Does the Work Product Doctrine Protect the Identity of Witnesses a Lawyer Thought Important Enough to Interview?

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In his October 31, 2012 “Privilege Points” release, Tom Spahn discusses work product protection for the identity of intrinsically non-protected material that a lawyer selects:

One of the most amorphous work product concepts involves the identity of important but intrinsically non-protected witnesses, documents, etc., that a lawyer selects out of a larger universe. Any protection rests on the theory that disclosing their identity might reveal a lawyer's litigation strategy.

_In DiDonna v. Village Farms IGA, LLC, No. CV 12-1487 (JS)(HRL), 2012 U.S. Dist. LEXIS 126963, at *1-2 (E.D.N.Y. Sept. 6, 2012),_ the court denied plaintiff’s motion to compel defendant’s answer to an interrogatory, which sought (among other things) ”the identity of individuals that defense counsel has interviewed concerning the allegations in plaintiff's complaint." The court held that ”the information sought does disclose an attorney's mental impressions and strateg[ies].” _Id._ at *2. Five days later, the Southern District of California similarly found that the work product doctrine protected the identities of witnesses interviewed by plaintiff's investigator. _Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund, v. Regions Fin. Corp., Civ. No. 12cv1561 H (NLS),_ 2012 U.S. Dist. LEXIS 130002 (S.D. Cal. Sept. 11, 2012). But two weeks after that, the District in Nebraska took the opposite position. In _Packard v. Darveau, No. 4:11CV3199, 2012 U.S. Dist. LEXIS 137058 (D. Neb. Sept. 25, 2012),_ the court ordered plaintiff to disclose the identity of any witnesses from whom the plaintiff had taken statements. The court held that ”[t]he identities of persons who provided statements . . . is not protected work product.” _Id._ at *11.

Although courts disagree about work product protection in such situations, litigants should be prepared to claim protection even for the identity of intrinsically non-protected witnesses, documents, etc. Next week's Privilege Point addresses this issue in a similar situation.