Can the Work Product Doctrine Protect Intangible Work Product?

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In his April 17, 2013 “Privilege Points” release, Tom Spahn discusses “intangible work product”:

On its face, Fed. R. Civ. P 26(b)(3) refers to "documents and tangible things that are prepared in anticipation of litigation or for trial." However, most courts also protect intangible work product (such as deposition testimony) – either ignoring the rule's literal language or relying on a parallel federal common law work product doctrine.

In Baird v. Dolgencorp, L.L.C., No. 4:11 CV 1589 DDN, 2013 U.S. Dist. LEXIS 17269 (E.D. Mo. Feb. 5, 2013), the court dealt with an investigator's surveillance videotapes of a plaintiff. The court rejected defendants' motion to quash plaintiffs' subpoena to depose the investigator. The court noted that the subpoena sought "testimony rather than documents or tangible things" – and "[w]hat [the investigator] witnessed, that is relevant to the case, may be the subject of his deposition." Id. at *4.

It makes far more sense to extend work product protection to the intangible articulation of what would clearly be protected if memorialized in writing. However, some courts read the work product rule literally.