

3-1-2019

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Recommended Citation

Sara Leonetti, Comments, *What Do You Know? Discovering Document Compilations in 39(B)(6) Depositions*, 94 Wash. L. Rev. 481 (2019).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol94/iss1/11>

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WHAT DO YOU KNOW? DISCOVERING DOCUMENT COMPILATIONS IN 30(B)(6) DEPOSITIONS

Sara Leonetti*

Abstract: The work product doctrine emerged as a judicially created, practical solution to resolve problems inherent in the Federal Rules of Civil Procedure (FRCP). While the FRCP famously sought to broaden discovery and increase parties' access to information, the rules infamously failed to prevent attorneys from discovering each other's work product. For policy reasons—primarily to keep some semblance of the adversarial system—the U.S. Supreme Court created work product qualified immunity to prevent attorneys from discovering their opponents' work, mental impressions, and legal strategies.

At the end of the twentieth century, courts significantly extended the work product doctrine when they began to recognize document compilations—the groups of documents attorneys use to prepare their witnesses for depositions—as privileged work product. These courts found that attorneys' document selection and organization processes necessarily reveal their mental impressions about cases and are therefore shielded by the work product doctrine. This relatively new work product designation has led to a flood of litigation and prevented deposing attorneys from successfully examining their witnesses. More specifically, deposing attorneys cannot effectively test witness memory or credibility when the attorney does not know which documents the witness reviewed.

Nowhere is this problem more apparent, or more problematic, than in the realm of 30(b)(6) depositions. FRCP 30(b)(6) governs the depositions of corporations. It requires corporations to choose a corporate designee who will bind the company as a whole through his or her testimony. Because corporate designees are frequently required to testify about vast amounts of information relating to the corporation, they almost always review document compilations to prepare for their depositions. In fact, their knowledge may be entirely secondhand, stemming completely from the documents reviewed rather than their own personal experiences. When parties shield these preparatory documents under the work product doctrine, they prevent the deposing attorney from learning the basis of the witness's testimony. This puts the examiner at a unique disadvantage. This Comment addresses the issue of document compilations in the context of 30(b)(6) depositions. It argues that 30(b)(6) document compilations are not work product at all.

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INTRODUCTION

Imagine the following scenario. Patricia brings a Title VII¹ action against her employer, ABC Corporation (ABC), in federal court. ABC is huge. It has thousands of employees and hundreds of managers. Patricia wants to depose the corporation, and her attorney follows the rules for deposing a corporation as specified by Federal Rules of Civil Procedure (FRCP) 30(b)(6).² Patricia's attorney describes with particularity the topics she plans to cover during the deposition—or the “noticed topics”—and delivers them to the corporation.³ In response, ABC knows it must provide a knowledgeable designee to answer questions on behalf of the corporation, binding the corporation.⁴

ABC chooses Vince as its designee. Vince has some personal, independent knowledge about the noticed topics, but some of the relevant events took place before Vince started working at ABC. To educate Vince about the designated topics, ABC, through its attorney, puts together a “document compilation”—two binders full of documents—for Vince to review.

At the deposition, Patricia's attorney asks Vince what documents, if any, he reviewed in preparation for his deposition. But, before Vince can reveal the source of his knowledge, ABC's attorney tells Vince not to answer the question on work product grounds. Patricia's attorney is left in a difficult situation. It will be tough—maybe even impossible—for her to impeach Vince if she does not know the source of his knowledge.⁵ Furthermore, Vince could easily deny knowing the answer to a damning question, and there will be little she can do to challenge this assertion.⁶ Finally, Patricia's attorney will be left wondering if ABC fulfilled its duty to prepare its corporate designee if she is unable to learn how the corporation prepared him.⁷

Courts have consistently held that document compilations, like the one ABC's attorney prepared for Vince, are work product entitled to qualified immunity.⁸ In making that determination, courts have accepted

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2018).

2. *See* FED. R. CIV. P. 30(b)(6).

3. *Id.*

4. *Id.*

5. *See* Coryn Group II, LLC v. O.C. Seacrets, Inc., 265 F.R.D. 235 (D. Md. 2010).

6. Adidas Am., Inc. v. TRB Acquisitions LLC, 324 F.R.D. 389, 398 (D. Or. 2017) (citing Nutramax Lab., Inc. v. Twin Lab. Inc., 183 F.R.D. 458, 473 (D. Md. 1998)).

7. *See id.* at 394 (explaining duty to prepare 30(b)(6) designee in context of document compilations).

8. *See id.* at 396–97 (discussing *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985)).

the idea that a deposing attorney can work backward from the selected documents to infer the defending attorney's legal strategy.⁹ Because these courts begin with the presumption that *all* document compilations are protected work product, they struggle to apply Federal Rule of Evidence (FRE) 612, which often requires the disclosure of documents reviewed by witnesses prior to their testimony.¹⁰ Courts have come up with a number of complex tests to grapple with the arguable conflict between the work product doctrine and FRE 612.¹¹ However, at least in the context of 30(b)(6) depositions, these tests are superfluous. Ultimately, these tests are unnecessary because document compilations reviewed by corporate designees are not work product. This Comment argues that they are not entitled to qualified immunity in the first place.

This Comment proceeds in five parts. Part I explains the underlying rules at the heart of the problem described above: the work product doctrine, FRE 612, and FRCP 30(b)(6). Part II explains why courts designate document compilations as work product by examining the seminal case *Sporck v. Peil*.¹² It then explores several different tests courts have adopted to determine when attorneys must disclose document compilation work product. Part III describes why 30(b)(6) document compilations are different from those used to prepare lay witnesses. It focuses primarily on a 2017 case in which the District of Oregon created a new test specifically tailored to 30(b)(6) document compilations: *Adidas America, Inc. v. TRB Acquisitions LLC*.¹³ Part IV analyzes the *Adidas* decision. This Part argues that, while the court was correct to treat 30(b)(6) document compilations as distinct from other types of document compilations, the court skipped a step in its analysis. It failed to ask the fundamental question: Are 30(b)(6) document compilations work product at all? Are they entitled to qualified immunity? Had the *Adidas* Court analyzed the case under a work product lens, it could have concluded that 30(b)(6) document compilations are not work product, meaning they are not shielded from discovery. Finally, Part IV concludes that courts should adopt the underlying reasoning from *Adidas*, which explains the distinct nature of 30(b)(6) document compilations. However, unlike *Adidas*, courts should

9. *Id.*

10. *See, e.g., Adidas*, 324 F.R.D. at 399 (adopting a “modified,” fact-specific balancing test).

11. *See, e.g., Nutramax*, 183 F.R.D. at 468–50 (adopting a balancing test to weigh the competing interests of FRE 612 and the work product doctrine).

12. 752 F.2d 312.

13. 324 F.R.D. 389.

use this distinction to conclude that 30(b)(6) document compilations are not work product at all.

I. THREE RULES, ONE PROBLEM: WORK PRODUCT, FRE 612, AND FRCP 30(b)(6)

Courts must often decide whether 30(b)(6) document compilations are discoverable. As courts engage in this analysis, three rules seem to collide: the work product doctrine, FRE 612, and FRCP 30(b)(6).¹⁴ When these three rules intersect, courts struggle to apply them simultaneously due to conflicting instructions and underlying policies. This Part briefly explains how these three rules function and the policies behind them, providing the foundation for further analysis.

A. *Work Product: History, Development, and Purpose*

Prior to the FRCP, discovery was limited, and the legal profession generally embraced the “sporting” theory of justice, where “a judicial proceeding was a battle of wits rather than a search for the truth.”¹⁵ Indeed, the rules were developed to reduce gamesmanship, concealment of evidence, and unfair surprise.¹⁶ The FRCP promoted broad discovery by creating new discovery tools and by permitting more discovery than any state’s civil rules allowed at that time.¹⁷

Work product became problematic soon after the FRCP’s creation in 1934.¹⁸ Trial courts could not reach a consensus about whether they should shield work product, and the new rules did not address the issue.¹⁹ Given the primary purposes of the new rules—namely to promote truth-finding and to curb gamesmanship—some courts required attorneys to disclose their work product.²⁰ However, many district courts reached the opposite conclusion, finding work product immune from

14. See FED. R. CIV. P. 30(b)(6).

15. Michael A. Blasie, *The Uncertain Foundation of Work Product*, 67 DEPAUL L. REV. 35, 38–39 (2017) (quoting 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2002 (3d ed. 2010)).

16. 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1029 (4th ed. 2013)).

