The Litigator's Dilemma: Waiver of Core Work Product Used in Trial Preparation

Ettie Ward
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I. INTRODUCTION

The work product doctrine, as we know it today, was first authoritatively delineated by the United States Supreme Court in the celebrated 1947 case, Hickman v. Taylor.1 The teachings of Hickman were subsequently codified, in part, in the 1970 amendment to rule 26(b)(3)2 of the Federal Rules of Civil Procedure ("FRCP"). The large number of court decisions after 1947, and again after 1970, confirm that establishing the parameters of work product did not, by any means, answer every open question or resolve all ambiguity.

Work product is generally referred to as a protection or immunity, not a privilege.3 Thus, work product is not given the same protection from disclosure to one's adversaries that is afforded materials covered by the attorney-client privilege or other testimonial privileges. Yet, to paraphrase George Orwell, some work prod-

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1 329 U.S. 495 (1947).

2 Fed. R. Civ. P. 26(b)(3). Rule 26(b)(3) provides in pertinent part:
Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Id.

3 See Cohn, The Work-Product Doctrine: Protection, Not Privilege, 71 Geo. L.J. 917 (1983); see also Bogosian v. Gulf Oil Corp., 738 F.2d 587, 599 n.10 (3d Cir. 1984) (Becker, J., dissenting) ("[t]he Supreme Court has been assiduous in terming the protection of offered work product as a 'doctrine' and as an 'immunity,' not as a 'privilege'").

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uct is "more privileged" than other work product. Although work product in the form of "documents and tangible things" is discoverable under FRCP 26(b)(3) upon a showing of (1) substantial need of the materials by the requesting party, and (2) an inability to obtain the substantial equivalent of the materials by other means or without undue hardship, the court is required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." These "mental impressions, conclusions, opinions, or legal theories," which have been referred to as "core" or "opinion" work product, are given, if not absolute immunity, a higher degree of qualified immunity from disclosure. The Federal Rules and the cases interpreting them attempt to distinguish between ordinary fact work product and core or opinion work product, but the line is not always an easy one to draw.

This Article focuses on the protection from disclosure accorded to opinion or core work product when it is used, as intended, in pretrial preparation of cases. It is this use of opinion or core work product that brings the litigator to a dilemma. There are no explicit or "bright line" guides to advise the litigator when the use of such work product to prepare witnesses or the case will result in compelled disclosure of the materials to one's adversary. Thus, the litigator must either forego use of such materials to prepare his case, even if it adversely affects that preparation, or risk disclosure of his core work product. Examination of this dilemma only begins with a reading of FRCP 26(b)(3). In considering the question of whether, and if so, to what extent, opinion or core work product should be protected from disclosure, we hardly start with a blank slate. Instead we can choose from the array of approaches and rules argued by litigants and adopted by different courts.

Litigants have tended to use one or more of four basic ap-

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4 To qualify as work product under FRCP 26(b)(3), the materials must have been prepared (1) in anticipation of litigation or for trial and (2) by or for another party, or by or for that other party's representative.
proaches in seeking discovery of core work product from an adversary: (1) arguing that the material is not work product within the meaning of FRCP 26(b)(3) by showing, for example, that it was not prepared by a party or its representative, or that it was not prepared in anticipation of litigation, or, with respect to ordinary work product, that the claiming party has made the requisite showing of substantial need and undue hardship; (2) arguing that any work product protection was waived as a result of the claiming party's affirmative use of the material, or the inadvertent or intentional disclosure of the material to the adversary or to third parties; (3) showing that the disputed material was used to refresh a witness' recollection and therefore must be produced pursuant to rule 612 of the Federal Rules of Evidence ("FRE"); or (4) where the witness is an expert, finding that disclosure of the bases for the expert's opinions is required pursuant to FRCP 26(b)(4). This Article does not address the first approach—rather, it is assumed that opinion or core work product is at issue and the starting point is the situation in which one party is attempting to obtain another party's otherwise-protected opinion work product.

Just as litigators have focused on different approaches to obtain core work product, the courts have used a variety of analyses to justify a decision to withhold production or to compel disclosure. No court has suggested that core work product be freely discoverable on a showing of need, nor have many courts granted absolute protection to such materials. Rather, the trend in recent cases—and one advocated by certain commentators—\(^7\) is a fairness approach which relies on ad hoc decisions by the district courts to further appropriate policy considerations. What policy considerations are "appropriate" in a given case may depend on the rule relied on and sometimes even on whether one policy or another for any given rule is given particular emphasis. For example, policies underlying FRCP 26(b)(3) include permitting broad discovery as well as protecting an attorney's work product. The variety of approaches available to the courts and the legitimate justifications for each approach leave too much uncertainty for attorneys and litigants.

As mentioned above, the inquiry only begins with an examination of FRCP 26(b)(3) with its internal tension between wide-open

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discovery on the one hand, and protecting an attorney's mental impressions, conclusions, opinions, or legal theories on the other. The approaches taken by litigants also focus on other rules, FRCP 26(b)(4) and FRE 612, as well as a general "waiver" theory. A basic purpose underlying both FRCP 26(b)(4) and FRE 612 is to ensure an opportunity for effective and meaningful cross-examination of witnesses. Sometimes it is not easy to reconcile this purpose with the work product protection afforded by FRCP 26(b)(3). To form a coherent approach it is necessary to consider the policies and purposes underlying the various rules and doctrines which apply—FRCP 26(b)(3) and (4), FRE 612, work product, and waiver—and to decide how best to further those policies. Because there are often conflicting considerations, a correct or single answer does not necessarily exist.

FRCP 26(b)(4) permits discovery of "facts known and opinions held by experts" and the protections under FRCP 26(b)(3) for trial preparation materials are explicitly made "subject to the provisions of subdivision (b)(4)." The advisory committee's notes to FRCP 26(b)(4) provide that: "These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert . . . . They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine."9 FRCP 26(b)(4) distinguishes among experts who are to testify at the trial, experts retained or specially consulted in relation to trial preparation, and experts informally consulted in preparation for trial, but not retained or specially employed, in terms of the scope and type of discovery available as well as allocation of costs. The rule does not, however, make a distinction between work product prepared by an expert and work product prepared by an attorney or party and shown to an expert.

FRE 612 also comes into play. Rule 612(2) provides that if a witness uses a writing before testifying to refresh his or her memory for the purpose of testifying, an adverse party is entitled to that writing "if the court in its discretion determines it is necessary in the interests of justice."9 The rule thus makes a distinction between writings used to refresh a witness' memory while testifying, which must be produced, and those used before testifying. The

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rule does not explicitly mention work product or privilege—although the legislative history indicates that assertion of privilege is not barred. It is not clear to what extent, if any, the "substantial need" and "undue hardship" tests of FRCP 26(b)(3) are applicable to production under FRE 612(2).

In the last several years, a relatively small number of cases have dealt with the various aspects of this problem. This is not intended to be an exhaustive study of the case law. Rather, a number of the cases, which reflect the variety of approaches followed by different courts, are examined. Drawing upon the cases, this Article suggests guidelines that may be more effective and predictable than those used in the past.

II. USE OF TRIAL PREPARATION MATERIALS IN TRIAL PREPARATION

One would expect an attorney to use trial preparation materials, including opinion work product, to prepare the case for trial. Attorneys and their representatives or agents prepare a host of materials that would qualify generally as work product, including: compilations of documents, witness interviews, deposition summaries, memoranda, drafts of briefs and opening statements, witness books, and trial notebooks. To the extent that an attorney's work product reflects factual information otherwise discoverable, FRCP 26(b)(3) permits discovery on an appropriate showing. Rule 26(b)(3) also refers to the "mental impressions, conclusions, opinions, or legal theories" of an attorney. Opinion or core work product is a shorthand designation of that rule 26(b) language and may include any document, memorandum, or compilation that provides insight into an attorney's litigation strategy, intended lines of proof, evaluations of the strengths and weaknesses of arguments to be advanced, estimates of potential liability or damages, cross-examination plans, or assessments of the character, demeanor, or veracity of likely witnesses. Although FRCP 26(b)(3) contemplates

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the extraction and production of otherwise relevant facts contained in work product materials, it is less clear whether, and under what circumstances, opinion or core work product is discoverable. An additional complication is that it is often difficult to draw a clear distinction between fact work product and opinion work product, as the same document may contain both. It is the use of core work product in trial preparation and its waiver by that use which is examined here.

