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

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In his March 25, 2015 “Privilege Points” release, Tom Spahn discusses privilege protection for witness interview memoranda:


Armstrong also sought witness memoranda from the government's now-closed criminal investigation. The court acknowledged the government's affidavits, stating that lawyers "set the general direction of the [criminal] investigation and the interviews." Id. at 432. But after an in camera review, the court concluded that "it does not appear that these attorneys focused the content of the memoranda themselves or participated in drafting them." Id. Instead, the memoranda "appear to be substantially verbatim agent summaries of open-ended discussions of issues relevant to the criminal investigation." Id. This meant that the memoranda only deserved fact work product protection, which Armstrong could overcome. However, the court allowed the government to "redact any portions of the memoranda that reflect opinion work product, such as attorney notes or highlighting." Id. at 433.

Lawyers seeking the higher level of opinion work product protection for their witness interview memoranda should (1) explicitly articulate any of their opinions in the memoranda, and (2) be prepared to prove that they "shaped" the interview topics and "framed" the questions whose answers the memoranda memorialized.