17. Blasie, *supra* note 15, at 39 (citing 8 WRIGHT, MILLER & MARCUS, *supra* 15, § 2002).

18. See ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 39–47 (1946) (discussing FRCP 30).

19. Blasie, *supra* note 15, at 42.

20. *Id.*

discovery.²¹ These courts offered a variety of different reasons for prohibiting work product discovery, and the lack of a coherent theory “caused immense confusion.”²²

In 1947, the U.S. Supreme Court finally addressed the issue of work product in the seminal case *Hickman v. Taylor*,²³ deciding that work product is subject to qualified immunity.²⁴ In *Hickman*, five crew members died when their tugboat sank.²⁵ The tugboat company’s attorney, Fortenbaugh, swiftly interviewed survivors and witnesses to the accident.²⁶ Fortenbaugh then drafted witness statements and asked the witnesses to sign them.²⁷ He also wrote memoranda regarding the statements, which included his mental impressions about the witnesses and the case.²⁸ Afterward, Hickman, an attorney for one of the deceased crew members, sued the tugboat company.²⁹ In an interrogatory, Hickman attempted to obtain Fortenbaugh’s witness statements by asking Fortenbaugh to “[a]ttach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.”³⁰ Hickman requested the signed witness statements, “Fortenbaugh’s internal memos of what he was told by the witnesses, and a written account of what Fortenbaugh remembered the witnesses and survivors told him.”³¹ At the time, the FRCP did not forbid this strategic request.

21. *Id.*

22. ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, *supra* note 18, at 40 (“The two sentences added at the end of Rule 30(b) deal with the problem of inquiry into writings obtained or prepared by the adverse party, his attorneys, agents, or insurers in anticipation of litigation or in preparation for trial. The district courts have been in disagreement over the extent to which such an inquiry may be made. . . . A considerable number of decisions, for various reasons and to the varying extent hereafter indicated, have ruled, however, that the results of investigations or other information or matters secured or prepared by the adversary or his representatives in contemplation of litigation or in preparation for trial are not the proper subjects of discovery.” (collecting cases)); Blasie, *supra* note 15, at 42 n.50 (citing *Hickman v. Taylor*, 153 F.2d 212, 220 n.13 (3d Cir. 1945) (collecting conflicting cases—some district courts believing work product was immune from discovery)).

23. 329 U.S. 495 (1947).

24. *Id.*

25. *Id.* at 498.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 514 (Jackson, J., concurring).

31. Charles P. Cercone, *The War Against Work Product Abuse: Exposing the Legal Alchemy of Document Compilations as Work Product*, 64 U. PITT. L. REV. 639, 654 (2003).

In its decision, the Court addressed the tension between the new FRCP, which favored broad discovery, and the traditional, adversarial system.³² It concluded, “discovery, like all matters of procedure, has ultimate and necessary boundaries.”³³ The Court explained that even though the new rules did not address work product, refusing to create a work product rule would violate the most basic public policy considerations in the legal field.³⁴ It wrote:

Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney. Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.³⁵

The Court believed that if the mental impressions of opposing counsel were available through the new discovery methods, then attorneys would stop writing down their thoughts and opinions.³⁶ “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.”³⁷ While the work product doctrine fell outside of the newly enacted FRCP, the Court explained that public policy and the legal profession required its existence.³⁸

However, the *Hickman* decision did not render work product completely inaccessible to opposing counsel.³⁹ The Court clarified that the work product protection is a *qualified* immunity.⁴⁰ It explained that when non-privileged facts remain “hidden in an attorney’s file” and the “production of those facts is essential to the preparation of one’s case,” then discovering work product is appropriate.⁴¹ The burden of showing

32. See *Hickman*, 329 U.S. at 507.

33. *Id.*

34. *Id.* at 510–11.

35. *Id.*

36. *Id.* at 511.

37. *Id.*

38. *Id.*

39. See *id.* at 513–14.

40. *Id.*

41. *Id.* at 511.

that the work product is essential, or necessary, for the preparation of one's case rests on the party moving to compel its disclosure.⁴²

1. *FRCP 26(b)(3): A Partial Codification of Work Product*

It was not until 1970 that the FRCP Advisory Committee decided to incorporate *Hickman* and its progeny as FRCP 26(b)(3).⁴³ However, the Advisory Committee did not incorporate the entire body of case law into the new rule.⁴⁴ Indeed, courts and commentators acknowledge that FRCP 26(b)(3) is a “partial codification” of *Hickman* and its progeny.⁴⁵ FRCP 26(b)(3) gives the following instruction: “Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative.”⁴⁶ An attorney may only discover work product if she shows that she “has substantial need” for the documents and cannot obtain them, or their “substantial equivalent” without enduring “undue hardship.”⁴⁷ The court must take extra steps to protect work product when the work product at issue contains an attorney’s “mental impressions, conclusions, opinions, or legal theories.”⁴⁸

Courts have acknowledged that both *Hickman* and FRCP 26(b)(3) provide a source of protection for work product.⁴⁹ In other words, if the FRCP do not protect a category of alleged work product, *Hickman* might

42. *Id.* at 512.

43. Blasie, *supra* note 15, at 53–54.

44. *Id.* at 54.

45. *Id.* at 56 (citing 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2023–24 (3d ed. 2010) (“[T]he preexisting protections for intangible work product have continued application despite the 1970 amendment.”)). Blasie compiled various other cases, including *United States v. Deloitte LLP*, 610 F.3d 129, 136 (D.C. Cir. 2010) (“*Hickman* provides work-product protection for intangible work product independent of Rule 26(b)(3).”); *In re Cendant Corp. Secs. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) (“It is clear from *Hickman* that work product protection extends to both tangible and intangible work product.”); *United States v. One Tract of Real Prop. Together with all Bldgs., Improvements, Appurtenances and Fixtures*, 95 F.3d 422, 428 n.10 (6th Cir. 1996) (“When applying the work product privilege to such nontangible information, the principles enunciated in *Hickman* apply, as opposed to Rule 26(b)(3) of the Federal Rules of Civil Procedure, which applies only to ‘documents and tangible things.’”); and *Alexander v. FBI*, 192 F.R.D. 12, 17 (D.D.C. 2000) (“To analyze an attorney work-product claim as to intangible work product, courts must look to the caselaw under *Hickman v. Taylor* . . . and its progeny and not to FED. R. CIV. PRO. 26(b)(3), which applies only to ‘documents and tangible things.’”). *Id.* at 56 n.169.

46. FED. R. CIV. P. 26(b)(3).

47. *Id.*

48. *Id.*

49. See Blasie, *supra* note 15, at 57.

provide protection (and vice versa).⁵⁰ It is unnecessary for the purposes of this Comment to explore the differences between *Hickman* and FRCP 26(b)(3).⁵¹

2. Distinguishing “Opinion” From “Fact” Work Product

As the work product doctrine developed, courts distinguished between “opinion” work product and “fact” work product.⁵² FRCP 26(b)(3) also distinguished between the two. Opinion work product contains an attorney’s “mental impressions, conclusions, opinions, or legal theories.”⁵³ For instance, an attorney’s research memoranda containing their analysis and theories of a case is opinion work product.⁵⁴ Unlike opinion work product, fact work product does not implicate the attorney’s legal theories or other thoughts about the case.⁵⁵ Courts have defined fact work product as “a lawyer’s tangible work product that includes facts but not the lawyer’s mental impressions.”⁵⁶ For example, if an attorney simply takes a witness’s statement, without including any of the attorney’s own personal thoughts, a court is likely to conclude that the witness statement is fact work product rather than opinion work product.⁵⁷ Courts have consistently held that the doctrine requires much stricter protections for opinion work product than it does for fact work product, as does FRCP 26(b)(3).⁵⁸ Fact work product “may be ordered to be produced upon a showing of substantial need for the information and that the

50. *Id.*

51. For a detailed discussion of the differences between *Hickman* and the FRCP, see Blasie, *supra* note 15.

52. *Crosby v. City of New York*, 269 F.R.D. 267, 277 (S.D.N.Y. 2010).

53. *Id.* at 269 (quoting FED. R. CIV. P. 26(b)(3)(B)).

54. *See, e.g., In re Murphy*, 560 F.2d 326, 333–34 (8th Cir. 1977) (explaining that opinion work product, unlike fact work product, covers written legal theory and strategy). In *Hickman*, the Supreme Court seems to have also acknowledged this distinction, although not expressly. *See Hickman v. Taylor*, 329 U.S. 495, 509 (1947) (“We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in . . . the mind of the attorney.”).

55. *Crosby*, 269 F.R.D. at 267.

