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

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 11, 2013 “Privilege Points” release, Tom Spahn discusses distinctions between attorney client privilege and work product doctrine that make both worth considering:

The last two Privilege Points described ways in which the work product doctrine provides less protection than the attorney-client privilege. However, in some situations the work product doctrine can apply when the privilege cannot.

In U.S. Bank National Ass’n v. PHL Variable Insurance Co., Nos. 12 Civ. 6811 & 1580 (CM) (JCF), 2013 U.S. Dist. LEXIS 143398, at *28 (S.D.N.Y. Oct. 3, 2013), the court confirmed that the work product doctrine can protect "the identities of people interviewed as part of counsel's investigation" – if disclosing those identities has "the potential to reveal counsel's opinion, thought processes, or strategies." The privilege cannot protect such information, because it covers only client-lawyer communications. Also, work product protection does not depend on a communication, in contrast to the attorney-client privilege. In Dempsey v. Bucknell University, Civ. A. No. 4:11-CV-1679, 2013 U.S. Dist. LEXIS 144636, at *27-28 (M.D. Pa. Oct. 7, 2013), the court found the privilege inapplicable to a lawyer's agents' "strategy notes" – because "there is nothing to suggest that these documents themselves were communicated to ... counsel, nor that they contain references to any privileged communications within them." However, the court extended work product protection to the notes.

Lawyers should remember that the work product doctrine can protect documents that would not deserve privilege protection, and vice versa. The differing strengths and weaknesses of the two protections should prompt lawyers to consider both.