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## Review of Privileged Documents in Trial and Deposition Preparation of Witnesses in New York: When, if Ever, Will the Privilege be Lost?

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## **Review of Privileged Documents in Trial and Deposition Preparation of Witnesses in New York: When, if Ever, Will the Privilege be Lost?**

**By Michael J. Hutter<sup>1</sup>**

### **I. Introduction**

Trial and deposition witnesses may forget or fail to mention a relevant fact during the course of their examination at a trial or deposition.<sup>2</sup> Such forgetfulness is inevitable,<sup>3</sup> and not an unusual occurrence due to the lapse of time since the fact was perceived, the complexity of the subject matter involved, or even the nervousness of the witness during the examination itself.<sup>4</sup> The best of witnesses, like the rest of us, can forget things that occurred in the past.

When the witness suffers such a memory loss while testifying, it is standard trial practice of the examining attorney, as permitted under the common law of evidence in all state and federal jurisdictions, to attempt to refresh the witness's recollection in order to have the witness testify to the forgotten relevant fact. Refreshing recollection is "a last-ditch means to secure information known to the witness but apparently lost to

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1. Professor of Law, Albany Law School.

2. John M. Maguire & Charles W. Quick, *Testimony: Memory and Memoranda*, 3 HOW. L.J. 1, 1 (1957) ("Impermanence and erratic flightiness of human memory are great perils of litigation.").

3. Brittany R. Cohen, "Whose Line is it Anyway?": *Reducing Witness Coaching by Prosecutors*, 18 N.Y.U.J. LEGIS. & PUB. POL'Y 985, 986 (2015) ("In an ideal world, human memory would be infallible and . . . human beings would have the ability to remember and relay events exactly how they occurred. Unfortunately, this is not the case. Human memory is inherently flawed . . .").

4. See generally 1 KENNETH S. BROUN ET. AL., MCCORMICK ON EVIDENCE § 9, at 48-49 (7th ed. 2013); ROGER C. PARK ET. AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS § 1.08, at 22 (3d ed. 2010); Joseph J. Kalo, *Refreshing Recollection: Problems with Laying a Foundation*, 10 RUTGERS-CAMDEN L.J. 233, 233 (1979); Stephen A. Saltzburg, *Refreshing Recollection: Witnesses with Memory Problems*, 25 CRIM. JUST., 43, 43 (2010) ("It is not unusual in cases for witnesses, especially those who have little experience testifying and are nervous, to forget things.").

conscious memory, hence lying beyond reach of ordinary direct.”<sup>5</sup> A writing of some variety is usually employed in this process.<sup>6</sup> When the effort is successful, the witness can testify from his or her now revived memory. However, the witness’s testimony may be perceived as less than credible because of the process preceding it.

How then is the refreshing recollection scenario avoided or at least minimized? The witness will, and must, be “prepped” before testifying. Witness preparation refers to the process where an attorney discusses with a witness the witness’s prospective testimony at a forthcoming trial or deposition.<sup>7</sup> It has been noted that “American litigators regularly use witness preparation, and virtually all would, upon reflection, consider it a fundamental duty of representation and a basic element of effective advocacy.”<sup>8</sup> During the discussion the attorney will, among other things, review with the witness the witness’s personal knowledge and recollection of the facts relevant to the action. The witness may review at the session, or even in advance of the session at the request of the attorney or his or her own initiative, various writings to refresh the witness’s recollection when the witness is unable to relate the totality of relevant facts within the witness’s personal knowledge or when the relevant facts as related by the witness conflict or are

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5. 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 6:93, at 585-86 (4th ed. 2013).

6. 3 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, *JONES ON EVIDENCE: CIVIL & CRIMINAL* § 32:3 (7th ed. 2016). When used in this article, the term “writing” is to be read as including documents, records, memoranda, or other papers in any form including electronic and photographs.

7. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 647-48 (1986).

8. John S. Applegate, *Witness Preparation*, 68 *TEX. L. REV.* 277, 278-79 (1989). It must be noted that a failure to engage in any witness preparation and even a failure to adequately prepare a witness, may be a violation of an attorney’s ethical duty to provide competent representation to a client in violation of ethical standards and rules. See *United States v. Rhynes*, 218 F.3d 310, 319 (4th Cir. 2000). Such a failure may also form the basis for a legal malpractice claim. See also *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 52 cmt. b (AM. LAW. INST. 2000) (general negligence standard may require interviews with witnesses); *Caso v. Miranda Sambursky Sloane Sklarin Ver Veniotis LLP*, 54 N.Y.S.3d 386 (App. Div. 2017) (citing the First Department decision that Plaintiff’s allegations concerning his attorney’s inadequate witness preparation prior to the witness’s deposition were based upon a failure to refresh the witness’s recollection stated a claim for legal malpractice).

inconsistent with other available evidence.<sup>9</sup> The goal is, of course, to ensure that the witness's testimony at the trial or deposition is complete, accurate, and not unexpected. As one court has noted: "This sort of preparation is essential to the proper presentation of a case and to avoid surprise."<sup>10</sup>

While such discussions present no ethical concerns for the attorney, provided they are conducted properly,<sup>11</sup> a concern of another nature arises: Should a privileged writing be shown to the witness? It may be that such a writing is the best or perhaps the only tool for refreshing recollection purposes.<sup>12</sup> However, a risk is created by such a showing, namely, that the privileged writing will now have to be disclosed to the opposing attorney.<sup>13</sup> The opposing attorney will have become aware of such use by the inevitable question to the witness during the questioning to identify the writings which were reviewed by the witness during the preparation sessions. A disclosure of this nature can be devastating to the attorney who prepped the witness, adversely impacting the attorney's client, especially where the writing contains comments and statements about the attorney's theory of the case, evaluation of strengths and weaknesses of the parties' case, or actions to be undertaken. While the witness's recollection may have been refreshed, the cost of doing so may

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9. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 cmt. b (AM. LAW. INST. 2000); Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 4-5 (1995).