56. *Id.* at 277 n.50 (citing *Abdell v. City of New York*, No. 05 Civ. 8453 KMK JCF, 2006 WL 2664313, at *6 (S.D.N.Y. Sept. 14, 2006)).

57. *See id.* at 279 (citing *Abdell*, 2006 WL 2664313, at *6) (finding statement of facts within memorandum to be fact work product, even when summarized by the attorney).

58. *See, e.g., FED. R. CIV. P. 26(b)(3)(B); Admiral Ins. Co. v. U.S. Dist. Court for the Dist. of Ariz.*, 881 F.2d 1486, 1494 (1989).

information cannot be otherwise obtained without undue hardship.”⁵⁹ However, to obtain opinion work product, the moving party must show that “the mental impressions of counsel are at issue and the need for the material is compelling.”⁶⁰

The line between fact and opinion work product is not always bright.⁶¹ However, many courts have held that document compilations are opinion work product, as the attorney’s selection strategy and/or mental impressions are arguably at issue.⁶²

B. FRE 612: Writing Used to Refresh a Witness’s Memory

While the work product doctrine shields documents from disclosure, FRE 612 requires the production of certain documents. Generally, if an attorney uses documents to refresh a witness’s memory during trial or deposition testimony, FRE 612 requires the attorney to show those documents to opposing counsel.⁶³ The rule also requires the witness’s attorney to produce the documents that the witness reviewed *prior to* testifying if justice requires it.⁶⁴ Even before FRE 612 existed, counsel had a duty to show her opponent the documents she used to refresh a witness’s memory during the witness’s testimony.⁶⁵ FRE 612 expanded the rule by adding the possibility of obtaining the documents the witness reviewed *prior to* testifying.⁶⁶

The express purpose of FRE 612 is to “promote the search of credibility and memory.”⁶⁷ While a few courts have held that the rule does not apply to depositions, the overwhelming majority have held that

59. *Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 393 (D. Or. 2017) (citing *Admiral Ins. Co.*, 881 F.2d at 1494; FED. R. CIV. P. 26(b)(3)(B)).

60. *Id.* at 390 (citing FED. R. CIV. P. 26(b)(3)(A)(ii)).

61. *See Abdell*, 2006 WL 2664313, at *6 (citing *Johnson v. Bryco Arms*, Nos. 03 CV 2582, 02 CV 3029, 2005 WL 469612, at *5 (E.D.N.Y. Mar. 1, 2005); *SR Int’l Bus. Ins. Co. v. World Trade Ctr. Properties LLC*, No. 01 Civ. 9291, 2002 WL 1455346, at *7 (S.D.N.Y. July 3, 2002)) (explaining that lower courts have consistently treated witness statements as “factual rather than opinion work product” even when counsel summarizes the testimony).

62. *See, e.g., Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985) (finding document compilations are opinion work product because they implicate attorney thought process). For further discussion, see *infra* Section II.B.

63. FED. R. EVID. 612.

64. *Id.*

65. FED. R. EVID. 612 advisory committee’s notes.

66. FED. R. EVID. 612.

67. FED. R. EVID. 612 advisory committee’s notes.

it does.⁶⁸ In the context of depositions, courts have struggled to balance FRE 612 and the work product doctrine.⁶⁹ If a witness reviews a work product document to prepare for her deposition, the two rules seem to conflict. On one hand, FRE 612 may require disclosure so that the deposing attorney can test the witness's memory and credibility with the document. On the other hand, the work product doctrine may require non-disclosure to protect the attorney's legal strategy and preparation.

C. *FRCP 30(b)(6): Deposing a Corporation*

The final rule at play is FRCP 30(b)(6), which governs the depositions of corporations. Numerous courts have analyzed the apparent tension between FRE 612 and the work product doctrine differently when the deponent is a corporation.⁷⁰ Adopted in 1970, the rule provides special deposition duties and instructions when a corporation is the deponent.⁷¹ Before FRCP 30(b)(6) was established, deposing corporations posed two primary problems: (1) it was difficult, if not impossible, to figure out which agents or employees had relevant information, thereby making the choice of whom to depose challenging, and (2) "bandying."⁷² Bandyng occurred when multiple representatives would each claim that they lacked the requisite knowledge to answer deposition questions, then advise counsel to ask a different deponent.⁷³ The Advisory Committee defined bandying as a process by which "officers or managing agents of a corporation are deposed in turn but

68. *Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 393–94 (D. Or. 2017); *Cercone*, *supra* note 31, at 669.

69. *See, e.g., Adidas*, 324 F.R.D. at 396–99 (summarizing status of the law surrounding the discovery of document compilations).

70. *See, e.g., Adidas*, 324 F.R.D. 389 (developing a new test that presumes document compilations are discoverable in the context of 30(b)(6) depositions); *Hsingching Hsu v. Puma Biotechnology, Inc.*, No. 8:15-cv-00865-AG (SHK), 2018 WL 3078589, at *9–11 (C.D. Cal. June 20, 2018) (applying the test developed in *Adidas*, presuming document compilations are discoverable in the text of corporate deponents); *Coryn Group II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235 (D. Md. 2010) (explaining that deposing attorneys are at a disadvantage when unable to rely on document compilations to cross-examine corporations in depositions); *Nutramax Lab., Inc. v. Twin Lab. Inc.*, 183 F.R.D. 458 (D. Md. 1998) (finding the work product privilege less likely to protect document compilations used to prepare corporate deponents).

71. Craig M. Roen & Catherine O'Connor, *Don't Forget to Remember Everything: The Trouble with Rule 30(b)(6) Depositions*, 45 U. TOL. L. REV. 29, 34 (2013).

72. *Id.* at 34 & n.28 (quoting FED. R. CIV. P. 30 advisory committee's notes to 1970 amendments) ("[Rule 30(b)(6)] will curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it.").

73. *Id.*

each disclaims knowledge of the facts that are clearly known to persons in the organization and thereby to [the corporation].”⁷⁴ This finger pointing would, unfortunately, result in counsel going on a “wild goose chase” for information the corporation had all along.⁷⁵

FRCP 30(b)(6) deals with these problems by requiring the corporation to produce one or more competent witnesses to answer questions on the topics specified by the deposing party.⁷⁶ The rule imposes duties on both parties. The deposing party must list with specificity all of the topics it plans to question the corporation about, while the corporation must provide at least one designated representative to answer questions on those topics.⁷⁷ To avoid bandying, the corporate designee must have the requisite knowledge to answer the deposing attorney’s questions.⁷⁸ Additionally, whatever the designee says binds the corporation.⁷⁹ The rule explains the process, stating:

In its notice or subpoena, a [deposing] party . . . must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. . . . The persons designated must testify about information known or reasonably available to the organization.⁸⁰

By imposing a duty to ensure that the corporate designee has sufficient knowledge to answer for the corporation, the system deals with both problems: it forces the corporation to identify which of its employees or agents has the sought-after information, and it minimizes opportunities for bandying.⁸¹ The duty to provide a competent corporate representative to answer counsel’s questions is well-established.⁸²

74. FED. R. CIV. P. 30(b)(6) advisory committee’s notes to 1970 amendments.

75. Roen & O’Connor, *supra* note 71, at 34.

76. *Id.*; FED. R. CIV. P. 30(b)(6).

77. FED. R. CIV. P. 30(b)(6).

78. FED. R. CIV. P. 30 advisory committee’s notes to 1970 amendments.

79. R&B Appliance Parts, Inc. v. Amana Co., 258 F.3d 783, 786 (8th Cir. 2001); State Farm Mut. Auto. Ins. Co. v. New Horizon, Inc., 250 F.R.D. 203, 213 (E.D. Penn. 2008) (“[T]he testimony of the Rule 30(b)(6) designee is deemed to be the testimony of the corporation itself.”); *see also* Dongguk Univ. v. Yale Univ., 270 F.R.D. 70, 73 (D. Conn. 2010) (referencing the binding nature of 30(b)(6) testimony).

80. FED. R. CIV. P. 30(b)(6).

81. Roen & O’Connor, *supra* note 71, at 34.

82. *See* 8 WRIGHT, MILLER & MARCUS, *supra* note 15, § 2210.