Courts have not taken a single approach when faced with demands for production of opinion work product. Some courts have afforded opinion work product virtually absolute protection from disclosure; others have only permitted disclosure subject to very limited exceptions, such as when the material relates directly to a crime or fraud, or when the activities or mental impressions and theories of a party's attorney are "at issue"; many courts apply a balancing test in deciding whether opinion work product is discoverable; and some courts hold that opinion work product is, in

notes by attorney); Special Project, The Work Product Doctrine, 68 CORNELL L. REV. 760, 818 (1983) (attorney's strategy, intended lines of proof, and evaluation of strengths and weaknesses of case); Note, Expert Witness, supra note 6, at 1159 n.2 (same); Note, Protection of Opinion Work Product, supra note 6, at 333 (opinion work product also includes "impressions he has drawn from interviews with witnesses").

See, e.g., Phoenix Nat'l Corp., 98 F.R.D. at 671 (only allowed question which went to witnesses' knowledge of underlying facts).

See Duplan Corp. v. Moulinage Retorderie de Chavanoz, 509 F.2d 730, 733-34 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975); In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 848 (8th Cir. 1973); United States v. Chatham City Corp., 72 F.R.D. 640, 643-44 (S.D. Ga. 1976). In Upjohn Co. v. United States, 449 U.S. 383, 401-02 (1982), the Supreme Court held that a far stronger showing was required to compel production of opinion work product, but declined to decide whether opinion work product was absolutely immune from discovery. Id. Some courts have refused to disclose core work product in view of the fact that since Hickman v. Taylor, 329 U.S. 495 (1947), the "Supreme Court has never permitted intrusion in the work product revealing the attorney's thought processes." Al-Rowaishan, 92 F.R.D. at 781; see 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 612[04], at 612-40 (1987).

See, e.g., Sporck, 759 F.2d at 316 (opinion work product is "'accorded an almost absolute protection from discovery"); In re Sealed Case, 676 F.2d 793, 809-12 (D.C. Cir. 1982) (extraordinary showing required for discovery of opinion work product); In re Doe, 662 F.2d 1073, 1079-80 (4th Cir. 1981) (showing of extraordinary circumstances required), cert. denied, 455 U.S. 1000 (1982); In re Murphy, 560 F.2d 326, 336 n.19 (8th Cir. 1977) (facts of case did not warrant invocation of exception); see also Note, Expert Witness, supra note 6, at 1164 ("other courts . . . would permit discovery of opinion work product only when the material relates directly to a crime or fraud, or is itself at issue"); Note, Protection of Opinion Work Product, supra note 6, at 341-44 (courts allow exceptions to nondisclosure rule in only limited circumstances, mainly where opinion work product is central to opposing party's claim or defense, or where crime or fraud has been perpetrated).

As a result of the absence of a consistent approach, attorneys who make use of work product in their trial preparation, particularly by showing it to a witness, risk a serious penalty—waiver of the work product protection requiring disclosure of the materials to one's adversary. Indeed, very little consideration has been given to how any particular approach taken by a court or rationalization of apparently conflicting policies affects the litigation process. The situation is further complicated when expert witnesses are involved; when opinion work product is shown to an expert witness in preparation for trial, even courts that would give virtually absolute immunity for opinion work product recognize the potential for conflict with the policies embodied in the expanded expert discovery made available by FRCP 26(b)(4). Whether the court is inclined to use a balancing approach or only recognizes a qualified immunity for opinion work product, rule 26(b)(4) may weigh in favor of requiring production.

Further, whether the witness is an ordinary witness or an expert witness, if the opinion work product "refreshed" his recollection or had an "impact" on the witness's testimony, production may be ordered pursuant to FRE 612.

Although the problems of waiver and discovery of expert opinions may arise in a variety of ways through requests for the production of documents and for responses to interrogatories, the problems are highlighted when a live witness is involved. With

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16 See, e.g., Sealed Case, 676 F.2d at 824-25 (participation in SEC's voluntary disclosure program constitutes waiver); Boring v. Keller, 97 F.R.D. 404, 407 (D. Colo. 1983) (showing opinion work product to expert witness constitutes waiver); see also United States v. Nobles, 422 U.S. 225, 239-40 & n.14 (1975) (waiver of opinion work product protection where witness interview notes used at trial to discredit witnesses); Note, Expert Witness, supra note 6, at 1164-65 (many courts view disclosure of opinion work product to expert as waiver).

17 See, e.g., Bogosian v. Gulf Oil Corp., 738 F.2d 587, 592-96 (3d Cir. 1984) (appellate court examines conflicts between FRCP 26(b)(3) and FRCP 26(b)(4)).
document production, inadvertent disclosure as a result of careless, inadequate, or time-pressured screening is the most likely avenue for waiver of work product production. With live witnesses, waiver is usually intentional in the sense that the lawyer, in preparing the witness to testify, "intends" to show him selected documents or work product materials prepared in the course of the litigation, but unintentional in that there is no desire to make such materials available to his opponent. In any event, FRE 612 simply does not apply in the absence of deposition or trial testimony.

Given that a court might compel disclosure of core work product to one's adversary, relying on any one of the competing theories, rules, or doctrines, why would any competent lawyer take such a risk? Or to put it another way, what are the benefits as compared to the costs of using opinion work product materials in witness preparation? One answer may very well be that an attorney cannot prepare his case adequately without using opinion work product and, even if he can, his client may not be able to afford the added expense.

In preparing a witness to testify at a deposition, the attorney certainly has the option of meeting with the witness at length to review the status of the case, the basic claims and defenses, and the knowledge of the witness about the matters in litigation. No risk of waiver under any theory can occur so long as the attorney and the witness conduct a face-to-face meeting at which no documents are shown to the witness. The attorney may read to the witness from documents to avoid triggering waiver. Yet, once the attorney shows a document to the witness there is some likelihood that, upon a proper showing, the document will be discoverable by the adversary. The low-budget client who cannot afford to pay his attorney to "read" to him may very well have to forego the face-to-face interview and opt for a packet of papers to be read before his deposition. The selection process for compiling such a packet may be protected by some courts, but production to one's adversary may very well be required if the witness' memory was refreshed or if the witness is an expert and the documents helped

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18 See, e.g., Marcus, supra note 7, at 1644 (disclosure to client or "retained expert" may result in waiver).


him to form his opinion.\textsuperscript{21} Certainly, the possibility of disclosure is not the only determinant of the method of witness preparation. The time available and the economics of litigation are most likely more significant determinants in a given case.

There is no empirical data to indicate what weight is given by litigators preparing cases for trial to the possibility of disclosure of work product. Most litigators will screen production of documents to avoid waiver of work product and attorney-client protected materials; most litigators will object appropriately to requests for work product and attorney-client protected materials. More likely than not, though, most litigators discount the possibility that core work product might not be protected. If attorneys are required to plan for such a contingency by practicing avoidance techniques, that in itself provides a powerful argument for creating greater certainty in the Rules and, perhaps, greater protection from disclosure.\textsuperscript{22} Certainly, in most cases, protecting core work product by declining to show a witness relevant documents will hinder proper preparation of both the case and the witness. A witness may fail to appreciate the scope or nature of the case; a witness may be flustered when shown a document at his deposition or at trial; the lawyer may not learn early enough about the extent of the witness’ knowledge in a particular area; and some witnesses may simply be unable to absorb information orally. In any event, such avoidance techniques, which tend to involve additional expenses reflecting lawyer time and travel costs, will usually weigh in favor of the wealthier party or, at least, the party prepared to devote more resources to the matter. As has been said: “A poor man’s only privilege is perjury.”\textsuperscript{23} There is no reason to build in higher pretrial costs when pretrial litigation is already too costly and time-consuming.\textsuperscript{24}

\textsuperscript{21} See, e.g., Elco Indus. v. Hogg, No. 86-C-6947 (N.D. Ill. Feb. 26, 1988) (LEXIS, Genfed library, Dist file) (court ordered production of documents that were substantially factual and “assured” to influence expert testimony); Boring v. Keller, 97 F.R.D. 404, 407 (D. Colo. 1983) (“waiver of the privilege exists where counsel has delivered work product to an expert to be ‘useful to client’”).

