Do Witness Interview Memoranda Deserve Opinion or Merely Fact Work Product Protection?: Part I

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 March 18, 2015 “Privilege Points” release, Tom Spahn discusses witness interview memoranda protection in the Floyd Landis qui tam action:

Unlike the absolute attorney-client privilege, the work product doctrine offers two possible levels of protection. Lawyers' (and other client representatives') opinions deserve absolute or nearly absolute protection in most courts. In contrast, non-opinion fact work product provides only a qualified privilege — which an adversary can overcome by proving "substantial need" for the documents, and the inability to obtain their "substantial equivalent" without "undue hardship." Fed. R. Civ. P. 26(b)(3)(A)(ii).

In United States ex rel. Landis v. Tailwind Sports Corp., Case No. 1:10-cv-00976 (CRC), 2015 U.S. Dist. LEXIS 4610 (D.D.C. Jan. 12, 2015), the court addressed the work product protection level for litigation-related witness interview memoranda. In bicyclist Floyd Landis's qui tam action, Lance Armstrong sought to discover government agents' witness interview memoranda. The court first dealt with memoranda government agents prepared in their civil investigation of Armstrong. The court noted that even the memorandas' factual portions reciting the witnesses' statements had been "'sharply focused or weeded'" by lawyers (quoting In re Sealed Case, 124 F.3d 230, 236 (D.C. Cir. 1997). Id. at *5. The court therefore held that all the memoranda in question deserved opinion work product protection — because government lawyers "'shape[d] the topics that were covered' and 'frame[d] the questions that were asked.'" Id. at *9 (citation omitted). The court rejected Armstrong's discovery efforts, because the D.C. Circuit considers opinion work product "virtually never discoverable." Id. at *4.

The court then turned to witness memoranda government agents prepared during their now-closed criminal investigation of Armstrong — which the court described as "a different kettle of fish." Id. at *9. Next week's Privilege Point will discuss those memoranda.