II. DOCUMENT COMPILATIONS AS WORK PRODUCT

This Part examines how document compilations fit into the work product analysis. Document compilations are groups of documents selected by an attorney for a particular witness to review prior to their deposition.⁸³ Many courts have concluded that document compilations are opinion work product because they inherently reveal the attorney's mental impressions about the case.⁸⁴ These courts believe that, if courts force attorneys to disclose the document compilations they create, their opponents will impermissibly learn about their legal strategies. This Part reviews the body of case law that analyzes the work product doctrine as it applies to document compilations. It focuses on *Sporck v. Peil*, perhaps the most influential case on the subject. Then, it explains two of the most prominent approaches to document compilation discovery since *Sporck*: the “automatic waiver” approach and the “balancing approach.”⁸⁵

A. *Sporck v. Peil: Document Compilations as Opinion Work Product*

The Third Circuit famously addressed the issue of document compilations as opinion work product in *Sporck v. Peil*.⁸⁶ That case involved a discovery dispute in a securities fraud class action suit.⁸⁷ As lead plaintiff, Peil alleged that the president and chairman within the defendant corporation had conspired to inflate the value of their stock before selling it.⁸⁸ Discovery was massive and unwieldy; the defendant corporation responded to Peil's interrogatories and document requests with a landslide of hundreds of thousands of documents.⁸⁹

The work product issue arose when Sporck was deposed in his personal capacity, i.e., not as the corporation under 30(b)(6).⁹⁰ Prior to the deposition, Sporck's counsel created binders of relevant documents to prepare Sporck for questioning.⁹¹ Though counsel never disclosed

83. See Cercone, *supra* note 31, at 639.

84. *Id.*

85. See *Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 397 (D. Or. 2017) (referring to the “automatic waiver” approach); Cercone, *supra* note 31, at 671, 678 (referring to the “balancing approach”).

86. *Sporck v. Peil*, 759 F.2d 312, 313 (3d Cir. 1985).

87. *Id.*

88. *Id.*

89. *Id.* at 315.

90. See *id.* at 313.

91. *Id.*

how many documents the binders contained, none of the underlying documents were themselves work product or privileged.⁹² In fact, defense counsel alleged that it had already provided all of the underlying documents to plaintiffs' counsel in response to prior discovery requests.⁹³

When the deposition began, Peil's counsel led with some variation of the classic question: "Mr. Sporck, in preparation for this deposition, did you have occasion to examine any documents?"⁹⁴ When Sporck answered that he had, the deposing attorney asked him to identify which documents he had reviewed.⁹⁵ However, defense counsel instructed the witness not to answer under the theory of work product.⁹⁶

Defense counsel claimed that work product applied to the compilation of documents, even though none of the documents within the compilation were work product or otherwise privileged.⁹⁷ He argued that if opposing counsel could see which documents he selected to prepare the witness for his testimony, then they could infer his mental impressions about the case.⁹⁸ Therefore, identifying the documents he used to prepare the witness would be opinion work product and immune from discovery.⁹⁹

The trial court granted Peil's motion to compel, forcing Sporck to identify all of the documents he reviewed to prepare for his deposition.¹⁰⁰ However, rather than comply with the court's order, Sporck's counsel daringly chose to ignore the order so he would be held in contempt of court and could petition for a writ of mandamus.¹⁰¹ The Third Circuit heard the petition and held (1) that the document compilation *was* opinion work product, and (2) FRE 612 does not interfere with the work product doctrine in document compilation cases.¹⁰² Therefore, the lower court committed legal error by requiring

92. *Id.*

93. *Id.* at 314.

94. *Id.*

95. *Id.*

96. *Id.* at 315.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 314.

101. Cercone, *supra* note 31, at 675.

102. *Sporck*, 759 F.2d at 318–19.

Sporck's attorney to identify which documents his client relied on in preparation for his deposition.¹⁰³

1. *The Compilation Was Opinion Work Product Because It Compromised the Attorney's Selection Process*

The *Sporck* Court found that the compilation was opinion work product, deciding "that the selection process itself represents defense counsel's mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation."¹⁰⁴ The court justified its finding with a policy argument focused on the value of witness preparation. It opined that Sporck's counsel might have foregone preparing Sporck with documents if he knew that those documents would later be subject to disclosure.¹⁰⁵ "As a result, [Sporck] 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."¹⁰⁶ The court also emphasized the adversary role our legal system requires attorneys to play, endorsing the view that the discovery process should be a battle of wits rather than a search for the truth.¹⁰⁷ "That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interest."¹⁰⁸

2. *FRE 612 Does Not Interfere with the Work Product Doctrine When Document Compilations Are at Issue*

The *Sporck* Court also concluded that FRE 612 and the work product doctrine do not conflict when courts apply both rules properly.¹⁰⁹ The court walked through the application of FRE 612, explaining that counsel must meet three requirements before obtaining documents reviewed by a witness prior to his or her testimony.¹¹⁰ The requesting party must show that: "(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

103. *Id.* at 319.

104. *Id.* at 315.

105. *Id.* at 317.

106. *Id.*

107. *See id.*

108. *Id.* at 316–17 (quoting *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947)).

109. *Id.* at 318–19.

110. *Id.* at 317.

in the interests of justice.”¹¹¹ If a witness does not rely on the document to refresh his or her memory, then the opposing party is not entitled to it, as it could not be used to attack the witness’s credibility or memory.¹¹²

In the context of document compilations, the *Sporck* Court held that FRE 612 and work product immunity will never overlap as long as courts apply both rules properly.¹¹³ Indeed, when attorneys follow the requirements of FRE 612, the underlying documents no longer constitute opinion work product—or opposing counsel’s mental impressions.¹¹⁴ The court explained that, when an attorney lays the appropriate foundation under FRE 612, the documents are no longer work product.¹¹⁵ They are no longer work product because they relate to the deposing attorney’s line of questioning—they are not solely documents selected by opposing counsel to prepare the witness.¹¹⁶ As the court explained:

[I]f respondent’s counsel had first elicited specific testimony from petitioner, and then questioned petitioner as to which, if any, documents informed that testimony, the work product petitioner seeks to protect—counsel’s opinion of the strengths and weaknesses of the case as represented by the group of identification of documents selected by counsel—would not have been implicated. Rather, because identification of such documents would relate to specific substantive areas raised by respondent’s counsel, respondent would receive only those documents which deposing counsel, through his own work product, was incisive enough to recognize and question petitioner on. *The fear that counsel for petitioner’s work product would be revealed would thus become groundless.* Rule 612, therefore, when properly applied, does not conflict with the protection of attorney work product¹¹⁷

In the *Sporck* Court’s scenario, counsel is only entitled to the requested documents if they can ask the correct, tailored foundational questions pursuant to FRE 612.¹¹⁸ Even then, counsel will only receive the documents relevant to the foundational questions asked—not the

111. *Id.*

112. *Id.*

113. *Id.* at 318.

114. *Id.* at 319.

115. *Id.* at 318.

116. *Id.*

117. *Id.* (emphasis added).

118. *Id.*

entire compilation of documents used to prepare.¹¹⁹ The court believed allowing anything else would undermine the adversarial system.¹²⁰

Many courts have adopted *Sporck*'s reasoning or a variation of it.¹²¹ These courts have concluded that document compilations are opinion work product, and FRE 612 does not require attorneys to turn them over when asked.¹²² Instead, the deposing attorney must lay the foundation under FRE 612 for each requested document through her own questioning; she cannot gain access to the entire compilation by simply asking the classic question: "Which documents did you review in preparation for your deposition?"¹²³

3. *The Dissent: Document Compilations Are Not Work Product*

Judge Collins J. Seitz dissented in *Sporck*, arguing that the majority had gone too far in designating document compilations as work product.¹²⁴ He believed that the mere identification of documents shown to the witness prior to his deposition could not reasonably reveal any litigation strategy.¹²⁵ Indeed, he argued this theory is flawed because "it assumes that one can extrapolate backwards from the results of a selection process to determine the reason a document was selected for review by the deponent."¹²⁶ Judge Seitz worried that the work product doctrine would expand to hinder other forms of legitimate discovery, since nearly every action taken by an attorney can lead "to similar vague inferences."¹²⁷

B. *After Sporck: Different Approaches to Resolving the Apparent Conflict Between FRE 612 and the Work Product Doctrine*

While some courts have adopted *Sporck*'s approach, other courts have dealt with the apparent conflict between FRE 612 and the work product doctrine differently.¹²⁸ Two of the most common approaches courts have

119. *Id.*

120. *Id.* at 316.

121. Cercone, *supra* note 31, at 674.

122. *See id.*

123. *See id.*

124. *Sporck*, 759 F.2d at 319 (Seitz, J., dissenting).