\textsuperscript{22} See, e.g., Marcus, supra note 7, at 1606 (concluding that costs generated by broad traditional waiver rules result largely from changes in lawyers’ behavior to reduce waiver risks; “lawyers may adopt elaborate witness preparation strategies in order to prevent witnesses from seeing privileged materials”).

\textsuperscript{23} Anonymous, quoted in Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1450, 1450 (1985).

\textsuperscript{24} See Marcus, supra note 7, at 1613-14.
In *Hickman v. Taylor*, Justice Murphy recognized the importance of attorney preparation, stating:

Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his legal strategy without undue and needless interference.... This work is reflected ... in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways....

Noting the likelihood that attorneys would fall back on avoidance techniques if access to work product were made more freely available, the Supreme Court in *Hickman* warned of possible deleterious effects on the litigation process and the adversarial system:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.... Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.... And the interests of the clients and the cause of justice would be poorly served.

Similar concerns were recently noted by the Third Circuit in *Sporck v. Peil* where, in protecting defense counsel's selection of documents used in witness preparation from disclosure, the court stated:

In the instant case, without the protection that the work product doctrine accords his preparation, defense counsel may have foregone a sifting of the documents, or at the very least chosen not to show the documents to petitioner. As a result, petitioner may not have been as well-prepared for his deposition, and neither plaintiff nor defendant would have realized the full benefit of a well-prepared deponent's testimony.

An additional disadvantage of attorneys' reliance on avoidance techniques is that it becomes even more difficult to impeach or otherwise challenge the witness whose testimony was improperly shaped by counsel's oral coaching. It becomes nearly impossible to trace what impact preparation and refreshed recollection had on

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26 *Id.* at 511.
27 *Id.*
29 *Id.* at 317.
the witness.

At the other extreme, a diligent lawyer might choose to show prospective witnesses no work product whatsoever. Witness preparation might involve reviewing only those documents already produced in the litigation and, as a further safeguard, all of those documents could be shown to the witness. As a practical matter, however, except in those cases where the number of documents involved is quite small, such a procedure is wasteful, inefficient, and not reasonably calculated to soothe clients who retain attorneys, at least in part, to separate the wheat from the chaff. The advantage, of course, is that there is no likelihood of revelation of attorney thought processes from disclosing what the witness has seen. The downside, besides the waste and inefficiency likely to result, is the fact that the attorney and his client will not be as well prepared as they could be if other materials, including documents not yet requested or the attorney's assessments of the materials produced and the issues in the litigation, were reviewed before testifying.

The cases fail to provide adequate and certain guidelines upon which litigators may rely. Although some courts are explicitly recognizing and occasionally protecting from disclosure compilations or other aggregations of documents as materials that would tend to reveal an attorney's strategy and trial preparation, other courts focus on the policies favoring disclosure in a given case, including the need for effective cross-examination, and give short shrift to policies underlying work product and protection of the adversarial process.

III. TRENDS IN RECENT DECISIONS

A. Protection of Compilations and the Attorney Selection Process

The 1985 Third Circuit decision in Sporck v. Peil was roundly applauded by commentators and practitioners in the federal courts for approving the rule that most litigators thought appropriate—that the "selection and compilation of documents by counsel . . . in preparation for pretrial discovery falls within the highly-protected category of opinion work product." The documents at issue in Sporck were a group of documents selected by defendants'
counsel and reviewed by the defendant and counsel in preparation for defendant's deposition. Although none of the individual documents contained defense counsel's work product, the Third Circuit agreed that identification of the documents as a group would reveal defense counsel's selection process, and thus his mental impressions. The Third Circuit was apparently the first appellate court to reach the issue of whether a compilation of otherwise discoverable documents made by the party or his representative in anticipation of litigation, should be protected as core work product. Prior to Sporck, a few district courts had recognized work product protection for such materials, but even when work product coverage was accepted, some courts still required disclosure to the adversary on a finding of waiver or by application of either FRCP 26(b)(4) or FRE 612.

A few earlier district court cases had focused on the witness preparation process and protected that subject from discovery by an adversary. For example, in Ford v. Philips Electronics Instruments Co., the trial court found that counsel's attempt to elicit, at a deposition, the specific questions posed to the witness by plaintiff's counsel, the general line of inquiry pursued by plaintiff's counsel, or the facts to which plaintiff's counsel appeared to attach significance "exceeds the permissible bounds of discovery and begins to infringe on plaintiff's counsel's evaluation of the case."

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33 Id. at 316. But see City Consumer Servs. v. Horne, 100 F.R.D. 740, 745-47 (D. Utah 1983). The City Consumer court rejected the argument that the documents copied and compiled by plaintiffs' counsel were the result of attorney work product and permitted copying of such documents by defendants to "avoid duplication, surprise, and prejudice." Id. at 746. It is submitted that this court improperly focused on whether the documents at issue were work product and, because they were corporate business records, concluded that there was no immunity. See id. at 746-47. No weight was given to the selection process although the selection there was much more extensive than what would have been used for witness preparation. Id.

34 See, e.g., James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144-46 (D. Del. 1982) (disclosure of privileged documents constitutes waiver); In re International Sys. & Controls Corp. Secs. Litig., 91 F.R.D. 552, 561 (S.D. Tex. 1981) ("material[s] selected from a larger group, and assembled meaningfully, are protected as work product"—material included letters from attorneys or responses to attorneys' requests with assembled attached exhibits), vacated, 693 F.2d 1235 (5th Cir. 1982).

35 See, e.g., James Julian, 93 F.R.D. at 146 (review of binder prior to deposition waived work product protection); Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 617 (S.D.N.Y. 1977) (court noted that "where an attempt is made to exceed decent limits of preparation on the one hand and concealment on the other," discovery may be allowed under theory of waiver or qualified privilege).


37 Id. at 360; see also Phoenix Nat'l Corp. v. Bowater United Kingdom Paper, 98 F.R.D.
Cases like *Ford* do not pose the same problem as *Sporck*, however, because the probing in *Ford* was unrelated to documents and sought counsel’s oral preparation of his witness—an area of core work product under any definition.

Similarly, in 1982, a New York district court in *Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.* protected as core work product a deposition digest with marginal notes added by plaintiff’s counsel, which had been read by one of plaintiff's witnesses in preparation for a later deposition. The trial court concluded, after an *in camera* inspection, that the documents at issue contained “solely the mental impressions of an attorney concerning pending litigation” which were entitled to greater protection under FRCP 26(b)(3) than ordinary work product. Unlike *Sporck*, the writing involved here was itself work product and its use in preparation did not enhance its status as work product.

*Sporck* cited *Berkey Photo, Inc. v. Eastman Kodak Co.* to support giving particular protection to compilations as core work product. In *Berkey*, the plaintiff sought the production of defense counsel’s trial notebooks which had been shown to the defendant’s experts. Although the *Berkey* court denied production, recognizing that “counsel’s selection and ordering come close to the vital area of maximum protection under *Hickman,*” the court advised litigants that, in the future, use of such material to prepare one’s experts would justify requiring the production of such material to one’s opponent on a theory based either on waiver or qualified privilege.