10. Hamdi & Ibrahim Mango, Co. v. Fire Ass'n of Phila., 20 F.R.D. 181, 183 (S.D.N.Y. 1957).

11. Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching"*, 1 GEO. J. LEGAL ETHICS 389 (1987). When witness preparation becomes problematic from an ethical perspective is a topic beyond the scope of this article. For comprehensive reviews of this problem, see Wydick, *supra* note 9.

12. See Ettie Ward, *The Litigator's Dilemma: Waiver of Core Work Product Used in Trial Preparation*, 62 ST. JOHN'S L. REV. 515, 522-23 (1988) (discussing reasons why attorney would provide witnesses with privileged documents).

13. See generally Alfred F. Belcuore, *Use It and Lose It – Privileged Documents, Preparing Witnesses and Rule 612 of the Federal Rules of Evidence*, 31 FED. B. NEWS & J. 171 (1984); Daisy Hurst Floyd, *A "Delicate and Difficult Task": Balancing the Competing Interests of Federal Rule of Evidence 612, the Work Product Doctrine, and the Attorney-Client Privilege*, 44 BUFF. L. REV. 101 (1996); Michael Keeley & Michael D. Feiler, *You Can't Ask That! Asserting Work Product Protection for Deposition Preparation Materials*, 40 BRIEF 34 (2011).

result in the loss of an otherwise winnable case.

Under New York law, can the review of a privileged writing by a witness in a preparation session prior to a trial or a deposition lead to the writing's privileged status being lost? While it is well established in New York that the use of any writing to refresh the recollection of a testifying witness at a trial or deposition triggers an automatic disclosure of the writing to opposing counsel, irrespective of its privileged nature,<sup>14</sup> New York law is unclear as to the consequences, if any, when the witness reviews a privileged document prior to trial or deposition. Specifically, in the absence of a governing statutory provision and Court of Appeals precedent on point, it is unclear as to whether: (1) the automatic disclosure rule applies at all in the witness preparation context; (2) if the automatic disclosure rule does apply, does a mere showing to or review of the writing by the witness trigger disclosure, or will disclosure be mandated only if the witness uses the writing to refresh his or her recollection; and (3) can disclosure of a writing be ordered over a claim of privilege. Notably, Rule 612 of the Federal Rules of Evidence and federal court decisions interpreting the Rule, provide guidance to how these questions are determined and answered. However, there is not always unanimity among the federal courts on these matters.

This article will examine New York's refreshing recollection doctrine in the context of trial and deposition preparation of witnesses as to the consequences of the witness's review of privileged writings. Initially, Part II will discuss Rule 612 of the Federal Rules of Evidence. The discussion will serve as the backdrop for the analysis of the above-mentioned issues under New York law. Part III will then examine the refreshing recollection doctrine as developed and applied to testifying witnesses at a trial or deposition by the New York courts. The examination will point out the doctrine's key rules. Part IV discusses the treatment of these key rules by the New York courts in the witness preparation situation, both pre-trial and pre-deposition, showing the shortcomings of this judicial treatment and advocating for change. Lastly, Part V makes some suggestions to the attorney in light of current New York

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14. See *infra* notes 156-68 and accompanying text.

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law as to avoidance in the preparation of witnesses before they testify at a trial or a deposition of the disclosure of otherwise privileged writings.

## II. Federal Rule of Evidence 612

### A. Rule 612

Rule 612 of the Federal Rules of Evidence 612 provides:

Rule 612. Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

- (1) while testifying; or
- (2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a

criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial.<sup>15</sup>

Rule 612 covers a small part of the refreshing recollection doctrine as applied in the federal courts. Under that doctrine, when a witness is unable to relate facts within the witness's knowledge, the examining attorney is afforded the opportunity to refresh the witness's testimony through the use of a writing or object.<sup>16</sup> The basics of the doctrine, *i.e.*, when the doctrine can be invoked and the mechanics of its use, are governed by common law rules adopted and developed by the federal courts.<sup>17</sup> Rule 612 governs only the mechanics of the production, inspection, and use of writings used to refresh a witness's recollection at trial while testifying or before testifying.

The inspection and use right given to an adverse party for writings used to refresh the witness's recollection while testifying is unqualified. However, the right as given for writings used before testifying is subject to the discretion of the court, and production and inspection is only required if "justice requires."

Of note, the Rule, on its face, provides no privilege-based exception to the inspection and use right, either when a writing is used to refresh a witness's recollection while testifying or before testifying. Furthermore, while the Rule's inspection right clearly applies to writings used to refresh a witness's recollection before a trial, it is silent as to whether it is operative term "testifying" applies in the context of preparing a witness for a deposition as well.

