Courts Discuss Work Product Protection for Witness Statements and Interview Notes

In his August 29, 2012 “Privilege Points” release, Tom Spahn discusses the importance of carefully crafted questions and notes in protecting witness interview material.

In all or nearly all litigated cases, lawyers (and sometimes witnesses) prepare documents during or after witness interviews. Not surprisingly, courts frequently address the availability of work product protection for such documents.

In Giraldo v. Drummond Co., Case No. 2:09-CV-01041-RDP, 2012 U.S. Dist. LEXIS 83415 (N.D. Ala. June 15, 2012), plaintiffs interviewed several jailed witnesses in Columbia. The court held that the work product doctrine did not protect one witness's recitation of "his own recollection in his own words," because "[h]e was not filling in the blanks or simply answering a questionnaire." Id. at *7. In contrast, the court extended work product protection to draft statements in which the prisoner appeared to be "answering . . . direct questions from counsel." Id. at *8-9. Three days later, the Southern District of Florida similarly held that a witness interview summary deserved work product protection. Chase v. Nova Se. Univ., Inc., Case No. 11-61290-CIV-COHN/SELTHER, 2012 U.S. Dist. LEXIS 83815 (S.D. Fla. June 18, 2012). One week after that, the California Supreme Court carefully analyzed recorded witness statements. Coito v. Superior Court, 278 P.3d 860 (Cal. 2012). The court found that recorded witness statements "are entitled as a matter of law to at least qualified work product protection," and might be entitled to absolute opinion work product protection "if defendant can show that disclosure would reveal its 'attorney's impressions, conclusions, opinions, or legal research or theories.'" Id. at 863 (citation omitted).

It makes great sense to provide at least fact work product protection to recorded witness statements or interview notes, and extend the higher level of opinion work product protection to recorded witness statements or notes that reflect a lawyer's opinions. For instance, a transcript or memorandum of a witness answering a simple question from a lawyer such as "Please tell me what you saw" normally would deserve only the lower level of fact work product protection – while the higher level opinion protection should cover the witness's answer to a series of pointed and detailed questions focusing on aspects of the case the lawyer deems important.