*Sporck* also relied on a 1982 district court case, *James Julian, Inc. v. Raytheon Co.*, to support the proposition that counsel’s selection of documents should be protected as work product. In that case, plaintiff’s counsel assembled a binder containing documents obtained during discovery, documents obtained from public

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669, 671 (N.D. Ga. 1983) (conversation between investigating attorney and employee subject to work product doctrine); Bercow v. Kidder, Peabody & Co., 39 F.R.D. 357, 358 (S.D.N.Y. 1965) (in pre-rule 26(b)(3) case, court refused to order answer to question, “[W]hat documents have you looked at in preparation for this deposition today?,” which it found to be “an indirect attempt to ascertain the manner in which an adversary is preparing for trial”).

38 92 F.R.D. 779 (S.D.N.Y. 1982).
39 Id. at 780.
41 Id. at 616 n.8.
42 93 F.R.D. 138 (D. Del. 1982).
records, and documents prepared by the plaintiff, which was used to prepare witnesses for depositions. The district court in James Julian recognized that:

In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case. Indeed, in a case such as this, involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research.\(^4\)

Nevertheless, in James Julian, the district court, citing Berkey Photo, Inc. v. Eastman Kodak Co. as the leading case, relied on a waiver theory and an application of FRE 612 to order production of the binders.\(^4\)

Although Sporck has been widely cited and discussed, not many cases have been decided either adopting or extending its holding. Only one district court and one circuit court case have squarely relied on Sporck.

In 1986, the Eighth Circuit, in Shelton v. American Motors Corp.,\(^4\) reversed the trial court's entry of a default judgment on the issue of liability based upon the defendant's in-house counsel's refusal to respond to certain deposition questions and agreed that the deponent's mere acknowledgment of the existence of corporate documents is protected by the work product doctrine where "the deponent is opposing counsel and has engaged in a selective process of compiling documents from among voluminous files in preparation for litigation."\(^4\)

As in Sporck, compilations of otherwise discoverable documents were protected to avoid revealing counsel's core work product. The Shelton conclusion is clearly correct, but does not advance the analysis much further than Sporck, in large part because it was an easier case on the facts. In Shelton, the deponent was an attorney for a defendant engaged in trial preparation and not an ordinary fact witness. Although permitted by the FRCP,\(^4\) the court viewed "the increasing practice of taking opposing counsel's deposition as a negative development."\(^4\)

Certainly, taking the testimony of opposing counsel, if freely permitted without adhering to principles of privilege and work product, would

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\(^{45}\) Id. at 144.
\(^{44}\) Id. at 145.
\(^{46}\) 805 F.2d 1323 (8th Cir. 1986).
\(^{47}\) Id. at 1326.
\(^{48}\) FRCP 30(a) provides that a party may take the deposition of "any person."
\(^{48}\) Shelton, 805 F.2d at 1327.
shortcut the discovery process—but not without significant costs. As the Eighth Circuit explained:

Undoubtedly, counsel's task in preparing for trial would be much easier if he could dispense with interrogatories, document requests, and depositions of lay persons, and simply depose opposing counsel in an attempt to identify the information that opposing counsel has decided is relevant and important to his legal theories and strategy. . . . Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. . . . Finally, the practice of deposing opposing counsel detracts from the quality of client representation. . . . Moreover, the "chilling effect" that such practice will have on the truthful communications from the client to the attorney is obvious.49

That counsel's deposition was at issue made work product protection more likely and easier to justify on general principles, particularly where plaintiffs had already had access to the relevant documents, had obtained much of the same information by other means, and were offered other witnesses to answer the particular questions asked. Because the deponent was neither a fact witness nor an expert witness, and was the defendant's in-house counsel, there was a good deal less concern about satisfying the objectives of FRE 612 to permit effective cross-examination and impeachment.

In a 1986 case, *Omaha Public Power District v. Foster Wheeler Corp.*,50 the district court confronted a fact situation very much like that in *Sporck*. In contemplation of depositions of the plaintiff's employees, plaintiff's counsel segregated copies of some of plaintiff's business records which had been produced as part of a massive document production at an earlier stage in the litigation and provided the selected documents to one of plaintiff's employees so that he could prepare for his deposition. The employee was not an expert so FRCP 26(b)(4) was not called into play. Although agreeing with the Third Circuit that the "selection and segregation

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49 *Id.*

50 109 F.R.D. 615 (D. Neb. 1986). Another district court recently applied the so-called "Sporck doctrine" to a limited category of documents which it concluded was a compilation revealing an attorney's mental impressions and where the information was otherwise available to his adversary. *See* Santiago v. Miles, No. 86-Civ.-0694, (W.D.N.Y. July 26, 1988) (LEXIS, Genfed library, Dist file).
of the particular documents’ is opinion work product “accorded an
almost absolute protection from discovery,” the trial court went
on to address waiver and the applicability of Federal Rule of Evi-
dence 612.

B. FRE 612 and FRCP 26(b)(3): Conflict or Harmony?

FRE 612 provides that an adverse party is entitled to the pro-
duction of a writing used by a witness to refresh memory (1) while
testifying, or (2) before testifying. If the witness uses the writing
to refresh memory while testifying, the adverse party is entitled to
that writing without regard to any claim of privilege or work prod-
uct. If the witness, however, uses the writing to refresh memory
before testifying, the adverse party is not automatically entitled to
see the writing and use it in cross-examination. Rather, before dis-
closure is required in the face of any objection, including a claim of
privilege or work product, the court must exercise its discretion to
determine that production “is necessary in the interests of justice.”
This addition of a discretionary element to the version submitted
to Congress was made by the House Judiciary Committee in recog-
nition of concerns that “permitting an adverse party to require the
production of writings used before testifying could result in fishing
expeditions among a multitude of papers which a witness may
have used in preparing for trial.”

FRE 612 is thus not intended to be a rule of discovery, but
rather, to serve the evidentiary function of allowing the adverse
party to test the memory of and effectively cross-examine wit-

81 Id. at 616.
82 FRE 612 provides in pertinent part:
Except as otherwise provided in criminal proceedings by section 3500 of title
18, United States Code, if a witness uses a writing to refresh memory for the pur-
pose of testifying, either—
(1) while testifying, or
(2) before testifying, if the court in its discretion determines it is necessary
in the interests of justice,
an adverse party is entitled to have the writing produced at the hearing, to inspect
it, to cross-examine the witness thereon, and to introduce in evidence those por-
tions which relate to the testimony of the witness.
FED. R. EVID. 612.
83 JUDICIARY COMMITTEE NOTES, supra note 10, at 7086.
84 Sporck v. Peil, 759 F.2d 312, 317 (3d Cir.), cert. denied, 474 U.S. 903 (1985); see, e.g.,
must be protected by attorney-client privilege or work product to be excluded from
discovery).
nesses. A prerequisite for obtaining documents under rule 612 is that the party establish that the witness used the document to refresh his recollection for the purpose of testifying. The purposes and functions of rule 612 are important and essential but do not take into account the possibly conflicting concerns which necessitate providing some degree of protection to attorney work product. Although the assertion of a privilege is not barred by rule 612, to some degree, at least as viewed by some courts, it is beside the point.

Generally, counsel is permitted to inspect any document used by a witness to refresh his or her recollection. Use of the document for that purpose by a witness is in effect a waiver of any right to withhold the document from production. Should there be a more restrictive rule when the documents inspected by the witness are protected by privilege or work product? One obvious concern about adopting such a rule is that it would “ignore the unfair disadvantage which could be placed upon the cross-examiner by the simple expedient of using only privileged writings to refresh recollection.” The flip side, of course, is that adoption of a broad waiver theory would encourage “the sophisticated prospective witness to avoid refreshing recollections prior to testifying, or to use a ‘coach’ who has examined the documents, rather than the documents themselves.”

