Decisions Highlight Important Differences Between the Work Product Doctrine and the Attorney-Client Privilege: Part II

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 December 4, 2013 “Privilege Points” release, Tom Spahn discusses limitations on the work product doctrine as compared to the attorney-client privilege:

Last week's Privilege Point noted that the work product doctrine applies only at certain times, and therefore offers a more limited protection than the attorney-client privilege. The work product doctrine is narrower than the privilege in other ways too.

For instance, work product protection might evaporate, while the attorney-client privilege lasts forever. In Cosmetic Warriors v. Lush Day Spa, LLC, the court explained that some courts protect work product forever, some courts only protect work product created during "closely related" earlier litigation, and some courts only protect work product during the litigation in which it was created. Civ. A. No. 13-1697 (WJM), 2013 U.S. Dist. LEXIS 144272, at *6 (D.N.J. Oct. 4, 2013) (not for publication). The court noted that "the Third Circuit has endorsed the 'closely related' view." Id. A few weeks later, a court dealt with another limitation -- adversaries can overcome litigants' work product protection, while the attorney-client privilege provides absolute immunity. In Bryan Corp. v. ChemWerth, Inc., Civ. A. No. 12-10446-MLW, 2013 U.S. Dist. LEXIS 152286 (D. Mass. Oct. 23, 2013), defendant sought to overcome plaintiff's work product protection for documents created by its FDA consultant. Under the federal rules, adversaries can obtain litigants' work product if they establish "substantial need" for the work product, and their inability to obtain its "substantial equivalent" without "undue hardship." Id. at *33-34 (citing Fed. R. Civ. P. 26(b)(3)). The court rejected defendant's attempt, noting that it could depose other fact witnesses possessing the same information as plaintiff's consultant.

Although the work product doctrine sometimes provides less protection than the attorney-client privilege, in other ways it can be more expansive. Next week's Privilege Point will describe two ways (of many) in which the work product doctrine can apply when privilege protection is unavailable.