125. *Id.*

126. *Id.*

127. *Id.*

128. Cercone, *supra* note 31, at 670.

taken are the “automatic waiver” approach and the “balancing test” approach.¹²⁹

1. *The Automatic Waiver Approach*

A few courts have held that attorneys waive the work product immunity when they show documents to a witness to prepare that witness for their testimony.¹³⁰ Since document compilations are always shown to witnesses prior to their testimony, they are always discoverable under an automatic waiver approach.¹³¹ Courts that adopt the automatic waiver theory find that the policies underpinning FRE 612—namely fostering effective cross-examination and the ability to test the witness’s credibility—outweigh the policies underlying the work product doctrine.¹³² If an attorney uses privileged documents to prepare a witness, that attorney should not be allowed to shield that witness from effective cross-examination by refusing to disclose the documents reviewed.¹³³ Otherwise, an attorney may choose to use only privileged documents to prepare a witness, giving the deposing or crossing attorney no way to effectively challenge the witness’s testimony at the deposition or on the stand.¹³⁴

2. *The Balancing Approach*

Most courts have attempted to resolve the conflict between FRE 612 and the work product doctrine by harmonizing the two rules.¹³⁵ These courts heavily consider the policy justifications underpinning each rule to decide when one rule trumps the other.¹³⁶

*Nutramax Laboratories, Inc. v. Twin Laboratories*¹³⁷ offered a particularly influential balancing test that subsequent courts have looked

129. *See id.* at 671, 677.

130. *Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 397 (D. Or. 2017).

131. *Id.*

132. *Id.*

133. *Id.* at 398 (citing *Nutramax Labs., Inc. v. Twin Labs. Inc.*, 183 F.R.D. 458, 473 (D. Md. 1998)).

134. *Id.*

135. *Id.*; *Cercone*, *supra* note 31, at 67.

136. *See, e.g., Adidas*, 324 F.R.D. at 399 (“After reviewing numerous cases and several leading treatises involving FRE 612 and attorney-client privileged or work-product protected documents, and considering the purposes and requirements of depositions of a corporate representative designated under FRCP 30(b)(6), the Court finds that the application of FRE 612 should be different in the context of a deposition of a percipient witness.”).

137. 183 F.R.D. 458 (1998).

to for guidance.¹³⁸ Unlike the *Sporck* Court, which believed that FRE 612 and the work product doctrine did not conflict, the *Nutramax* Court believed there was a “clear conflict” between the rules.¹³⁹ Nevertheless, the test it offered is surprisingly similar to the *Sporck* test.¹⁴⁰ Like the *Sporck* Court, it held that (1) document compilations were protected work product, and (2) that each prong of FRE 612 must be met for that work product to be revealed.¹⁴¹ However, where *Nutramax* differed from *Sporck* was in its analysis of FRE 612’s third prong—whether “justice” requires disclosure.¹⁴² To answer this question, the court implemented a balancing test, focusing on the policies underlying each rule.¹⁴³

According to the *Nutramax* Court, the following factors are examples of the types of concerns courts should analyze in their balancing approach. First, courts should note the deponent’s status.¹⁴⁴ They should ask whether the witness is an expert or corporate designee under FRCP 30(b)(6), as “[t]here is a greater need to know what materials were reviewed by expert and designee witnesses in preparation for deposition since the substance of their testimony may be based on sources beyond personal knowledge.”¹⁴⁵ Second, courts should consider the time between the relevant events and the deposition, as it is more likely that the documents influenced the witness’s testimony if the events took place long ago.¹⁴⁶ Third, courts should ask if the documents within the compilation contain the explicit legal opinions or mental impressions of opposing counsel.¹⁴⁷ If they do, then requiring their

138. See, e.g., *Coryn Group II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 240–43 (D. Md. 2010) (analyzing the *Nutramax* Court’s balancing test); *N. Nat. Gas Co. v. Approx. 9177.53 Acres*, 289 F.R.D. 644, 649 (D. Kan. 2013) (using *Nutramax* to conclude that document compilations are not always shielded by the work product doctrine).

139. *Nutramax*, 183 F.R.D. at 461.

140. *Id.* at 468.

141. The *Sporck* Court believed that, if the prongs of FRE 612 were met, then the requested documents were no longer work product. *Sporck v. Peil*, 759 F.2d 312, 318 (3d Cir. 1985). Unlike *Sporck*, the *Nutramax* Court found that the document compilation was work product regardless of whether the prongs of FRE 612 were satisfied. See *Nutramax*, 183 F.R.D. at 468–69. However, it held that the work product privilege was waived when FRE 612 was met. *Id.* at 467. Therefore, if the use of a document compilation meets FRE 612’s prongs, then the work product immunity is waived under the *Nutramax* Court’s balancing test. *Id.*

142. *Nutramax*, 183 F.R.D. at 468–69.

143. *Id.* at 473.

144. *Id.* at 469.

145. *Id.*

146. *Id.*

147. *Id.* at 470.

disclosure may undermine the adversarial system in an unacceptable way.¹⁴⁸ Finally, courts should consider whether the documents in the compilation have already been discovered.¹⁴⁹ An attorney may argue that he need not disclose the documents a second time if opposing counsel already has access to them through some other means of discovery.

However, the forcefulness of this argument may diminish if the documents previously produced are so voluminous or technical that the party receiving them cannot readily be expected to grasp their significance. Finding the critical documents in a population of thousands may be like looking for a needle in a haystack, even with the aid of modern technology.¹⁵⁰

These are just a few of the factors that the *Nutramax* Court suggested balancing, all of which implicate policies behind the competing rules.¹⁵¹ *Nutramax* has inspired many courts in their application of balancing tests.¹⁵² Those courts have agreed that if the first two prongs of FRE 612 are met, then a balancing test is appropriate to determine “whether production is necessary for fair cross-examination” or whether the examining party is simply engaged in a “fishing expedition” that FRE 612 would otherwise prohibit.¹⁵³

III. PUTTING IT ALL TOGETHER: CORPORATE DESIGNEES, DOCUMENT COMPILATIONS, AND WORK PRODUCT

As explained in Part I, under FRCP 30(b)(6), corporations have a special duty to provide a deponent who is competent to testify about the designated topics.¹⁵⁴ Corporate deponents rarely, if ever, know all of the information necessary to meet this duty.¹⁵⁵ Oftentimes, they will be responsible for knowing about events that happened before they began working for the corporation or about complicated issues in which they only played a minor role.¹⁵⁶ Sometimes, corporate deponents are “empty vessel[s],” and know little to nothing about the topics selected by

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. Cercone, *supra* note 31, at 680 (collecting cases).

153. *In re Rivastigmine Patent Litig.*, 486 F. Supp. 2d 241, 243 (S.D.N.Y. 2007) (quoting *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 615 (S.D.N.Y. 1977)).

154. Roen & O'Connor, *supra* note 71, at 30.

155. *Id.* at 29.

156. *Id.* at 31.

deposing counsel.¹⁵⁷ To avoid bandying, corporations are responsible for educating their deponents so they are prepared to answer honestly *as* the corporation.¹⁵⁸ Usually, this is a daunting task, and corporate designees must review documents to fulfill their duties under FRCP 30(b)(6).¹⁵⁹ Corporate designees will have an even bigger task ahead of them if they are “empty vessels.”¹⁶⁰ In that case, the designee must start from scratch and rely exclusively on the documents gathered by the corporation and its attorney.¹⁶¹

Courts that have adopted balancing tests acknowledge the importance of distinguishing between witnesses who testify from their own personal knowledge and those who do not.¹⁶² In fact, witness status (whether the witness is a lay witness, expert, or corporate designee) was the first factor considered by the *Nutramax* Court in its balancing test.¹⁶³ Ruling on the same issue, the District Court of Maryland explained that disclosure of document compilations is usually appropriate when the witness is a corporate designee¹⁶⁴ because the witness must rely on those documents to fulfill his duties under FRCP 30(b)(6).¹⁶⁵ In its decision, the court worried about corporate counsel improperly coaching 30(b)(6) designees and hiding important documents:

[P]articularly in the context of a Rule 30(b)(6) designee, “[i]t is all too easy for a witness to testify that his recollection is vague . . . [and] rigorous cross examination is needed to test such self-serving statements by focused, analytical questioning . . . to test the witness’s assertions.” Where a 30(b)(6) deponent has no personal (or independent) knowledge of a topic, factual documents prepared for him to allow him to discharge his obligations under Rule 30(b)(6) must necessarily

157. *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 243 (D. Md. 2010); Roen & O’Connor, *supra* note 71, at 37 (“Courts often seem oblivious to the obvious problem that Rule 30(b)(6) designated witnesses often lack personal knowledge of the subject matter, and consequently, may have difficulty providing complete responses on behalf of the organization.”).

