Who Owns Lawyers' Work Product?

In his January 22, 2014 “Privilege Points” release, Tom Spahn discusses the client’s ability to control disclosure of protected materials.

The attorney-client privilege clearly belongs to the client alone, although the client's lawyers must assert the privilege when they can. In contrast lawyers have at least some ownership interest in their work product – but few courts have applied that abstract principle to real-life situations.

In *Gruss v. Zwirn*, No. 09 Civ. 6441 (PGG) (MHD), 2013 U.S. Dist. LEXIS 165211 (S.D.N.Y. Nov. 19, 2013), defendants hired Gibson Dunn to conduct an internal investigation into financial irregularities, and present its findings to the SEC. The court held that the presentation waived any privilege and fact work product protection for Gibson Dunn's internal investigation-related documents. However, defendants responded to plaintiff’s demand for some of those documents by arguing that they did "not have the Gibson Dunn notes, and never have had access to those notes." *Id.* at *7 (internal citation omitted). Gibson Dunn also filed a pleading, contending that it could assert its own work product protection and withhold its internal documents from its clients. The court rejected these arguments – concluding that the defendant "has a presumptive right of access to Gibson Dunn's entire file, including the interview notes taken by Gibson Dunn attorneys." *Id.* at *12. The court ordered an in camera review to analyze any remaining opinion work product claims – bluntly labeling as "not credible" a Gibson Dunn lawyer's representation that "every word in the interview memos constitutes 'core opinion work product.'" *Id.* at *20 (citation omitted).

Because clients generally "control" privileged and work product material in their lawyers' possession, they normally cannot resist discovery of their lawyers' documents if a court has stripped away any privilege and work product protections.