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15. FED. R. EVID. 612.

16. See BROUN ET. AL., *supra* note 4, at 48-49.

17. See *generally* MUELLER & KIRKPATRICK, *supra* note 5, §§ 6:94-6:97; 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE §§ 612.01-09 (Mark S. Brodin & Joseph M. McLaughlin eds., 2d ed. 2016).

### B. Legislative History

The Federal Rules of Evidence were enacted on January 2, 1975 and deemed effective on July 1, 1975.<sup>18</sup> The pre-enactment history of the Federal Rules of Evidence is extensive.<sup>19</sup> Specifically, Rule 612's legislative history consists of three Reporter's drafts, prepared from 1965 through 1968,<sup>20</sup> three Advisory Committee drafts, prepared from March 1969 through November 1972,<sup>21</sup> and reports of congressional hearings compiled from testimony at congressional hearings and comments received as a result of the hearings.<sup>22</sup> The history of Rule 612 as gleaned from these documents is clear and instructive as to the differing treatment of the inspection and use right specifically granted by the Rule, depending upon whether the use of the writing occurred while the witness was testifying or before testifying. However, as to the issue of whether the Rule could be employed to override a claim that the writing could not be disclosed because it was privileged, the legislative history is ambiguous as to the reason for the omission of the treatment of a claimed privilege in the Rule.

As to the inspection and use right granted to the adverse party, the Advisory Committee initially proposed in the Preliminary Draft of March 1969 that an adverse party is entitled to have such right not only as to any document used by a witness to refresh the witness's recollection while testifying, but also as to any other document used prior to testifying for refreshing recollection purposes. The right as granted was

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18. Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, § 1, 88 Stat. 1926, 1936 (1975).

19. An excellent resource for this history is the *FRE Legislative History Overview Resource Page*, FED. EVIDENCE REV., <http://federalevidence.com/legislative-history-overview> (last visited Apr. 2, 2018).

20. See RICHARD D. FRIEDMAN & JOSHUA DEAHL, FEDERAL RULES OF EVIDENCE: TEXT AND HISTORY xi-xii, 258-59 (2015).

21. See Rules of Evidence for United States Courts and Magistrates, *Amendments to the Federal Rules of Criminal Procedure*, 56 F.R.D. 183, 276-77 (1973) (transmitted by the United States Supreme Court to Congress); Comm. on Rules of Prac. & Proc. of the Jud. Conf. of the U.S., *Revised Draft of Proposed Rules of Evidence*, 51 F.R.D. 315, 399-400 (1971); Comm. on Rules of Prac. & Proc. of the Jud. Conf. of the U.S., *Preliminary Draft of Proposed Rules of Evidence*, 46 F.R.D. 161, 306-07 (1969).

22. See FRIEDMAN & DEAHL, *supra* note 20, at xiii-xv.



unqualified. In support of this proposal, the Committee stated:

The treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine. The bulk of the case law has, however, denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter. An increasing group of cases has repudiated the distinction., and this position is believed to be correct. As Wigmore put it, “the risk of imposition and the need of safeguard is just as great” in both situations. To the same effect is McCormick.<sup>23</sup>

The McCormick treatise cited in the Advisory Committee Note stated the policy ground that supports this right of inspection and use as follows:

With the memorandum in hand, the cross-examiner has a good opportunity to test the credibility of the witness’s claim that her memory has been revived, and to search out any discrepancies between the writing and the testimony. For instance, if there is no evident nexus between the contents of the writing and the fact purportedly remembered, the cross-examiner can attack the plausibility of the witness’s testimony that viewing the writing helped the witness remember that fact. In the past, this inspection right was usually limited to writings used by the witness on the stand. However, the policy reasons for inspection seem equally applicable to writings used by the witness to refresh her memory before she testifies.<sup>24</sup>

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23. *Preliminary Draft of Proposed Rules of Evidence*, *supra* note 21, at 307-08 (citations omitted).

24. BROUN ET AL., *supra* note 4, at 55-56 (citation omitted).

Opposition to this proposal came from the Department of Justice and Senator John McClelland.<sup>25</sup> Among other concerns expressed was that “cross-examination of witnesses may deteriorate into lengthy fishing expeditions on the part of counsel seeking to inquire what pieces of paper a witness has seen during the courts of preparation for his testimony.”<sup>26</sup> Responding to these concerns, the House Judiciary Committee amended the proposed Rule to make the right of inspection and use a discretionary one by adding after “before testifying” the words “if the court in its discretion determines it is necessary in the interests of justice.”<sup>27</sup> Its Report states:

As submitted to Congress, Rule 612 provided that except as set forth in 18 U.S.C. 3500, if a witness uses a writing to refresh his memory for the purpose of testifying, “either before or while testifying,” an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness on it, and to introduce in evidence those portions relating to the witness’ testimony. The Committee amended the Rule so as still to require the production of writings used by a witness while testifying, but to render the production of writings used by a witness to refresh his memory before testifying discretionary with the court in the interests of justice, as is the case under existing federal law. See *Goldman v. United States*, 316 U.S. 129 (1942). The Committee considered that permitting an adverse party to require the

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25. See Letter from Richard G. Kleindienst, Deputy Attorney General, United States, to Albert Branson Maris, Federal Judge, United States (1971) (*available at* 117 CONG. REC. 33648, 33656-57) [hereinafter KLEINDIENST LETTER]; Letter from John Little McClellan, Senator, United States, to Albert Branson Maris, Federal Judge, United States (1971) (*available at* 117 CONG. REC. 33642, 33645-46) [hereinafter MCCLELLAN LETTER].