In Sporck v. Peil, the Third Circuit determined that rule 612 was inapposite because of the deposing counsel’s failure to establish either that the witness relied on any documents in giving his testimony, or that those documents influenced his testimony. The Sporck court, in dicta, found that “[p]roper application of Rule 612 should never implicate an attorney’s selection, in preparation for a witness’ deposition, of a group of documents that he believes

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56. Judiciary Committee Notes, supra note 10, at 7086.
58. Sporck, 759 F.2d at 318. In Omaha Pub. Power Dist. v. Foster Wheeler Corp., 109 F.R.D. 615 (D. Neb. 1986), the district court attempted to read FRE 612 more restrictively to protect core work product and make that rule generally inapplicable to civil deposition testimony. Id. at 616. As a fall-back position, however, the court approved the Sporck court’s procedural approach of requiring counsel to elicit specific testimony as a basis for obtaining any particular document, as opposed to a group of documents. Id. at 617.
critical to a case,” and thus, when properly applied, rule 612 “does not conflict” with the protection of attorney work product. Because of its conclusion as to the inapplicability of rule 612, the Third Circuit had no occasion to comment on the additional wrinkle noted in dictum in Bogosian v. Gulf Oil Corp., concerning the direct conflict that arises between FRE 612 and FRCP 26(b)(3) when a witness uses a document prepared by an attorney to refresh his or her recollection prior to testifying.

A number of cases, however, have dealt more directly with the conflict between FRE 612 and FRCP 26(b)(3) and found that the need for disclosure overwhelms the obligation to protect work product. In Berkey Photo, Inc. v. Eastman Kodak Co., for example, although the trial court did not require production of defense counsel’s trial notebooks which were shown to defendant’s experts as background, the court did make it clear in dicta that in most cases disclosure would be required under rule 612 in the future: “[T]here will be hereafter powerful reason to hold that materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties.” In announcing a prospective rule, the trial court made no distinction between material shown to expert witnesses and material shown to ordinary fact witnesses, and the court relied on FRE 612, not FRCP 26(b)(4), to justify disclosure. The Berkey court gave rule 612 an expansive reading; even though the express requirements of rule 612 did not appear to have been met, the court found it sufficient that the writings may have had an impact on the witnesses’ testimony. Specifically, there was no acknowledgment by the witnesses that the books had been used to refresh their recollection or that they were used in testifying; to the contrary, the testimony was that the books had not been used to assist in the preparation of the witnesses’ testimony, but rather, merely filled in details and provided background material not concerned with their areas of expertise. Thus, the court relied upon the advisory committee’s note to FRE 612 rather than the explicit language of the rule “to permit ‘access . . . to those writings which may fairly be said in fact

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69 Sporck, 759 F.2d at 318 (emphasis added).
60 Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 n.3 (3d Cir. 1984).
62 Id. at 617.
63 Id. at 614-16.
to have an impact upon the testimony of the witness.’” The court was willing to find waiver or a qualified privilege even though precedent came “close to . . . ‘absolute immunity’” for such core work product, noting that:

[T]he sweeping language of the cited authorities has never been challenged by an instance where such immunized materials have been deliberately employed to prepare—and thus, very possibly, to influence and shape—testimony, with the anticipation that these efforts should remain forever unknowable and undiscoverable.

Thus, the Berkey court’s focus was to avoid overprotection of work product, which would allow preparation of witnesses with materials that could not be discovered by one’s opponent for use in cross-examination and impeachment. The court opted instead for a rule, to be applied prospectively, which virtually presumed a waiver if work product materials were used for witness preparation. Disclosure of the trial notebooks was not ordered in Berkey because “counsel were not vividly aware of the potential for a stark choice between withholding the notebooks from the experts or turning them over to opposing counsel” and there was no attempt to “exceed decent limits of preparation” or to conceal materials from the plaintiff. A simpler approach utilizes the general “refreshment” rule embodied in FRE 612 on the theory that use of the document in witness preparation evidences an affirmative intent to relinquish the immunity. Neither approach, however,
gives any weight to the strong policies against disclosure which underlie FRCP 26(b)(3).

A number of cases, including Sporck, have attempted to advance a more restrictive reading of rule 612. One court relied on legislative history for the view that "little if any widening of disclosure obligations has occurred." The concern about too broad an application of the rule recognizes that allowing disclosure of work product under rule 612 circumvents the rule 26(b)(3) requirements of "substantial need" and "undue hardship." As one court stated: "While even a narrow construction of Rule 612 mandates waiver of protections for portions of documents actually used to refresh, permitting discovery of the bulk of the notes converts Rule 612, a rule of evidence, into a discovery device." Only the Third Circuit has concluded explicitly, although in dictum, that the work product protection afforded by FRCP 26(b)(3) is not overridden by FRE 612(2).

FRE 612(2) should not be read expansively, but the cases which seek to limit the application of the rule do not present compelling reasons for doing so. Two main arguments, neither of which is entirely convincing, are often advanced. The first focuses on the legislative history, including the statement in the Report of the House Judiciary Committee that "nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory." The argument raises the possibility that the drafters did not intend that rule 612 apply to privileged materials.

The second argument attempts to create a distinction under rule 612 between core work product writings used while testifying and such writings examined before testifying. This argument also...

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70 Id. at 409. Similarly, in Sporck v. Peil, 759 F.2d 312 (3d Cir.), cert. denied, 474 U.S. 903 (1985), the court stated that "[t]he Rule as adopted distinguishes between documents used in testifying and those examined before testifying.
71 Id. at 317.
72 Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 n.3 (3d Cir. 1984).
73 JUDICIARY COMMITTEE NOTES, supra note 10, at 7086.
74 See Barrer v. Women's Nat'l Bank, 96 F.R.D. 202, 203 (D.D.C. 1982) ("It is significant to note that the provisions of Rule 612 do not explicitly speak to privileged matters. Certainly the drafters . . . could have employed language comparable to that in Rule 26(b)(1) restricting parties to discovery of matters, not privileged.").
75 See, e.g., Jos. Schlitz Brewing Co. v. Muller & Phipps, Ltd., 85 F.R.D. 118, 120 (W.D. Mo. 1980) ("[t]he Rule as adopted distinguishes between documents used in testifying and
WAIVER OF CORE WORK PRODUCT

relies on the legislative history of rule 612 for its foundation. Because of the House Committee's amendment to rule 612(2), requiring production only when the court finds that it is "necessary in the interests of justice," it can be concluded that Congress intended for courts to treat refreshment before testifying differently than refreshment while testifying. As one district court recently noted, "those courts which hold that disclosure of materials reviewed before testifying is always 'necessary in the interests of justice' ignore the rather clear Congressional intent." The courts have not specifically considered, however, how the "necessary in the interests of justice" standard of rule 612(2) should mesh with the "substantial need" standard of FRCP 26(b)(3) or how to apply either standard to production of core work product. The obvious concern under rule 612(2) is to avoid abusive use of core work product to refresh a witness' recollection prior to testifying while withholding production of that material.

Another common tack used to avoid ordering disclosure is to find that actual use of the documents has not been established to invoke FRE 612. This may be a difficult limitation to maintain, particularly in view of the standard set forth in Berkey Photo, Inc. v. Eastman Kodak Co., which speaks to whether a document "may fairly be said in fact to have an impact upon the testimony of the witness" rather than whether it was actually used to refresh recollection or used in testifying. By focusing on "impact" on test-

documents reviewed before testifying").

Derderian v. Polaroid Corp., 121 F.R.D. 13, 16 (D. Mass. 1988). The district court concluded that defendant had not established that production of the notes was "necessary in the interests of justice." Id.

See, e.g., Sporck v. Peil, 759 F.2d 312, 318 (3d Cir.), cert. denied, 474 U.S. 903 (1985); S & A Painting v. O.W.B. Corp., 103 F.R.D. 407, 409-10 (W.D. Pa. 1984); Jos. Schlitz Brewing Co., 85 F.R.D. at 119; see also Omaha Pub. Power Dist. v. Foster Wheeler Corp., 109 F.R.D. 615, 616 n.1 (D. Neb. 1986) (examining distinction between use of work product to refresh recollection before deposition and such use prior to in-court testimony). In James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 146 (D. Del. 1982), the court noted that it had found only one case in which the court had denied production of privileged documents reviewed prior to testimony, but in that case the court's actual holding was simply that "there was insufficient establishment of actual use of any of the various documents [contained in the file], so as to authorize [the invocation of] Rule 612." Id. (quoting Jos. Schlitz Brewing Co., 85 F.R.D. at 120).

