Courts Disagree About Basic Work Product Principles: 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 April 16, 2014 “Privilege Points” release, Tom Spahn discusses whether work product is absolutely protected from disclosure by Rule 26:

Ironically, federal courts disagree more about work product principles enunciated in a single federal rule than they do about the organically developed attorney-client privilege protection. This can create enormous uncertainty for litigants, who usually do not know in advance where they might face litigation, and therefore will not know what work product approach will apply.


Perhaps there is little practical difference between a "virtually undiscoverable," "near absolute" and "absolutely privileged" standard, but one might expect courts to articulate the same approach. Next week's Privilege Point will provide another example of courts' disagreement about how to apply a single sentence in the federal rules.