26. KLEINDIENST LETTER, *supra* note 25, at 33657; MCCLELLAN LETTER, *supra* note 25, at 33645.

27. H.R. REP. NO. 93-650 (1973), *as reprinted in* FRIEDMAN & DEAHL, *supra* note 20, at 262 [hereinafter House Report]. The compromise reached and the discussions leading up to it are fully discussed in 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 347, 597-99 (2d ed. 1994).

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.<sup>28</sup>

With respect to the privilege issue, attorneys, academic commentators, and federal judges provided their comments about the potential conflict between Rule 612 as proposed and privilege law.<sup>29</sup> The House Report concerning Rule 612 stated: “The Committee intend[ed] 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.”<sup>30</sup> A discussion on the House floor between Representative Hungate (House Manager of the Federal Rules of Evidence Bill) and Representative White is also revealing:

Mr. WHITE. If there is, for instance, hypothetically, a personal injury action, that is, if a party to the personal injury action asks for the work of an attorney. . . on matters on which the party has re-trial [and must refresh his memory before trial], then would the adverse attorney and adverse party have the opportunity to inspect that work?

Mr. HUNGATE. If the gentleman will yield, I understand—and if I am in error, some other members of the committee can correct me—the attorney’s work product would not be subject to that inspection.

If it was used to refresh the memory of a witness would it then not be subject to inspection?

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28. House Report, *supra* note 27, at 13.

29. See MUELLER & KIRKPATRICK, *supra* note 5, at 583-84; Martha J. Aaron, *Resolving the Conflict Between Federal Rule of Evidence 612 and the Work-Product Doctrine: A Proposed Solution*, 38 U. KAN. L. REV. 1039, 1045-46 (1990).

30. House Report, *supra* note 27, at 13.

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If it was used while testifying. If it were used before testifying there are different limitations on it.

Mr. WHITE. You see, the way it reads, it says “before testifying.” In other words, if you use it before testifying then it is a memory refreshener [sic].

Mr. HUNGATE. It can become a discretionary matter with the court in that case. The rule was originally broader than this, as I recall it. We have tried to narrow the past rule, the rule that one point could have meant bringing in everything you used to refresh your memory, and the committee has sought to restrict that. You could use the classic examples, for instance, of patent cases or antitrust cases where you might have several large railroad boxcars full of documents, and to force them to be brought in could prove to be harassment.

Mr. WHITE. Does not the chairman’s own interpretation mean that at the court’s discretion the court could insist that the adverse party bring to the opponent the material on which the witness refreshed his memory, is that correct?

Mr. HUNGATE. The gentleman is raising a good point, because I think the gentleman is putting two legal concepts at each other’s throats, one would be perhaps the original work product of the attorney, and I am not qualified to say that this is paramount, but it was not meant to repeal the attorney-client relationship, and, let me add, this does not write that out of its present existence. It does not do away with it. What we concentrated upon was in these extremely long cases where there would be lots and lots of documents, and where it would be a harassment to have them all

brought in.

And it says, again, as the gentleman I am sure realizes:

If the court in its discretion determines it is necessary in the interest of justice. . . .

Mr. WHITE. Is not this then a change in the rule, a change from the general evidentiary rules in the Federal courts?

Mr. HUNGATE. That is not the case, as I understand it.

Mr. WHITE. Presently in civil actions or personal injury actions, using the same hypothetical question, can an opponent obtain the material on which a witness refreshed his memory before he comes to testify, before the case?

Mr. HUNGATE. He could not do so.

Mr. WHITE. So this is a radical change.

The point I am trying to make is that this is an inconsistency, that a man would have to produce the writings that he had used prior to coming to testify, whatever he refreshed his memory on, but he probably could not use the same writing in that regard, if these were self-serving to him. The lawyer's own work product would then be subject to inspection if it was used to refresh the memory of a witness, and thus you have intruded into a very established rule of law.

Mr. HUNGATE. However, we come back to the fact that this does not wipe out the other sections of the law, or the law as it exists regarding the

privilege of attorney-client relationships, or their work products.<sup>31</sup>

Despite this attention to the issue, it was never resolved.<sup>32</sup> The legislative history of the Rule shows only that the Rule apparently was not intended to eliminate privilege protection for writings protected by a privilege, but fails to show how privilege rights are to be accommodated with the inspection and use right, if at all.

Lastly, there is no indication in Rule 612's legislative history that discussion was had as to whether the inspection and use right was applicable where a witness's recollection was being refreshed in preparation for a deposition. A commentator has noted that the Rule's requirement of document disclosure "at a hearing" strongly suggests that the Advisory Committee and Congress had only trials in mind.<sup>33</sup> On the other hand, another commentator has contended that the words "for the purpose of testifying" and the explanation for those words in the Advisory Committee's Notes shows Congress intended to have the right apply to a pre-deposition review of documents by a witness.<sup>34</sup> These differing interpretations raise the issue as to legislative intent, but do not resolve it.

