Does the Work Product Doctrine Protection Protect the Identity of Corporate Employees Who Helped Answer Interrogatories?

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 November 7, 2012 “Privilege Points” release, Tom Spahn discusses “discovery about discovery”:

Last week's Privilege Point discussed possible work product protection for the identity of witnesses a lawyer thought important enough to interview. Some courts have applied such protection even in the context of what might be called "discovery about discovery."

In Yerger v. Liberty Mutual Group, Inc., No. 5:11-CV-238-D, 2012 U.S. Dist. LEXIS 136291 (E.D.N.C. Sept. 24, 2012), plaintiff filed an interrogatory seeking the identity of anyone who had assisted the corporate defendant in answering interrogatories. The court denied the plaintiff’s motion to compel, finding that the interrogatory "is an inquiry into the manner in which defendant is preparing its case for trial, rather than the facts relating to the claims and defenses in the case." Id. at *12. Because "this interrogatory inquires into details about defendant's preparation of its responses to interrogatories," the interrogatory's focus "is on gaining insight into defense counsel's mental impressions and legal theories." Id.

As "discovery about discovery" disputes increasingly generate litigation side shows, companies should keep in mind the protection that some courts recognize.