Berkey, 74 F.R.D. 613, 615 (S.D.N.Y. 1977); see also Williamson v. Puritan Chem. Co., No. 80 Civ. 1698, slip op. (S.D.N.Y. Mar. 6, 1981) (discoverable material was statement made to counsel reviewed prior to testifying); Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, 81 F.R.D. 6, 10-11 (N.D. Ill. 1978) (documents serving to refresh witness' recollection prior to deposition held to be discoverable).
timony, rather than "refreshment" of recollection, the body of potentially discoverable material is inappropriately expanded—at least where core work product is at issue.

Sporck also emphasized that under FRE 612 a party must "meet three conditions before it may obtain documents used by a witness prior to testifying: "1) the witness must use the writing to refresh his memory; 2) the witness must use the writing for the purpose of testifying; and 3) the court must determine that production is necessary in the interests of justice."80 The first two requirements recognize that the document is of little value for impeachment and cross-examination without a showing that the witness used it to refresh his recollection and that the document influenced his testimony. Reliance on "impact" diminishes the restrictive effect of the first two requirements. The third requirement, codifying the Supreme Court's holding in Goldman v. United States,81 requires the trial court to exercise its discretion to protect against "fishing expeditions among a multitude of papers which a witness may have used in preparing for trial."82

Another approach taken by some courts is to examine each situation as it occurs and to balance the conflicting aims of FRE 612 and FRCP 26(b)(3). The concern that application of rule 612 will vitiate the privilege or immunity in every case is mitigated somewhat by the ad hoc balancing approach used by many courts, regardless of any stated standards. This balancing approach requires in camera examination of the documents at issue. It permits the court to strike a balance between one party's interest in full disclosure and discovering any evidence favorable to him, and the competing interest in protecting the efficacy and integrity of the adversary system by preserving immunity.83

FRE 612(2) must be read as "incorporating this balancing analysis," but an additional factor exists in the "normal work product calculus"84—the danger of an attorney obtaining an unfair

80 Sporck, 759 F.2d at 317 (citing FRE 612).
82 Sporck, 759 F.2d at 318 (quoting JUDICIARY COMMITTEE NOTES, supra note 10, at 7086).
83 See, e.g., In re Joint E. & S. Dist. Asbestos Litig., 119 F.R.D. 4, 5 (E.D.N.Y., S.D.N.Y. 1988) (court found it "appropriate to balance the competing interests in the need for full disclosure and the need to protect the integrity of the adversary system").
84 See Bloch v. Smithkline Beckman Corp., No. 82-510, slip op. at 6 (E.D. Pa. Apr. 9, 1987). But see In re Comair Air Disaster Litig., 100 F.R.D. 350, 353 (E.D. Ky. 1983) (rule 26(b)(3) and rule 612 "may be read in harmony" in that "balancing process under both rules
advantage over a cross-examining attorney by using only privileged documents to prepare his witness. Rejecting as an inappropriate response to such concerns a mechanical waiver rule, some courts have urged a “case-by-case analysis of the document in question, focusing particularly on the potential for unfair use of the work-product privilege.”

Such an approach becomes even more important in view of the “judicial trend towards requiring disclosure under Rule 612 of materials used to refresh recollection preliminary to the taking of a deposition, notwithstanding claims of attorney-client privilege or work product privilege.” Thus, in James Julian, Inc. v. Raytheon Co., the court adopted such an ad hoc approach, requiring in camera review of disputed documents and a case-by-case determination as to whether the objectives of FRE 612 should prevail over any work product claim:

As enacted, Rule 612 does limit the expansion of prior law, not . . . by exempting privileged documents, but by conditioning disclosure on the discretionary approval of the district court. It would thus appear that Congress left the task of striking a balance between the competing interests of full disclosure and the maintenance of confidentiality for case by case determination.

The James Julian court did not, however, make any distinction between ordinary work product and opinion work product, nor did it distinguish between expert and other witnesses.

In Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co., the trial court exercised discretion pursuant to FRE 612 to protect from disclosure as opinion

dovetails”).

65 Bloch, No. 82-510, slip op. at 7; see Barrer v. Women's Nat'l Bank, 96 F.R.D. 202, 205 (D.D.C. 1982).

66 Barrer, 96 F.R.D. at 204; see also Possidon Capital Corp. v. Nicolet Inst. Corp., 85 Civ. 6118, 85 Civ. 6151, slip op. (S.D.N.Y. Nov. 20, 1985) (ordering production of notebook used by witness during deposition to refresh recollection); S & A Painting Co. v. O.W.B. Corp., 103 F.R.D. 407, 409 (W.D. Pa. 1984) (“[c]onfronted with the conflict between the command of Rule 612 to disclose materials used to refresh recollection and the protections afforded by the attorney-client privilege and the work-product doctrine, the weight of authority holds that the privilege and protections are waived”); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 145 (D. Del. 1982) (“[t]hose courts which have considered the issue have generally agreed that the use of protected documents to refresh a witness' memory prior to testifying constitutes a waiver of the protection”).


68 Id. at 145.

work product a deposition digest with counsel’s marginal notes, which was read by a witness in preparation for his deposition. The trial court distinguished between ordinary work product and opinion work product and concluded that the value to the party seeking disclosure was “outweighed by the principle precluding disclosure of this type of work-product.” The district court adopted the suggestion by Judge Weinstein in his evidence treatise that “unless the judge finds [after an in camera inspection] that the adverse party would be hampered in testing the accuracy of the witness’ testimony, he should not order production of any writings which reflect solely the attorney’s mental processes.”

This approach does not afford absolute protection to core work product but gives primacy to the principles and policies underlying FRE 612.

In another recent New York case, In re Joint Eastern & Southern District Asbestos Litigation, which purported to follow Berkey, the district court favored a “balancing test . . . [o]n a case-by-case basis . . . to balance the competing interests in the need for full disclosure and the need to protect the integrity of the adversary system.” The trial court suggested that the conflict between the purposes of FRE 612 and FRCP 26(b)(3) “may be reconciled because the ‘interests of justice’ standard of Rule 612 incorporates as part of the balancing analysis the protection afforded by the work-product doctrine.” The Asbestos Litigation court required the disclosure of a “product book” prepared by plaintiff’s attorney and reviewed by plaintiff in preparation for his deposition. This case was easier than the Berkey case since the defendants were not seeking any materials written by plaintiff’s counsel but only pictures obtained from the defendants’ own sources; further, the witness (a non-expert) had actually used the books to refresh his recollection prior to testifying. And, finally, the court concluded that the pictures sought did not reveal the attorney’s core work product “or constitute a selection or ordering of information according to some legal theory.”

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90 Id. at 781.
91 3 J. Weinstein & M. Berger, supra note 13, ¶ 612[04], at 612-40.
93 Id. at 5.
94 Id. (citing Bloch v. Smithkline Beckman Corp., No. 82-510, slip op. at 12 (E.D. Pa. Apr. 9, 1987)).
95 Id. at 6.
C. FRCP 26(b)(3) and FRCP 26(b)(4): Conflict or Harmony?

Just as there is a potential conflict between FRE 612 and FRCP 26(b)(3) when work product is used to refresh a witness' memory prior to testifying or work product is shown to a witness which may have an "impact" on the testimony, similar issues arise when work product is shown to an expert witness. FRCP 26(b)(4) is somewhat narrower in scope than FRE 612 in that it only applies to experts. Rule 26(b)(4) was intended to overcome common law barriers to discovery of expert witnesses and to enhance preparation for the cross-examination of expert witnesses.