### C. Judicial Construction of Rule 612

#### 1. Applicability to Depositions

The courts addressed early on the issue left open by Congress of whether Rule 612 applied to deposition testimony where the deponent-witness's recollection was refreshed by the use of a writing while testifying or before testifying. After noting

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31. 120 CONG. REC. 1301, 2381-82 (1974).

32. Alfreda Robinson, *Duet or Duel: Federal Rule of Evidence 612 and the Work Product Doctrine Codified in Civil Procedure Rule 26(B)(3)*, 69 U. CIN. L. REV. 197, 206-07 (2000) (noting the extensive consideration by members of Congress to Rule 612).

33. See John S. Applegate, *Preparing for Rule 612*, 19 LITIG. 17, 17-18 (1993) (noting that a deposition is not called a "hearing").

34. Robinson, *supra* note 32, at 205 (noting the phrase is a "safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files").

that with respect to this issue the Rule itself is “silent” and its legislative history “somewhat ambiguous,”<sup>35</sup> the courts have consistently held the Rule is applicable to deposition testimony through Rule 30(c) of the Federal Rules of Civil Procedure.<sup>36</sup> The portion of Rule 30(c)(1) the courts relied upon provides that “[t]he examination and cross-examination of a deponent proceed[s] as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615.”<sup>37</sup> One court has also noted that since deposition transcripts are frequently used at trial in place of live testimony, it is appropriate to conclude that Rule 612 does apply to deposition testimony.<sup>38</sup>

There is contrary authority. In *Omaha Pub. Power Dist. v. Foster Wheeler Corp.*,<sup>39</sup> the court held Rule 612 did not apply to deposition testimony.<sup>40</sup> The court’s rationale for so holding was as follows:

[T]he notes of the Advisory Committee talk of use of writings to refresh recollection while a witness is “on the stand” or prior to “taking the stand.” While it may be argued that a deposition witness is on the “stand” during a civil deposition examination, it is unlikely that such a meaning is reasonable when you analyze the entire Rule, the Committee Note and the cases cited by the Committee in conjunction with the Note. Thus, it appears that the first sentence of *Fed. R. Civ. P.* 30(c) deals only with the procedures for

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35. See, e.g., *Nutramax Labs., Inc. v. Twin Labs., Inc.*, 183 F.R.D. 458, 467 (D. Md. 1948).

36. See, e.g., *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 637 (E.D.N.Y. 1997); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982); *Marshall v. U.S. Postal Serv.*, 88 F.R.D. 348, 350 (D.D.C. 1980); *Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs., Inc.*, 81 F.R.D. 8, 10 (N.D. Ill. 1978).

37. FED. R. CIV. P. 30(c)(1).

38. *Nutramax Labs.*, 183 F.R.D. at 467 n.7. FED. R. CIV. P. 32 permits the use of deposition transcripts at a trial and FED. R. EVID. 804(b)(1) permits, as an exception to the hearsay rule, the admission of transcripts of prior testimony from a trial.

39. *Omaha Pub. Power Dist. v. Foster Wheeler Corp.*, 109 F.R.D. 615 (D. Neb. 1986).

40. *Id.* at 616.

examination and cross-examination and not with the substance of the examination. Otherwise, the plain language of Rule 612 would permit a broad ranging inquiry into highly protected opinion work product, something clearly not envisioned by the drafters of the Rule. The word “testifying” as used in the Rule contemplates the presentation of evidence at a hearing before a judge or magistrate.<sup>41</sup>

While the court’s rationale is supportable,<sup>42</sup> no other court has adopted its holding and it stands “virtually alone in its position that Evidence Rule 162(2) [sic] does not apply in a deposition setting.”<sup>43</sup>

## 2. Meaning of “While Testifying”

The distinction between “while testifying” and “before testifying” as set forth in Rule 612(a) is readily apparent and seemingly needs no clarification. However, an issue concerning this distinction arose in *Hiskett v. Wal-Mart Stores, Inc.*<sup>44</sup> In this case, Plaintiff contacted an attorney in search of legal advice for an employment discrimination action she wanted to pursue. The attorney directed her to complete a form entitled “Possible Case Intake” and provide a chronological summary of events in the form. She did as directed and returned the completed form to the attorney. An employment discrimination action was subsequently commenced against Defendant, her employer. At Plaintiff’s deposition, defense counsel asked her questions regarding any statements she had prepared about her employment. She testified that she had prepared a statement on her own but could not remember whether it was made before or after she met with the attorney.<sup>45</sup> At that point a recess was taken. When the deposition continued, Plaintiff testified: “After

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41. *Id.* at 616-17 (citation omitted).

42. *See* Applegate, *supra* note 33, at 18.

43. *Napolitano v. Omaha Airport Auth.*, No. 8:08CV299, 2009 WL 1393392, at \*3 (D. Neb. May 11, 2009).

44. *See Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403 (D. Kan. 1998).