158. FED. R. CIV. P. 30(b)(6) advisory committee’s notes to 1970 amendments.

159. Roen & O’Connor, *supra* note 71, at 31.

160. *Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 399–400 (D. Or. 2017) (“[I]t is the corporation that has the ‘prior knowledge of the facts contained in the documents’ and thus it is the corporation’s knowledge that is being ‘refreshed’ under FRE 612.” (quoting *Coryn Grp. II*, 265 F.R.D. at 242)).

161. *Id.*; Roen & O’Connor, *supra* note 71, at 31–32.

162. *See, e.g.*, *Nutramax Labs., Inc. v. Twin Labs. Inc.*, 183 F.R.D. 458, 469–70 (D. Md. 1998).

163. *Id.*

164. *Coryn Grp. II*, 265 F.R.D. at 242 (quoting *Nutramax*, 183 F.R.D. at 469).

165. *Id.*

be produced. How would it serve the pursuit of truth to shield such information, where the very same information would be available through other discovery devices? Denial of access would only cloud, rather than clarify, corporate knowledge.¹⁶⁶

While many courts with balancing tests acknowledge that witness status is significant, it is just one factor they weigh when deciding whether a document compilation is discoverable. The fact that a witness is a 30(b)(6) designee is not dispositive of whether the document compilation reviewed by that witness is discoverable.¹⁶⁷

A. *Coming up with a New Test: Adidas America, Inc. v. TRB Acquisitions LLC*

Though the Ninth Circuit has not weighed in on the issue of document compilations as work product, the District of Oregon recently announced a new test that addresses this issue in the context of 30(b)(6) depositions specifically.¹⁶⁸ In *Adidas America, Inc. v. TRB Acquisitions LLC*, the defendant deposed two Adidas witnesses under FRCP 30(b)(6).¹⁶⁹ Adidas attorneys used document compilations to prepare these witnesses so that they would be sufficiently educated to answer questions about the topics designated by the defendant.¹⁷⁰

Similar to courts that have adopted balancing tests, the *Adidas* Court recognized that 30(b)(6) depositions are special.¹⁷¹ Documents rather than personal experience are often the true source of the deponent's knowledge.¹⁷² Additionally, FRCP 30(b)(6) imposes special duties upon the corporation to educate its designee.¹⁷³ However, the court was conflicted, unsure if it should adopt a balancing approach or a complete waiver approach.¹⁷⁴ Instead of adopting either full-stop, the court claimed it split the baby in half by adopting a new, "middle ground approach" somewhere between the two.¹⁷⁵ The *Adidas* Court held: (1) the *Sporck* test—which consists of FRE 612's three prongs—is the

166. *Id.* at 245 (citations omitted) (quoting *Nutramax*, 183 F.R.D. at 473).

167. *See Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 399 (D. Or. 2017).

168. *Id.*

169. *Id.* at 392.

170. *Id.*

171. *Id.* at 399.

172. Roen & O'Connor, *supra* note 71, at 29.

173. *Id.*; FED. R. CIV. P. 30(b)(6).

174. *Adidas*, 324 F.R.D. at 399.

175. *Id.*

appropriate test to determine if document compilations are admissible over a work product objection¹⁷⁶ and (2) in the context of 30(b)(6) depositions, the court will presume that the first two prongs of the *Sporck* test are met, and the burden will shift to the non-moving party to show that one of the prongs is lacking.¹⁷⁷

1. *The First Prong—Whether the Documents Refreshed the Designee’s Recollection*

The *Adidas* Court explained that in the context of 30(b)(6) depositions, courts should broadly construe what it means to “refresh” the witness’s memory.¹⁷⁸ For instance, a corporation should be said to refresh its memory when it educates its corporate designee to testify on its behalf.¹⁷⁹ In other words, courts should not distinguish between educating corporate designees and “refreshing” the corporation’s memory.¹⁸⁰

The court then declared that this prong is presumably met when a corporation, or its attorney, chooses to prepare the designee with selected documents.¹⁸¹ However, even under the new *Adidas* test, a party can overcome this presumption by showing that the designee had firsthand, independent knowledge of all the noticed topics, and did not need to review documents to recall any information.¹⁸² Because this is rarely the case, in the interest of fairness and efficiency, the *Adidas* Court presumed that the document compilation was “intended to and did refresh the recollection of and influence the testimony of the witnesses.”¹⁸³

2. *The Second Prong—Whether the Documents Were Used for Testifying*

Just like the first prong, the *Adidas* Court decided a rebuttable presumption is appropriate for the second prong in the context of 30(b)(6) depositions as well.¹⁸⁴ Generally, to determine whether the

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 402.

183. *Id.*

184. *Id.* at 400.

second prong is met, courts must complete an arduous, in camera review of the contested documents to determine whether they actually influenced the witness's testimony.¹⁸⁵ If they did influence the witness, then they were used for the purpose of testifying.¹⁸⁶ The *Adidas* Court considered the inefficiency of the in camera review process and weighed it against fairness concerns.¹⁸⁷

The court found that a rebuttable presumption in this context is both appropriate and fair because the documents at issue are responsive to the noticed topics.¹⁸⁸ They are provided precisely to educate the 30(b)(6) designee.¹⁸⁹ Indeed, in this context, the document compilation's purpose is to ensure that the designee has all the information necessary to fulfill their duties under FRCP 30(b)(6).¹⁹⁰ Therefore, by showing selected documents to the designee in response to the noticed topics, corporate counsel's purpose is necessarily to shape testimony.¹⁹¹

3. *The Third Prong—Whether Justice Requires Disclosure*

Like many courts before it, the *Adidas* Court adopted a balancing test, weighing the policy interests of FRE 612 and the work product doctrine.¹⁹² While the court did not explicitly apply a rebuttable presumption to the third prong as it did for the first two, it noted that in the context of 30(b)(6) depositions, “there is a heightened need for robust disclosure in this context.”¹⁹³

In its consideration of *Sporck*'s final prong, the court was concerned about documents within the compilation that contained privileged information or work product.¹⁹⁴ It worried that deposing counsel would notice topics covering privileged information for the sole purpose of discovering privileged information.¹⁹⁵ The court dispensed of this concern quite quickly, stating corporations could get protective orders to avoid disclosing documents containing privileged information or work

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 399.

193. *Id.* at 401.

194. *Id.*

195. *Id.*

product.¹⁹⁶ By requiring the corporation to sift through the documents and move for protective orders when necessary, the court shifted the burden to the corporate designee again, reasoning “FRE 612 does not need to be weakened . . . to provide the necessary protections for [privileged information] under the narrow circumstances” where the opposing party notices improper topics solely to obtain privileged information.¹⁹⁷

In sum, the *Adidas* Court concluded that a different test was appropriate for 30(b)(6) witnesses than for witnesses testifying in their personal capacities.¹⁹⁸ The court reached this conclusion for the same policy reasons elucidated by the *Nutramax* Court: litigants have a “heightened need to discover” documents that counsel selects to prepare a 30(b)(6) witness because those witnesses do not testify solely from their own, independent knowledge.¹⁹⁹ Concealing which documents the deponent used to prepare for a 30(b)(6) deposition would not clarify corporate knowledge—the main purpose of FRCP 30(b)(6).²⁰⁰ Instead, it would only cast confusion over the corporation’s knowledge.²⁰¹ Similarly, it would put the deposing attorney at an unacceptable disadvantage, as she would not be able to point to inconsistencies between privileged documents and the witness’s testimony; she would not be able to develop an effective cross-examination or impeach.²⁰² The *Adidas* Court worried:

A corporate designee could testify only as to information and communications that are advantageous. Other information that would contradict the testimony or undermine the corporation’s position and was contained in the documents could be ignored, and the opposing party would have no way of knowing how to test or challenge the corporate designee’s testimony.²⁰³

The *Adidas* Court also worried that corporations would require their attorneys to prepare their corporate designees, rather than undergo the

196. *Id.*

197. *Id.*

198. *Id.* at 399.

199. *Id.* at 397–98 (citing numerous cases including *Nutramax Labs., Inc. v. Twin Labs, Inc.*, 183 F.R.D. 458, 472 (D. Md. 1988); *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 242 (D. Md. 2010); and *Seven Seas Cruises S. DE R.L. v. V. Ships Leisure Sam*, No. 09–23411–CIV, 2010 WL 5187680, at *3 (S.D. Fla. Dec. 10, 2010)).

200. *Id.* at 397.

201. *Id.*

202. *Id.* at 398 (citing *Barrer v. Women’s Nat’l Bank*, 96 F.R.D. 202, 205 (D.D.C. 1982)).