FRCP 26(b)(4) permits limited "[d]iscovery of facts known and opinions held by experts, otherwise discoverable under [rule 26(b)(1)] and acquired or developed in anticipation of litigation or for trial."96 A party is thus entitled to inquire as to the substance of the facts and opinions to which the expert is expected to testify and the grounds for each opinion.97 This impinges on the work product immunity afforded by FRCP 26(b)(3) when the expert witness has relied on core work product or reviewed core work product in reaching his opinion. An attorney who has retained an expert witness generally must provide him with the background of the litigation and direct him to relevant factual data and evidence. Expert witnesses may be shown drafts of litigation documents, may review background materials that highlight litigation strategy, or may be given memoranda or correspondence summarizing conversations with counsel. An expert who is kept in the dark about counsel's factual and legal theories to avoid the possibility of waiver of work product immunity is less valuable as part of a litigation team.98 On the other hand, to counter the possibility that the expert's opinion might be improperly influenced or shaped by counsel and because of the deference given to expert opinions by the triers of fact, disclosure to permit effective cross-examination and impeachment may be necessary.

Just as counsel can attempt to avoid disclosure under FRE 612 by withholding work product writings from witnesses and conducting oral witness preparation, similar tactics can be used with expert witnesses. This is obviously an undesirable result because it

fosters either "sharp practices" or shoddy preparation. Here, as with rule 612, if there is absolute protection for core work product, there is an equivalent concern about "sharp practices" which might be used by the party claiming work product—for example, using only "nondisclosable" core work product in expert witness preparation to avoid disclosure to one's opponent.

The courts and commentators have used one of three approaches when faced with the issue of the discoverability of work product shown to an expert witness: (1) the FRCP 26(b)(3) policy against disclosure of opinion work product should generally prevail over attempts to obtain such materials under FRCP 26(b)(4);99 (2) the FRCP 26(b)(4) policy favoring disclosure should generally result in finding a waiver of FRCP 26(b)(3);100 and (3) using FRE 612 and its underlying policies to obtain such work product rather than using FRCP 26(b)(4).101 Although the choice of one approach over another would generally determine the ultimate result—that is, whether disclosure will be ordered—the courts have tended to attempt balancing the competing interests in every case. Using balancing builds in a certain flexibility to shape the result without abandoning the basic premises and rationales which underlie the particular court's approach.

At least one court has favored nondisclosure to safeguard opinion work product. The Third Circuit in a 1984 decision, Bogosian v. Gulf Oil Corp.,102 analyzed the interaction between rules 26(b)(3) and 26(b)(4) and remanded the decision of the trial court which had required plaintiffs to produce opinion work product which had been shown to plaintiffs' expert witnesses.103 The district court did not find a waiver by the plaintiffs, but nevertheless held that disclosure was required by the FRCP 26(b)(3) proviso that it is "[s]ubject to the provisions of subdivision (b)(4)."104 The Third Circuit, however, concluded that the proviso did not relate to the portion of rule 26(b)(3) which dealt with opinion work prod-

100 See, e.g., Boring v. Keller, 97 F.R.D. 404, 407 (D. Colo. 1983); see also Bogosian, 738 F.2d at 590-91 ("[the district court] construed Rule 26(b)(4)(A) as overriding the work product privilege of Rule 26(b)(3)").
102 738 F.2d 587 (3d Cir. 1984).
103 Id.
104 Id. at 594; see Fed. R. Civ. P. 26(b)(3).
uct, that rule 26(b)(4) did not wholly override rule 26(b)(3), and that the strong policy of subdivision (b)(3) against disclosure of opinion work product should ordinarily prevail over the subdivision (b)(4) concerns about effective impeachment and cross-examination preparation: "[T]he marginal value in the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product." These guidelines, according to the Third Circuit, were not to be effectuated in an absolute rule, but rather, were to be applied by the trial judge after an in camera review of the documents in question. The Third Circuit suggested that if "facts" were intertwined with core work product, the trial judge could order appropriate redaction to give effect to "the policies underlying each section." The court did not address the problem of which policy would hold sway in the event that redaction proved impossible, although, on balance, greater weight was given to the FRCP 26(b)(3) policy against disclosure.

To the extent absolute protection is not afforded to core work product, some balancing must be done by the district judge in the course of his in camera review. Such review is not limited to a determination as to whether the documents at issue contain work product, but must also reflect an evaluation of whether the examiner's need to obtain the work product in that case "would significantly outweigh the chill on development of legitimate attorney work product that would admittedly accompany disclosure. . . . [T]his latter consideration is entitled to great weight." Several courts have followed the second approach and concluded that the policies of FRCP 26(b)(4) would be frustrated if discovery was foreclosed, thus depriving a party of the opportunity

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105 Bogosian, 738 F.2d at 594.
106 Id. at 595. In a dissenting opinion, Judge Becker disagreed with the majority's conclusion that the revelation of an attorney's involvement in forming the expert's opinion had only "marginal value" and suggested that "such a revelation could, in some cases, critically alter the finder of fact's assessment of the expert's testimony." Id. at 598 (Becker, J., dissenting).
107 Id. at 596.
108 Id. at 598 (Becker, J., dissenting). Both the majority and the dissenting opinions in Bogosian advocated a limited balancing test; the approaches diverged, however, with respect to the appropriate weight to be given the competing policies of rules 26(b)(3) and (b)(4). The majority gave greater weight to the subdivision (b)(3) policy against disclosure, whereas the dissent was swayed by the need for disclosure for effective cross-examination reflected in subdivision (b)(4).
for effective cross-examination and impeachment. In *Boring v. Keller*, for example, the trial court required the defendant to produce certain work product materials which had been shown to defendant's experts. The work product materials included a summary of plaintiff's deposition which contained defense counsel's impressions and evaluations of plaintiff's appearance and demeanor and a letter from counsel which contained general suggestions to experts for their deposition testimony, along with counsel's general impressions, thoughts, and opinions regarding issues encountered in medical malpractice cases. Although these materials could fairly be characterized as opinion or core work product, the trial court declined to give it absolute immunity and, recognizing the tension between the policies of rules 26(b)(3) and (b)(4), ordered disclosure pursuant to rule 26(b)(4).

The *Boring* court accepted the finding of the magistrate who conducted an *in camera* review that the documents "will most probably have an influence on the evidence presented by testimony." The court rejected the defendant's arguments that all relevant factual information had been provided, that there was no suggestion that the documents had been supplied to experts for improper or illegitimate purposes and that there was no basis for finding that the experts' testimony would be affected. The trial court concluded that "[o]ne situation in which opinion work product is not protected is where an expert witness utilizes counsel's opinion work product in order to formulate his or her opinion" and that showing such materials to an expert constitutes a waiver "because immunized materials should not remain undiscoverable after they have been used to influence and shape testimony."

One major gap in the court's reasoning is the apparent assumption that any opinion work product shown to an expert will somehow shape and influence the expert's testimony and that cross-examination without access to that work product cannot effectively test the bases for the expert's testimony. First, certain work product may provide the expert with background and perspective on a case and still have no specific relevance to the particular opinions to which he testifies. Second, the cross-examining attorney is free to inquire about the bases for the expert's opinion.

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110 *Id.* at 404-05.
111 *Id.* at 405.
112 *Id.* at 407.
and to challenge, in a variety of ways, the adequacy of those bases, the expert's lack of awareness of relevant information, or other faults in his analysis. On the theory adopted in *Boring*, however, *everything* shown to an expert is discoverable because it *might* have influenced the testimony. The result in *Boring*, although based upon FRCP 26(b)(4) rather than FRE 612, involves a similar approach and brings us to the same point as *Berkey*—the only sure way to protect opinion work product is not to show it to one's expert witness.

Thus, one troubling aspect of the *Boring* decision is the possible deleterious effects that operation of the rule might have on attorney preparation. If an attorney wishes to safeguard work product he cannot show it to his expert who has been retained to advise and consult as well as testify. As a result, trial preparation is likely to suffer. In addition, avoidance of waiver becomes feasible primarily for the party with significant resources and a willingness to spend those resources to protect work product. For example, if an attorney provides the expert with an oral assessment of a witness's demeanor, there is nothing to be discovered under FRCP 26(b)(4).