45. *Id.* at 406.



we took a break, my lawyer showed me the documents, and I remembered that I wrote them in November 1996 at my attorney's request."<sup>46</sup> This review, she further testified, "helped me to place the date when I wrote he [sic] documents . . . ."<sup>47</sup>

Defendant then moved to compel production of those referenced documents. It argued that the documents were not privileged, and, even if they were, that status did not preclude production because they had the right to inspect and use the documents since she used the documents to refresh her memory while testifying at her deposition.<sup>48</sup> Plaintiff argued that the documents were protected by privilege and that Defendant was not automatically entitled to inspect them just because Plaintiff used them before testifying at her deposition, requiring the documents to be produced only if the court in its discretion so ordered, an order that was not warranted at that time.<sup>49</sup>

The court denied the motion to compel. It initially concluded the form was protected by the attorney-client privilege.<sup>50</sup> It then held that the automatic right of inspection and use of documents to refresh a witness's recollection, which could override the privilege, did not apply as Plaintiff reviewed the documents "before testifying" and not while testifying. It stated:

Within the meaning of Fed.R.Evid. 612(1), "while testifying" requires more than the fact that the review occurred after commencement but before completion of a deposition. Plaintiff had left the witness stand. Transcription had ceased until her testimony resumed. She proffered no testimony during the break. In short, she was not then testifying. The Advisory Committee Notes to Rule 612 support the finding that plaintiff reviewed the document "before testifying." They equate "while testifying" to "while on the stand" and "before testifying" to "prior to taking the stand." See Fed.R.Evid. 612 advisory committee notes. Her

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46. *Id.* at 407.

47. *Id.* (alteration in original).

48. *Id.* at 405.

49. *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 407 (D. Kan. 1998).

50. *Id.* at 405.

review of the document impacted only testimony after her deposition recommenced. The review occurred before she took the stand to begin her after-break testimony.<sup>51</sup>

The Court's holding has been criticized as form over substance.<sup>52</sup> The argument is that because the refreshing occurred on matters that were being examined on at the time of the review, the review occurred "while testifying."<sup>53</sup>

#### D. Meaning of "Uses a Writing to Refresh Memory"

Rule 612 grants an inspection and use right with respect to a document only when a witness "uses a writing to refresh memory."<sup>54</sup> While this foundation element for invoking the right is obviously ascertainable when the refreshing recollection process is pursued while a witness is testifying and the recollection is refreshed, use of a writing before a trial or a deposition to refresh a witness's recollection is not as apparent.<sup>55</sup> When use is present in the latter situation has been the subject of several federal court decisions.

The courts have uniformly held that to trigger the inspection and use right, it must be established that the witness actually relied on the writing to refresh his or her recollection for the purpose of testifying.<sup>56</sup> Thus, merely looking at a document prior to testifying will not trigger inspection and use.<sup>57</sup>

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51. *Id.* at 407-08.

52. *See* 2 PAUL R. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:40, 260 (2013-14 ed. 2013).

53. *Id.*

54. FED. R. EVID. 612(a).

55. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 612.05, at 612-49 n.1 (1987) ("There is no mechanism for ascertaining the existence of the writings used other than reliance on the integrity of witness and counsel.").

56. 1 DAVID M. GREENWALD ET AL., TESTIMONIAL PRIVILEGES 358, 360 (3d ed. 2015) ("most courts require a showing that the privileged material actually impacted the witness's testimony.").

57. *See, e.g.,* *Leucadia, Inc. v. Reliance Ins. Co.*, 101 F.R.D. 674, 679 (S.D.N.Y. 1983); *Jos. Schlitz Brewing Co. v. Muller & Phipps (Hawaii), Ltd.*, 85 F.R.D. 118 (W.D. Mo. 1980).

This requirement of use is designed to ensure that the writing is relevant to an attempt to test the credibility of the witness.<sup>58</sup> It also safeguards against use of the right of inspection and use granted by the Rule “as a pretext for wholesale exploitation of an opposing party’s files.”<sup>59</sup>

*Thomas v. Euro RSCG Life*<sup>60</sup> is illustrative of the analysis to be employed in determining use. In this case, Plaintiff acknowledged that she reviewed shortly before her deposition chronological notes provided in confidence by her to her attorney for the purpose of seeking legal advice. She also admitted that it would have been “very difficult” for her to recall all of the events without referring to those notes.<sup>61</sup> Under these circumstances the Court concluded that Plaintiff relied on her notes in connection with her deposition testimony.<sup>62</sup> In addition, the Court noted that events summarized in the notes “were a central part of the deposition” and were “likely to play a substantial role in Plaintiff’s case.”<sup>63</sup> As a result, the notes would have a significant impact on the Plaintiff’s testimony. Thus, the Court concluded that it would exercise its discretion to order disclosure of the notes.<sup>64</sup>

As *Thomas* indicates, the proof necessary to establish the requisite use will ordinarily be obtained by an examination of the witness at the deposition or at the trial. The examining attorney will need to examine the witness as to documents relied upon in giving his or her testimony and whether those documents influenced the testimony.<sup>65</sup> To be sure, the witness

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58. *Sporck v. Peil*, 759 F.2d 312, 318 (3d Cir. 1985) (“the document is of little utility for impeachment and cross-examination without a showing that the document actually influenced the witness’ testimony.”).

59. *Id.* at 317.

60. *Thomas v. Euro RSCG Life*, 264 F.R.D. 120 (S.D.N.Y. 2010).

61. *Id.* at 122.

