as “Attorney Work Product” to protect them from disclosure in future litigation may unintentionally trigger document preservation obligations.

A duty arises to preserve relevant documents and other evidence the moment a party “reasonably anticipates litigation.” *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 (S.D.N.Y. 2004) (“[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). The standard for asserting the attorney work product privilege is similar, because the work product doctrine protects those “documents and tangible things that are prepared in anticipation of litigation.” Fed. R. Civ. P. 26(b)(3)(A).

In at least three cases, courts have held that a party has a duty to preserve documents as of the date of any documents for which the party asserts work product protection in the litigation. For example, in *Siani v. State Univ. of New York*, 2010 WL 3170664 (E.D.N.Y. Aug. 10, 2010), the plaintiff sought an adverse inference finding based on his employer’s destruction of electronic records. The defendant had not instituted a litigation hold until August 1, 2008; yet, during the litigation, the defendant argued that certain documents created in February 2008 were protected attorney work product. The issue presented was, when did the defendant’s duty to preserve arise?

The court reached “the common sense conclusion” that, if litigation was reasonably foreseeable for purposes of asserting attorney work product protection, “it was reasonably foreseeable for *all purposes*.” 2010 WL 3170664 at *5 (emphasis added). Thus, *Siani* recognizes a direct relationship between the assertion of the work product doctrine and a duty to preserve — *i.e.*, claiming the protection of the work product doctrine meant that litigation was reasonably anticipated, and that a duty to preserve potentially relevant documents had been triggered.

In another recent decision, the United States District Court for the District of New Jersey held that an adverse inference may be drawn with respect to certain documents that the defendants systematically destroyed (pursuant to a typical document retention program) during a time period when they were asserting work product privilege in their privilege log. *sanofi-aventis Deutschland GmbH v. Glenmark Pharmaceuticals Inc.*, 2010 WL 2652412 (D.N.J. July 1, 2010). As the court summarized:

Plaintiffs underscore the fact that Defendants’ privileged documents log claims work product immunity with respect to four documents, dating from February 23, 2006 through June 26, 2007.... Therefore, Defendants’ duty to impose a litigation hold and to institute legal monitoring for purposes of compliance arose no later than February 23, 2006.

Given that Defendants practice systematic document destruction and the fact that Defendants claim that a duty to impose a litigation hold did not arise until mid-2007, an

adverse inference may be drawn with respect to documents systematically destroyed between February 23, 2006 and the mid-2007 date alleged by Defendants.

Id. at *6.

Similarly, in *Anderson v. Sotheby's, Inc. Severance Plan*, 2005 WL 2583715 (S.D.N.Y. Oct. 11, 2005), the court clearly articulated the connection between a party reasonably anticipating litigation and a duty to preserve evidence. There, the court held that a company withholding documents based on work product grounds has a corresponding duty to preserve all pertinent documents as of the date of that document's creation.

The holdings in *Siani*, *sanofi-aventis*, and *Anderson* are not universal, but we must be mindful of the consequences that they may have. By following a few simple practice tips, we can avoid unintended pitfalls and the potentially draconian sanctions that courts can impose on litigants for failure to adequately preserve documents:

- Do not automatically affix an “Attorney Work Product” label to every document drafted.
- Keep an open dialogue regarding when you anticipate that litigation will ensue.
- The “Attorney Work Product” label should be added only when litigation is truly anticipated.
- Before asserting the protection of the work product doctrine in a privilege log, consider whether a litigation hold has been instituted prior to the document date.

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