Finally, the *Boring* rule, carried to its logical extreme, wipes out protection for *any* work product shown to an expert witness. It goes even further in mandating production than the memory refreshment doctrine of FRE 612 because no showing that the document refreshed recollection or was used in testifying is required.

In another recent district court case, *Elco Industries v. Hogg*, the trial court reasoned that the rule 26(b)(3) work product rule was explicitly subject to rule 26(b)(4) and concluded: "Consequently, one occasion which allows the discovery of work product materials is when those materials have been given to an expert and may influence and shape the expert's testimony." The trial court did, however, recognize its obligation under rule 26(b)(3) to protect against disclosure of opinion work product and

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113 *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977); see also supra notes 51-65 and accompanying text (discussing issues of disclosure relative to cross-examination).

114 *See Berkey*, 74 F.R.D. at 615-17. Although the court in *Berkey* relied on FRE 612 with regard to materials shown to an expert, there was little likelihood that a trial expert without independent knowledge of the facts would use work product for "memory refreshment." *Id.* Instead, the *Berkey* court used an "impact on the testimony" test very much like that applied by the *Boring* court under rule 26(b)(4). *Id.*


116 *Id.*, slip op. at 3.
redacted portions of the document rather than having the entire document produced. The documents at issue in Elco included the experts’ notes on defense counsel’s view of the case and documents prepared by the defendants’ experts as to consultation matters.

Where the court’s approach falters is in the jump from the requirement of FRCP 26(b)(4) that there should be discovery of facts made known to adverse parties to its unsupported conclusion that discovery of work product is permissible where such materials were given to the expert and may influence and shape the expert’s testimony. The underlying facts contained in work product materials are not protected by work product. Surely there are other ways to ascertain what facts were made available to the expert than to order disclosure of work product. For example, the interrogator can cross-examine experts about the facts and assumptions underlying their opinions. Arguably, anything may influence experts’ opinions including the fact that they have been retained by one side in a litigation; if the concern is improper influence, there are less intrusive ways to deal with it.\(^7\)

### IV. Adapting Existing Approaches

Even if we could go back to square one and create a “bright line” rule, it might not be the best alternative. A rule which protects opinion work product absolutely or which mandates disclosure of such work product, if used in trial preparation, may promote certainty for litigants and counsel, but is likely to encourage courts to find “loopholes” to deal with perceived abuses and to protect the integrity of the litigation process. If opinion work product was protected absolutely, how would a court deal with a party who used only such work product to prepare witnesses and for memory refreshment? One way would be to set more narrow limits on work product or, alternatively, to create exceptions requiring

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\(^7\) Certainly, a party may show that the expert inappropriately weighed certain factors or was unaware of important facts or declined to consider other facts. There is ample opportunity to test the authority of experts’ opinions without shortcutting the process by going directly to work product or assuming improper influence or venality on the part of counsel. See Note, Expert Witness, supra note 6, at 1171-72. The Elco case also raises serious questions about the advisability of using a single expert as expert witness and as litigation and/or business advisor. See Elco, No. 86-C-6947, slip op. at 5. The implication of the court’s discussion is that absent a careful delineation of the expert’s roles in each aspect, a wider scope of “waiver” may apply. See id., slip op. at 4-5. Certainly one obvious and easy avoidance mechanism available to the party with sufficient resources is to hire separate experts for different functions.
 waiver of core work product disclosure under stated conditions, such as when misconduct or improper activity is found. If opinion work product immunity was automatically “waived” when the materials are used in trial preparation, there would similarly be an inclination to define the concept of “use” more narrowly to avoid harsh penalties. “Bright line” rules in an area subject to conflicting policies and tensions—as here between the policies favoring liberal disclosure, avoiding surprise, and permitting effective cross-examination on the one hand, and the policies promoting the integrity and efficiency of the adversarial process on the other—tend to be less than satisfactory.

The courts have by and large opted for an ad hoc balancing approach which recognizes the conflicting policies and attempts to reconcile them in the particular case presented. Such an approach may be fairer in taking account of the actual fact situations presented, but has the disadvantage of not giving attorneys and litigants guidelines to predict whether their conduct puts them at risk. This lack of predictability encourages “sharp practices” and avoidance techniques on the part of attorneys seeking to avoid disclosure which may increase the costs of litigation and decrease the quality of trial preparation. It also encourages parties seeking disclosure to demand materials that most lawyers would not expect to disclose. The increase in depositions of attorneys may very well reflect the impact of the ad hoc approach by encouraging attorneys to use discovery so as to “perform [their] functions either without wits or on wits borrowed from the adversary.”

The difficulty with any balancing lies in determining what factors should be weighed and what weight should be accorded to these factors. Because what is being balanced is invariably “apples and oranges,” the result in any given case is virtually predetermined by the importance attributed by the court to a particular factor or factors.

The trend in recent cases seems to be to use the ad hoc balancing approach to further the policies of liberal disclosure and effective trial preparation reflected in FRCP 26(b)(4) and FRE 612 at the expense of protecting opinion work product under FRCP 26(b)(3). This may be due, in part, to the fact that rules 26(b)(4) and 612 are clearer and more explicit as to what is discoverable (even though neither one mentions “work product”) than is rule 26(b)(3) about what protection should be given to core work prod-

uct. Further, the in camera review which is an essential part of the evaluation process permits the redaction of core work product, where possible, and also allows the court to assess independently the likelihood of improper coaching, the necessity for disclosure, the sensitivity of the material, and the effect on discovery, as well as the nature of the particular materials for which protection is sought.

Without abandoning a balancing approach, the courts should give more than lip service to the policies underlying protection of core work product. Perhaps the best approach might be to create a presumption of immunity for core work product which would be factored into the equation being balanced.

One difficulty in shoring up the weight accorded to FRCP 26(b)(3) policies may be that those policies focus on system interests in the adversarial process rather than the concerns relating to the particular case before the court. Another difficulty is that whatever weight is given to rule 26(b)(3) policies is undermined by adopting either broad definitions of waiver or expansive readings of FRCP 26(b)(4) and FRE 612. Unless a rule that any use of work product constitutes an automatic waiver is adopted, waiver in the context of trial preparation is neither a meaningful nor a realistic way to approach the problem of preserving opinion work product. An automatic waiver rule gives no protection to work product and should be rejected. Similarly, the courts must begin to adopt a stricter reading of the language of FRCP 26(b)(4) and FRE 612. For example, if the requirements of FRE 612 with respect to use of materials for memory refreshment and preparation of testimony were more strictly enforced, disclosure would be much less likely to occur. An expansive interpretation of FRE 612 so as to require disclosure of materials which may have had an impact on testimony severely undercuts whatever weight may be given to FRCP 26(b)(3) policies. Because rules 26(b)(4) and 612 are more explicit and have a narrower focus than rule 26(b)(3), a more literal reading is appropriate.

In sum, unless there is good reason for abandoning it in a given case, the courts should preserve immunity for core work product. In camera review and balancing other litigation interests can help insure that evasive and abusive uses of work product are not encouraged. There is a paucity of appellate authority in this area; clearer guidelines from the circuit courts would help add some degree of predictability to the ad hoc balancing process.
V. Conclusion

The cases addressing the question of the extent of immunity for core work product used in trial preparation veer off in a variety of directions and rely on different rules to justify elimination of the protection. Whether the focus is on whether waiver occurred, or whether there was an impact on testimony, or whether the work product refreshed a witness's recollection, or was used in shaping the lay witness's testimony or the opinions of the expert witness, the tendency is to order disclosure. Even those courts anxious to protect against disclosure couch their reasoning in terms of why waiver of FRE 612 or FRCP 26(b)(4) is inapposite in the particular situation.

Appellate guidelines are needed to revitalize work product protection and upgrade it to at least the level of a presumption. The present lack of predictability among the courts increases the likelihood that work product disclosure will be demanded and that avoidance techniques to protect against disclosure will be adopted, creating a cycle that adversely affects the adversarial process.