Courts Address "Discovery about Discovery": 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 3, 2014 “Privilege Points” release, Tom Spahn discusses work product protection for deposition preparation:

Last week’s Privilege Point described a court's complicated approach to lawyers' deposition preparation sessions and adversaries' efforts to determine if the preparation refreshed a witness's recollection. That court acknowledged that the work product doctrine generally protects lawyers' "selection of materials to be covered during a preparation session." Estate of Jaquez v. City of New York, No. 10 Civ. 2881 (KBF), 2014 U.S. Dist. LEXIS 148717, at *4 (S.D.N.Y. Oct. 10, 2014).

Three days later, however, a North Carolina state court dealt with an adversary's interrogatory asking that litigants "identify all documents that [they] reviewed and/or relied upon in responding to the . . . interrogatories." Nat'l Fin. Partners Corp. v. Ray, 2014 NCBC 49 ¶ 41 (N.C. Super. Ct. Oct. 13, 2014). The court held that "in merely seeking identification of documents, [the interrogatory] requests only factual information" that did not deserve protection under either the attorney-client privilege or the work product doctrine. Id. ¶ 43. A week after that, a federal court addressed defendant Winn-Dixie's argument that the attorney-client privilege protected its "methods of preparing for deposition." Pate v. Winn-Dixie Stores, Inc., Civ. A. No. CV213-166, 2014 U.S. Dist. LEXIS 148764, at *13 (S.D. Ga. Oct. 20, 2014). Although concluding that it needed more information, the court warned that "[b]ecause preparation for deposition often requires investigating numerous sources of information, it is unlikely that all efforts to prepare for the deposition in this case constitute privileged communications." Id.

Although courts disagree about both the attorney-client privilege's and the work product doctrine's application to the process of preparing discovery responses, companies should not assume that their lawyers' involvement in those efforts automatically assures either protection.