203. *Id.* (citing *Barrer*, 96 F.R.D. at 205).

task themselves, for the sole purpose of claiming work product immunity.²⁰⁴ The court emphasized the corporation has the responsibility to gather documents relevant to the noticed topics and to educate its 30(b)(6) witness—that particular obligation does not rest on the attorney.²⁰⁵ The court explained that a corporation cannot shield itself from its discovery duties under the FRCP by collecting the required documents, showing those documents to its attorney, then claiming work product immunity.²⁰⁶ The *Adidas* Court addressed this concern, concluding that a corporation should not be allowed to “shield itself from the duties required under the rules of discovery” by asking its attorneys to prepare document compilations, then refusing to produce those compilations under a work product theory.²⁰⁷

IV. *ADIDAS*: THE RIGHT DIRECTION, THE WRONG REASONING

A. *The Adidas Court Should Have Analyzed the Fundamental Question: “Does Work Product Immunity Cover 30(b)(6) Document Compilations?”*

The *Adidas* Court considered the document compilation issue in the specific context of 30(b)(6) deponents, acknowledging that corporate designees should be treated differently.²⁰⁸ Like many courts before it, the *Adidas* Court was unsure how to effectively apply both the work product doctrine and FRE 612.²⁰⁹ However, in the court’s attempt to apply both rules, it took something for granted; it quickly held that *all* document compilations are opinion work product.²¹⁰ It never stopped to consider whether the work product doctrine applies to 30(b)(6) document compilations.²¹¹

204. *Id.* at 397–98 (quoting *Seven Seas Cruises*, 2010 WL 5187680, at *3 (“[I]n the 30(b)(6) context, a corporation cannot shield itself from the duties required under the rules of discovery merely by allowing its counsel to review all of the documents that its corporate representative uses to obtain a basis of knowledge in preparation of the 30(b)(6) deposition or to refresh his recollection, and then claim that those documents are protected from disclosure under the work product doctrine. Rather, it is the responsibility of the corporation and the 30(b)(6) corporate representative to gather the information relevant to the areas of inquiry for the deposition.”)).

205. *Id.*

206. *See id.*

207. *Id.* (quoting *Seven Seas Cruises*, 2010 WL 5187680, at *3).

208. *Id.* at 399.

209. *See id.* at 397–99.

210. *See id.* at 396 (framing the primary issue as whether the work product immunity trumps FRE 612, rather than asking whether the work product doctrine applies to 30(b)(6) depositions).

211. *Id.*

Had the *Adidas* Court begun with this fundamental question, it could have avoided pitting the work product doctrine and FRE 612 against each other. Such an approach would have been consistent with *Sporck*—one of the most influential cases on this issue. Indeed, the *Adidas* Court should have used *Sporck*'s approach to focus on the work product doctrine's applicability rather than balancing the policies of FRE 612 and the work product doctrine.

As explained Section II.A.2, the *Sporck* Court held that FRE 612 and the work product doctrine never overlap in the context of document compilations when both rules are properly applied.²¹² The *Sporck* court did *not* hold that FRE 612 trumps work product in some instances and vice versa.²¹³ Rather, it concluded that the rules did not conflict because it understood that a document, while perhaps work product at first, can change status depending on the surrounding circumstances.²¹⁴ In other words, materials—like a document compilation—may not be work product at all depending on the surrounding circumstances. In that case, the compilation moves outside the work product protection and into the realm of discoverable evidence.²¹⁵

The *Sporck* Court explained how a document might move outside the work product protection and become discoverable.²¹⁶ Specifically, it held that when an attorney asks the appropriate foundational questions under FRE 612, then the relevant documents are no longer work product.²¹⁷ They are no longer work product because the requesting attorney has asked the appropriate questions, and the documents relate to those questions—not the defending attorney's mental processes. “[B]ecause identification of such documents would relate to specific substantive areas raised by respondent's counsel, respondent would receive only those documents which deposing counsel, through his own work product, was incisive enough to recognize and question petitioner on.”²¹⁸ Therefore, under *Sporck*, selected documents used to prepare a witness for a deposition are not always work product; and whether they are work product will depend on the circumstances.²¹⁹

212. See *Sporck v. Peil*, 759 F.2d 312, 318 (3d Cir. 1985).

213. *Id.*

214. See *id.* at 318–19.

215. See *id.*

216. *Id.*

217. *Id.*

218. *Id.* at 318.

219. *Id.*

B. *The Adidas Court Could Have Used Nearly Identical Reasoning to Conclude 30(b)(6) Document Compilations Are Not Work Product*

The *Adidas* Court focused its reasoning on deciding which rule trumped: FRE 612 or work product.²²⁰ However, the court analyzed the case under the wrong lens. Rather than jump to a balancing test, the court should have applied the facts of the case to a work product analysis. Though the *Adidas* Court did not engage in this analysis, the court's underlying reasoning strongly supports the conclusion that 30(b)(6) document compilations are not work product. Indeed, one can use the *Adidas* Court's reasoning to conclude that 30(b)(6) document compilations are not work product at all. This Section will do just that—apply the *Adidas* Court's reasoning to a work product analysis and conclude that the work product doctrine does not cover 30(b)(6) document compilations.

1. *The Requesting Party Cannot “Extrapolate Backwards” from a 30(b)(6) Document Compilation to Guess Their Opponent’s Case Theory*

The *Adidas* Court accepted the notion that attorneys can infer opposing counsel's mental impressions by reviewing document compilations,²²¹ but it did not need to reach that conclusion. Whether an attorney can glean opposing counsel's case strategy via document compilations is debatable.²²² Judge Seitz, the dissenter in *Sporck*, explained this issue clearly by stating, “The problem with [this] theory is that it assumes that one can extrapolate backwards from the results of a selection process to determine the reason a document was selected for review by the deponent.”²²³ In a 30(b)(6) deposition, the idea that deposing counsel can “extrapolate backwards” from the selection process is even more unrealistic.

The *Adidas* Court expressly acknowledged many of the reasons counsel cannot “extrapolate backwards” when it comes to corporate designees. First, the court explains that the counsel requesting documents cannot have access to every document relied upon by opposing counsel.²²⁴ Rather, deposing counsel only has access to the

220. *Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 396 (D. Or. 2017).

221. *Id.*

222. *Sporck*, 759 F.2d at 319 (Seitz, J., dissenting).

223. *Id.*

224. *Adidas*, 324 F.R.D. at 400.

documents shown to the witness. Deposing counsel cannot conduct a “fishing expedition” or “wholesale” exploration of opposing counsel’s files.²²⁵

Second, the *Adidas* Court explains that corporate designees prepare their testimony in response to deposing counsel’s noticed topics.²²⁶ Therefore, the documents they review necessarily relate to deposing counsel’s theories and requests—not corporate counsel’s theory of the case. The *Adidas* Court expressly acknowledged this point, explaining that deposing counsel must use “*painstaking specificity*” to designate “the particular subject areas that are intended to be questioned.”²²⁷ Indeed, in 30(b)(6) depositions, an attorney is likely to review documents with her witness because the attorney believes *opposing counsel* will focus on them—not because they are particularly relevant to her case theory.²²⁸

Third, as the *Adidas* Court noted, corporate designees must often review a plethora of documents just to become familiar with basic information on the noticed topics; one person rarely has all the knowledge required to testify as a corporate designee independently.²²⁹ If counsel does not know which documents the witness reviewed to gain basic background knowledge, then it is even less likely that they will be able to “extrapolate backwards” and determine an underlying legal theory from the document compilation.

Fourth, the *Adidas* Court acknowledged that 30(b)(6) depositions function similarly to other discovery tools under the FRCP.²³⁰ The court could have easily expounded on this argument to conclude that the document selection process is not opinion work product. If we assume that revealing document compilations exposes an attorney’s litigation strategy, then we must be ready to accept that nearly every discovery tool in the FRCP forces attorneys to reveal their litigation strategies.²³¹ In fact, many pretrial requirements force attorneys to reveal their strategies to some extent, often more directly than revealing document compilations.²³² Judge Seitz and other commentators have explained this

225. *Id.* at 397 (quoting *Sporck*, 759 F.2d at 317–18).

226. *Id.* at 395.

227. *Id.* (quoting *Sprint Commc’ns Co. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006)) (emphasis added).

228. *See id.*

229. *See id.* at 400.

230. *Id.* at 394 (quoting FED. R. CIV. P. 30 advisory committee’s notes to 1970 amendments).

