Court Handling the September 11 Terrorist Attack Case Addresses Work Product Waiver

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 August 28, 2013 “Privilege Points” release, Tom Spahn discusses waiver of work product protection.

One dramatic difference between the work product doctrine and the attorney-client privilege involves the former's more robust protection -- which normally survives disclosure to friendly third parties. Numerous cases hold that disclosure to accountants, investment bankers, consultants, family members, etc. normally waives privilege protection -- but not work product protection.

However, even disclosure to a friendly third party can sometimes waive work product protection – if the disclosure increases the likelihood that an adversary can obtain it. In In re Terrorist Attacks on September 11, 2001, the court acknowledged that plaintiffs' FOIA requests were "clearly" work product, because plaintiffs and their lawyers prepared them in connection with the litigation. No. 03 MDL 1570 (GBD) (FM), 2013 U.S. Dist. LEXIS 84028, at *130 (S.D.N.Y. June 12, 2013). Plaintiffs also argued that "their sharing of work product information with various government agencies should not lead to any waiver because the government is not their adversary in this or any related proceeding." Id. at *131. The court nevertheless found a waiver – noting that defendants could themselves file FOIA requests, and that "even disclosure to non-adversaries waives work product protection if it materially increases the likelihood that an adversary can gain access to that information." Id.

Although most work product waiver cases involve disclosure to adversaries, even disclosure to non-adversaries can trigger a waiver in certain circumstances.