Can the Work Product Doctrine Protect "Intangible" Work Product?

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In his August 6, 2014 “Privilege Points” release, Tom Spahn discusses intangible work product:

Among many other variations in federal courts' analyses of the work product rule, courts disagree about whether the doctrine only applies to "documents and tangible things" — per Fed. R. Civ. P. 26(b)(3)(A)'s language. Most courts find that federal common law extends the same protection to intangible work product, such as a witness's memory being probed by an adversary's deposition questions.

Some courts take a narrower view. In Smyth v. Williamson, No. 2:13-cv-2553-DCN, 2014 U.S. Dist. LEXIS 64777 (D.S.C. May 12, 2014), automobile accident plaintiff Smyth sent a deposition subpoena to defendant Williamson's insurance company State Farm. Smyth sought a State Farm representative's testimony about (among other things) the "substance" of any statement Williamson gave to a State Farm agent. Id. at *3. Although the work product doctrine's applicability to either a document memorializing any statement (or even the statement itself) could present a close question, the court short-circuited any work product analysis. The court bluntly held that "Rule 26 does not apply to the current motion" — because "Smyth is not seeking discovery of any [documents or tangible] items but is rather seeking to depose a State Farm representative." Id. at *9.

Such a narrow work product view does not always have important ramifications. However, it would be easy to envision litigants prejudiced by allowing their adversaries to depose private investigators, consultants, or even paralegals, and ask about the "substance" of written reports that would clearly deserve work product protection.