231. *Id.*

232. Cercone, *supra* note 31, at 689.

problem.²³³ Professor Charles P. Cercone explains this issue in depth: “[I]nterrogatories under FRCP 33(b), requests for admission under FRCP 36, pretrial disclosure, disclosures of documents under FRCP 26(a)(1)(B), and pretrial memoranda under FRCP 16 all require litigants to disclose their evaluations and strategies of the case in a way that is much more direct than document compilation.”²³⁴

In sum, the *Adidas* Court inadvertently explained why 30(b)(6) document compilations are not opinion work product throughout its decision—it is nearly impossible to “extrapolate backwards” and infer opposing counsel’s mental impressions. The Court should have reached this conclusion rather than engage in a balancing test.

2. *Requiring Production Will Not Lead to Inadequate Preparation by Either Party*

Encouraging attorneys to prepare their cases adequately is a primary policy justification underpinning the work product doctrine.²³⁵ Indeed, the *Hickman* Court focused on this concern when it first announced the doctrine.²³⁶ Courts fear that attorneys will not prepare their cases adequately if their work product is discoverable.²³⁷ They worry attorneys will stop writing things down—they will not prepare work product at all—to prevent their opponents from learning their legal strategies.²³⁸ Corporations have an additional burden under FRCP 30(b)(6) to prepare their corporate designees, and courts and commentators have expressed concern that corporations may violate FRCP 30(b)(6) for fear of waiving work product immunity.²³⁹

Though the *Adidas* Court does not expressly address this concern, it consistently refers to the parties’ duties under FRCP 30(b)(6): “[W]itnesses designated under FRCP 30(b)(6) are unique based on the specific obligations and responsibilities placed on both the noticing party and responding party”²⁴⁰ While some attorneys may refuse to prepare corporate designees, doing so would violate FRCP 30(b)(6) and

233. *Id.*

234. *Id.*

235. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

236. *Id.*

237. *See Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985); *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 26 F.R.D. 235, 241 (D. Md. 2010).

238. *Hickman*, 329 U.S. at 511.

239. *Id.*

240. *Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 403 (D. Or. 2017).

the ethical responsibilities attorneys have to represent their clients adequately.²⁴¹ The concern that some attorneys will violate rules should not shape the rules or the work product doctrine. Furthermore, as Professor Cercone has explained, it is quite unlikely that attorneys will forego preparing witnesses to avoid disclosing which documents they used to prepare those witnesses.²⁴² “[S]ophisticated clients in corporations would not be impressed with a lawyer who did not review documents prior to a deposition with a witness, particularly after they have spent thousands of dollars assembling the documents in response to the deposing party’s discovery request.”²⁴³

Preventing “freeloading” is another policy consideration underpinning the work product doctrine.²⁴⁴ Freeloading occurs when the deposing attorney relies on his opponent’s work, rather than use his or her own mental prowess to gain information.²⁴⁵ In *Hickman*, the court’s freeloading concern was logical because the documents at issue were legal memoranda containing counsel’s mental impressions and interviews with witnesses.²⁴⁶ Obtaining such direct and revealing opinion work product from an adversary would make it much easier for attorneys to build their cases; if requesting attorneys had outlines of their opponent’s strategies, they would not need to do nearly as much work to research and craft their own arguments.²⁴⁷

The *Adidas* Court indirectly addresses why the freeloading concern makes little sense in the context of 30(b)(6) depositions.²⁴⁸ As the court explains, deposing counsel do not want to know which documents deponents review in order to glean their opponents’ legal strategies.²⁴⁹ Rather, they want these documents to cross-examine the deponents—to test credibility and memory.²⁵⁰ They want these documents to ensure that corporations actually prepare their witnesses to comply with their 30(b)(6) duties.²⁵¹ They want these documents to learn whether

241. Cercone, *supra* note 31, at 689–90.

242. *Id.*

243. *Id.* at 688.

244. *Id.* at 689.

245. *Id.*

246. *Hickman v. Taylor*, 329 U.S. 495, 512 (1947).

247. *Id.* at 510–11.

248. *See Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 397–98 (D. Or. 2017).

249. *Id.*

250. *Id.*

251. *Id.*

corporate counsel inappropriately coached their witnesses by refusing to show those witnesses damning documents.²⁵²

Numerous courts and commentators, including the *Adidas* Court, have recognized that corporations have misused the work product doctrine in the context of 30(b)(6) depositions to shield their witnesses from effective cross-examination.²⁵³ Indeed, by refusing to reveal which documents the corporate designee reviewed, the corporation puts the crossing attorney at an “unfair disadvantage.”²⁵⁴ By acknowledging that document compilations are desired for cross-examination purposes,²⁵⁵ these courts incidentally put the “freeloading” concern to rest.

C. Courts Should Use the Underlying Reasoning in Adidas to Conclude that 30(b)(6) Document Compilations Are Not Opinion Work Product

This Comment’s proposed solution is simple. Rather than jump to balancing tests to decide if a given document compilation is discoverable, courts must first analyze the circumstances under which the compilation was prepared and ask the fundamental question: “Is this compilation work product?” They should first ask whether a person could reasonably look at the documents within the compilation and infer the legal strategy of the attorney who created it. If not, then the compilation is not opinion work product, and no balancing test is necessary to weigh the competing interests of FRE 612 and the work product doctrine. Additionally, when deciding if a document compilation constitutes opinion work product, courts must remember the policies underpinning the work product doctrine. For instance, if the deposing attorney wants the compilation to impeach the witness rather than to “freeload,” then the compilation begins to look less like work product. Essentially, courts should not start with balancing tests that ask the question: “Which rule trumps, FRE 612 or work product?” Rather, courts must ask: “Are the policies underlying the work product doctrine implicated such that this document compilation should be considered work product?”

Using this approach, courts should conclude that 30(b)(6) document compilations are never work product. The context surrounding 30(b)(6)

252. *Id.*

253. *See id.*

254. *Id.* at 398 (quoting JOHN W. GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 5:29 (3d ed. 2017)).

255. *Id.*

document compilations makes them discoverable. As the *Adidas* Court acknowledged, in the specific context of 30(b)(6) depositions, it is unlikely that a deposing attorney can extrapolate backwards from the document compilation to learn her opponent's strategies.²⁵⁶ Additionally, the *Adidas* Court implicitly acknowledged that none of the concerns underpinning the work product doctrine are at issue in the context of 30(b)(6) document compilations²⁵⁷; neither party will be less likely to prepare their cases if the compilations are discoverable.

Even if courts find that 30(b)(6) document compilations implicate the mental impressions of the attorneys who create them, courts should still conclude that they are not work product. Courts can reach this conclusion by embracing the nuanced reasoning in *Sporck*. Namely, courts should accept the notion that a document within a compilation can begin as work product and become non-work product based on the circumstances.²⁵⁸ In *Sporck*, the documents moved outside the work product protection because the deposing attorney asked the appropriate foundational questions.²⁵⁹ The documents were therefore no longer a product of the defending attorney's mind.²⁶⁰ Instead, the documents were the fruits of the questioning attorney's work.²⁶¹ Similarly, 30(b)(6) document compilations are a product of the deposing attorney's work. Defending attorneys prepare document compilations in *response* to the particularized requests of deposing counsel under FRCP 30(b)(6). In other words, both parties put in work to comply with their duties under FRCP 30(b)(6). If courts continue to find that 30(b)(6) document compilations are work product, they must also be ready to accept that other traditional and important discovery methods are shielded by work product. For instance, the FRCP facilitate requests for admission, pretrial memoranda, and interrogatory responses, all of which compromise counsels' mental impressions more directly than 30(b)(6) document compilations do.

CONCLUSION

Many courts have held that 30(b)(6) document compilations are work product and developed elaborate tests to get around work product

256. *See id.*

257. *Id.* at 397–98.

258. *Sporck v. Peil*, 759 F.2d 312, 318–19 (3d Cir. 1985).

259. *Id.*

260. *Id.*

261. *Id.*

immunity. However, those attempts to overcome the work product immunity are superfluous because document compilations are not work product in the context of 30(b)(6) depositions. When it comes to 30(b)(6) depositions, the risk that an attorney's mental impressions will be implicated is low. Furthermore, the reasons attorneys request disclosure have nothing to do with unfairly uncovering their opponents' legal strategies. Designating 30(b)(6) document compilations as work product ignores the realities of litigation. Attorneys do not wish to know what documents a corporate designee relied on to glean insight into opposing counsel's legal strategies. Rather, they seek these documents to hold the corporation and the witness accountable—to avoid “bandying” and the spread of misinformation that FRCP 30(b)(6) was designed to curtail. Refusing to disclose 30(b)(6) document compilations only serves to cloud corporate knowledge and prevent the legitimate investigation of corporations.