In Some Situations, Facts Can Deserve Work Product Protection

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In his May 1, 2013 “Privilege Points” release, Tom Spahn discusses specially assembled facts as protected work product.

The attorney-client privilege protects only communications, not historical facts. But as in so many other areas, the work product doctrine presents a more complicated picture.

In United States v. J-M Manufacturing Co., Civ. A. No. 11-cv-01691-MSK-MJW, 2013 U.S. Dist. LEXIS 14800 (D. Colo. Feb. 4, 2013), the court dealt with the results of defendant's tests conducted on PVC plastic pipe. The court acknowledged that "[t]est results, of themselves, simply reflect matters of historical fact." Id. at *11-12. However, the court also explained that "[t]he selection of a particular test methodology or testing sample or set of samples to test could . . . permit one to draw inferences as to the reasons why one option was selected over another; those inferences, in turn, could reveal attorney opinions, theories, or strategies." Id. at *12. The court further explained that "[t]his, in turn, throws new light on the purely 'factual' test results" – thus justifying withholding of the results as work product. Id.

Unlike the attorney-client privilege, the work product can protect such disparate things as attorney-client communications, accident scene photographs, transcripts of public meetings, a pile of newspaper clippings, and even facts.