Does the Work Product Doctrine Protect the Identity of Documents a Witness Reviews Before Testifying?

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In his May 29, 2013 “Privilege Points” release, Tom Spahn discusses the “Sporck Doctrine” of work product protection for the identity of documents.

Under what is commonly called the Sporck doctrine, the opinion work product doctrine can sometimes protect the identity of certain documents that do not themselves deserve intrinsic privilege or work product protection, as long as the adversary also has the documents and the identity could reflect a lawyer's opinion. Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985).

Courts disagree about the Sporck doctrine's application to documents a witness reviews before testifying at a deposition. Some courts find that those documents' identity deserves work product protection, while other courts reject that concept. In In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation, No. 3:12-md-02385-DRH-SCW, 2013 U.S. Dist. LEXIS 59164 (S.D. Ill. Apr. 25, 2013) (not for publication), the court tried to thread the needle. The court held that deposition witnesses had to disclose which documents they reviewed before testifying, but did not have to disclose which documents their lawyers had selected.

Lawyers trying to maximize opinion work product protection should see if the pertinent court applies the Sporck doctrine in this setting.