Rhode Island State Court Sorts Through Work Product Issues

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 January 15, 2014 “Privilege Points” release, Tom Spahn discusses the practical application of the work product doctrine.


An asbestos plaintiff's lawyer and the defendants' lawyers jointly toured the site where plaintiff’s late husband had worked. All the lawyers came equipped with cameras, but the plaintiff's lawyer's camera stopped working – so he took pictures on his cell phone. Defendants refused to turn over their pictures and video footage. The court held as follows: (1) defendants' pictures and videos deserved fact work product protection; (2) defendants could not successfully claim that their pictures and videos deserved the higher opinion work product protection, although the defense lawyers specifically directed their photographer and videographer to record specific items – because plaintiff’s lawyer “could have gleaned the same information by listening to the instructions given to the photographer and videographer”; (3) plaintiff could establish "substantial need" for pictures of the worksite, because the "depiction of [the] photos of the asbestos-containing items . . . is key to one of the essential elements of Plaintiff's prima facie case"; (4) plaintiff could not obtain the "substantial equivalent" of the defense lawyers' pictures, because the cell phone picture's quality was "so poor that it is impossible to read some of the labels on the items photographed"; (5) plaintiff would face an "undue hardship" in attempting to obtain the "substantial equivalent" – because the property had been sold after the tour, and "many of the items the parties photographed are no longer there." Id. at *9, *11, *14, *13.

Courts describe the work product doctrine protection as "intensely practical," and decisions like this highlight that principle.