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In his June 6, 2012 “Privilege Points” release, Tom addresses work product and witness interviews:

Nearly all courts extend fact work product protection to notes that a lawyer or other client representative takes while interviewing a witness. Courts generally provide the higher level of opinion work product to any portion of such notes articulating the lawyer's impressions about the witness's demeanor, credibility, usefulness, etc.

Can a lawyer argue that all of her notes deserve the higher opinion work product protection, because they inherently reflect what the lawyer thought was important enough to ask or write down? In SEC v. Nadel, No. CV 11-215 (WFK) (AKT), 2012 U.S. Dist. LEXIS 53173, at *18 (E.D.N.Y. Apr. 16, 2012), Judge Tomlinson acknowledged that "[c]ourts have reached different results in deciding whether notes taken during witness interviews are fact or opinion work product." The court ultimately found that the notes deserved opinion work product protection, explaining that "in a situation like this, disclosure of the questions asked may reveal the attorney's thought processes." Id. at *22. The court also noted that "[d]uring the interviews, the [SEC] attorneys would at times indicate to the staff members that they should take note of particular statements made by the witnesses that the attorneys felt were particularly important," and that "[s]ome of the notes also contain underlining, the disclosure of which would reveal what the staff note takers and/or attorneys felt was important information." Id. at *21, *22.

It is always worth looking for ways to establish opinion work product protection, which ordinarily provides absolute or nearly absolute protection. In contrast, fact work product can be overcome – if the adversary proves "substantial need" for the work product and the inability to obtain the "substantial equivalent" without "undue hardship." Fed. R. Civ. P. 26(b)(3)(A)(ii).