

CLIENT ALERT

Protecting Work Product: When the Threat of Litigation Is Too Remote for Privilege

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In *Ingham Regional Medical Center v. U.S.* (Jan. 6, 2020), the Court of Federal Claims compelled production of certain government investigatory documents that the Court found were not privileged work product prepared “in anticipation of litigation.” The Medical Center sued to recover payments for outpatient healthcare services performed in connection with DoD’s TRICARE program after initial settlement discussions had failed. During discovery, the government inadvertently produced several documents that assessed the accuracy of its previous payments to the Medical Center, including documents that had been repeatedly logged as privileged. Although the government claimed that the documents were prepared in anticipation of litigation, the court held that the documents did not constitute protected work product because they were produced in furtherance of a business purpose (*i.e.*, payment investigation) well before a genuine threat of litigation arose. The court equated the government’s function in assessing the hospital’s claims for alleged underpayments to that of an insurer who investigates a claim before making a final determination. Therefore, since the threat of litigation was too remote, the court found that the work product had been prepared for a possible negotiated business settlement between the parties, rather than for litigation. Contractors and others engaged in litigation with the government should keep “ordinary course of business” arguments in mind as a basis to challenge government privilege assertions.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Nicole Owren-Wiest

Partner – Washington, D.C.
Phone: +1.202.624.2863
Email: nowrenwiest@crowell.com

Stephen M. Byers

Partner – Washington, D.C.
Phone: +1.202.624.2878
Email: sbyers@crowell.com

Skye Mathieson

Counsel – Washington, D.C.
Phone: +1.202.624.2606
Email: smathieson@crowell.com

Michelle D. Coleman

Counsel – Washington, D.C.
Phone: +1.202.654.6708
Email: mcoleman@crowell.com

Charles Baek

Counsel – Washington, D.C.

Phone: +1.202.624.2894
Email: cbaek@crowell.com

John Nakoneczny

Associate – Washington, D.C.
Phone: +1.202.624.2814
Email: jnakoneczny@crowell.com