Can the Work Product Doctrine Protect Oral Communications?

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In his October 30, 2013 “Privilege Points” release, Tom Spahn discusses the applicability of work product protection to purely oral communications:

The federal work product rule and its state counterparts on their face protect only "documents and tangible things." Fed. R. Civ. P. 26(b)(3)(A). Some courts apply the rule literally, and deny any work product claim for oral communications – even if the doctrine would protect memorializations of those communications. Courts taking an expansive view either ignore the rule's literal language, or rely on the parallel federal work product common law articulated in Hickman v. Taylor, 329 U.S. 495 (1947).

Some courts take a middle ground. In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 110928 (S.D.N.Y. Aug. 5, 2013), Judge James Francis cited an earlier Southern District of New York decision in extending work product to oral communications which reflect a lawyer's legal strategy or thought process. In essence, this approach protects intangible work product only if it meets the "opinion" work product standard.

Lawyers should not assume that the work product doctrine automatically protects their oral communications with witnesses and other third parties.