Courts Analyze Work Product Protection for Final and Draft Affidavits

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In his August 27, 2014 “Privilege Points” release, Tom Spahn discusses protection for draft and finalized affidavits:

Analyzing work product protection for party or witness affidavits can involve several factors.

In Colon v. City of New York, No. 12-CV-9205 (JMF), 2014 U.S. Dist. LEXIS 92483 (S.D.N.Y. July 8, 2014), the court assessed affidavits that a malicious prosecution plaintiff finalized, but had never filed, in his earlier criminal case. The court concluded that the work product doctrine applied — because the plaintiff had prepared the affidavits "in connection with his post-conviction litigation." Id. at *9. However, the court held that the defendant City could overcome the protection, because the 1999 affidavits contained "factual assertions made by the Plaintiff regarding events that occurred in 1989 and 1990." Id. The court pointed to "the length of time that has passed" since the events, and the City's possible use of the affidavits to impeach the plaintiff. Id. Two days later, another court dealt with draft affidavits. In Total E&P USA, Inc. v. Kerr-McGee Oil & Gas Corp., the defendants fought to discover drafts of the "near-identical" affidavits filed by several individual gas and oil royalty claimants. Civ. A. No. 09-6644, 2014 U.S. Dist. LEXIS 93881, at *8 (E.D. La. July 10, 2014). The court noted that a defense lawyer "admitted at the oral hearing that he seeks to review the 'back and forth process' between" the plaintiffs and their lawyer "while drafting the affidavits." Id. at *16. The court held that disclosing those drafts would "reveal the mental impressions and strategies of counsel for claimants," and thus found the draft affidavits immune from discovery as opinion work product. Id.

Lawyers assessing protections for party or witness affidavits must consider, among other things, the affiant's role (communications between a client affiant and her lawyer might deserve privilege as well as work product protection); the affidavit's status (some courts might find that the final version loses any privilege or work product protection); and lawyers' role in preparing draft affidavits (the more extensive the role, the more likely the privilege or the opinion work product doctrine is to apply).