62. *Id.*

63. *Id.*

64. *Id.*

65. It should be noted that where the witness has been provided certain writings, and those writings as selected or culled from numerous other documents, the provided documents may be protected as core attorney work-product. See *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982) (“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

may testify that he or she only “looked at” writings prior to testifying, seeking to preclude production of those documents. In such a situation, examination of the witness as to specific writings reviewed and the amount of time reviewing the writings may inferentially establish that the writings were relied upon to refresh the witness’s recollection.<sup>66</sup> Where the time involved was considerable and the witness can recall specific writings received, the use of these writings for refreshing recollection purposes can be established, notwithstanding the witness’s contrary statement.<sup>67</sup>

#### E. Automatic Disclosure and Discretionary Disclosure

As previously discussed,<sup>68</sup> Rule 612 grants a right of inspection and use to an adversary party of the writing used to refresh a witness’s recollection. With respect to the standard to be applied for the implementation of this right, the Rule distinguishes between two situations. Where the witness’s recollection is refreshed by the writing, the Rule grants an absolute or unqualified right to inspect and use whereas if the witness’s recollection is refreshed by a writing before testifying at either a trial or deposition, the adversary party has access to the writing only if the court decides that “justice requires” it. While the “absolute” right part of the Rule has presented no problems for the courts to resolve,<sup>69</sup> its discretionary part has

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process of selection and distillation is often more critical than pure legal research. There can be no doubt that at least in the first instance the binders were entitled to protection as work product.”). *But see* Pepsi-Cola Bottling Co. of Pittsburgh, Inc. v. PepsiCo, Inc., No. 01-2009-KHV, 2002 WL 113879, at \*1 (D. Kan. Jan. 22, 2002) (court required identification of documents shown to witness prior to his deposition, rejecting argument that selection of such documents constituted core attorney work-product).

66. *See* Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 615 (S.D.N.Y. 1977) (for Rule 612 to apply it must be shown “at least to a strongly arguable degree” that a writing impacted the testimony of the witness).

67. *See* Bank Hapoalim, B.M. v. Am. Home Assurance Co., No. 92 Civ. 3561 (KMW), 1994 WL 119575, at, \*5-7 (S.D.N.Y. Apr. 6, 1994); *see also* RICE ET AL., *supra* note 52, at 743-44.

68. *See supra* notes 17-18 and accompanying text.

69. *See, e.g.,* Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 637 (E.D.N.Y. 1997).

generated substantial case law as to its application.<sup>70</sup>

To determine what “justice requires” in the case before them, the courts, as Rule 612’s legislative history instructs, balance the Rule’s goal of accurate fact finding<sup>71</sup> against the prevention of time-consuming fishing expeditions at trial and depositions for writings that may have influenced the witness’s recollection.<sup>72</sup> The factors considered include:

[T]he importance of the witness’ testimony, the extent to which the witness apparently relied upon writings used to refresh memory, the extent to which the writings might reveal a credibility problem, whether credibility could be tested effectively in some less burdensome way, and whether there is evidence of a calculated plan to use writings to improperly influence the testimony of a witness and resist production in order to conceal this influence [and] . . . the extent of the materials sought[.] [This] permit[s] the adverse party to exercise rights under Rule 612, the courts have considered the extent of the materials sought, whether such materials are privileged or attorney work product, whether

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70. See WEINSTEIN & BERGER, *supra* note 17, at § 612.04(4)(b) (collecting cases); 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, *FEDERAL PRACTICE & PROCEDURE* § 6188 (2d ed. 2012) (collecting cases). It should be noted that “justice requires” replaced “in the interest of justice,” the words in Rule 612 when originally enacted, in the course of the general “restyling” of the Federal Rules of Evidence that became effective December 1, 2011. See *FEDERAL EVIDENCE REVIEW*, *supra* note 19 (2011 Amendment to Restyle the Federal Rules of Evidence). No change of meaning was intended.

71. See WEINSTEIN & BERGER, *supra* note 17, at § 612.04(4)(b); WRIGHT & GOLD, *supra* note 70, at § 6182.

72. See Note, *Interactions Between Memory Refreshment Doctrine and Work Product Protection Under the Federal Rules*, 88 YALE L.J. 390, 393 n.24 (1978) (noting that the “interest of justice” standard codifies the rule of *Goldman v. United States*, 316 U.S. 129 (1942), that inspection and use right under the common law is subject to the court’s discretion to guard against fishing expeditions); see also *In re: Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 314 F.R.D. 397, 402 (E.D. La. 2016) (“While the purpose of Rule 612 is to aid the pursuit of truth by prompting the unavoidably imperfect memories of witnesses, courts struggle with litigants who attempt to use Rule 612 for purposes of discovery.”).

some policy extrinsic to the evidence rules suggests the materials should not be disclosed, the probity of the adverse party's conduct in connection with the requested production, and whether production of writings could unduly delay proceedings because the materials are difficult to assess.<sup>73</sup>

Unfortunately, the courts rarely set forth the precise manner in which it makes its decision as to whether “justice requires” the production of the writing.<sup>74</sup> An exception is the thoughtful decision of the Court in *Barcomb v. Sabo*, an excellent example of the application of the standard.<sup>75</sup> Plaintiff, a state college police officer, commenced a federal civil rights action against college officials, alleging they “falsely arrested and maliciously prosecuted him in violation of his constitutional rights,” causing him to be suspended from his employment.<sup>76</sup> At the deposition of a college employee (“Welch”):

[S]he testified that a few months prior to the deposition, she and others printed all the electronic mail communications relevant to the case, sorted them into chronological order, reviewed them together, and [forwarded them to the attorney representing the defendant officials]. Welch [further] testified that it was “very possible” that the emails formed at least some of her current recollection of the events surrounding [plaintiffs] suspension, and that after reviewing and printing the electronic mails, she “put [a] time

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73. WRIGHT & GOLD, *supra* note 70, at § 6185. Privilege claims will be discussed separately *infra* notes 82-115 and accompanying text.

74. EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE: A STUDY OF THE FEDERAL RULES OF EVIDENCE BY THE SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION 186 (David A. Schleuter & Stephen A. Saltzburg eds., 3d ed. 1998) (citing *Smith & Wesson, Div. of Bangor Punta Corp. v. United States*, 782 F.2d 1074 (1st Cir. 1986) and *Cosden Oil & Chem. Co. v. Karl O. Helm Aktiengesellschaft*, 736 F.2d 1064 (5th Cir. 1984)).

75. *Barcomb v. Sabo*, No. 07-CV-877 (GLS/DRH), 2009 WL 5214878 (N.D.N.Y. Dec. 28, 2009).

76. *Id.* at \*1.

line together” which was “possib[ly]” shaped by the information she gathered while copying and correlating all of the electronic mail communications. Based on [her] review and her recollection that defendants . . . were all given the same packet of electronic mails to review prior to their depositions, [plaintiff] demand[ed their] production. . . pursuant to Rule 612.<sup>77</sup>

The Court ordered the documents to be disclosed to Plaintiff. As for its rationale in so ordering, the Court initially noted that Welch had examined all these electronic mails while she was organizing them and possibly used them as a basis for both her current testimony and the time lines that were used during the course of hers and others’ depositions. The Court concluded this testimony “demonstrat[ed] an [sic] a sufficient impact on witness testimony for both Welch and [Defendant] Sabo.”<sup>78</sup> Additionally, the Court noted that it was unknown to what degree the electronic mail circulations impacted the testimony of the other employees who were present photocopying, correlating, and reviewing the documents prior to the depositions.<sup>79</sup> As to this fact, the court commented that “[m]ass sharing of electronic mail communications raises a significant issue for fair and effective cross-examination concerning matters reviewed by a witness in preparation for his or her testimony.”<sup>80</sup> Lastly, the Court observed that “the time lines included information about [Plaintiff’s present] suspension and criminal charges”—“information [which was] directly relevant to [Plaintiff’s] theory of his case.”<sup>81</sup> For these reasons, the Court held “disclosure under Rule 612, does not constitute a fishing expedition but a necessary action to ensure fairness.”<sup>82</sup>

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77. *Id.* at \*8 (citations omitted).

78. *Id.* at \*9.

79. *Barcomb v. Sabo*, No. 07-CV-877 (GLS/DRH), 2009 WL 5214878, \*9 (N.D.N.Y. Dec. 28, 2009).

80. *Id.*

81. *Id.*

82. *Barcomb v. Sabo*, No. 07-CV-877 (GLS/DRH), 2009 WL 5214878, at \*9 (N.D.N.Y. Dec. 28, 2009).

## F. Privilege and Work-Product Claims

A writing subject to automatic or discretionary production may be protected from disclosure by the attorney-client privilege<sup>83</sup> or as work product.<sup>84</sup> A “tension” or “conflict” has been recognized between the production directive of Rule 612 and the protection afforded by the attorney-client privilege and the work-product doctrine.<sup>85</sup> The issue presented is whether Rule 612 production right overrides the privilege protections.

When a writing is used to refresh a witness’s recollection while testifying, and thus subject to automatic production, the

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83. The attorney-client privilege, as governed by Federal Rule of Evidence 501, protects against disclosure of confidential communications between attorneys and their clients. *See Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). It is “intended to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’” *Id.* at 403 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). While the reported decisions involve the attorney-client privilege, other privileges can also be invoked, and will be treated similar to attorney-client privilege claims. *See Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 637 (E.D.N.Y. 1997) (physician-patient privilege); *Audiotext Commc’ns Network, Inc. v. US Telecom, Inc.*, 164 F.R.D. 250, 253 (D. Kan. 1996) (“any privilege”).

84. The work-product doctrine is defined as the “protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.” FED. R. EVID. 502(g)(2). Work-product protection encompasses both advisory work-product, such as diagrams, photographs and reports prepared by or for any attorney and opinion work-product, including the opinions, strategies, or mental impressions of an attorney, so called core work-product. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 87 cmt. f (AM. LAW INST. 2000). However, under FED. R. CIV. P. 26(b)(3)(A)(ii), ordinary work-product is generally immune from discovery unless the party seeking disclosure “has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Under FED. R. CIV. P. 26(b)(3)(B) opinion work-product is immune from disclosure. *See Appleton Papers, Inc. v. Env’tl. Prot. Agency*, 702 F.3d 1018, 1023-24 (7th Cir. 2012). FED. R. CIV. P. 26(b)(3)(A)-(B) is, in essence, a codification of the holdings of *Hickman v. Taylor*, 329 U.S. 495 (1947), the seminal work-product decision, which holdings were justified by the Supreme Court upon several policies, including the prevention of ill-prepared opposing counsel from piggy-backing on the effort put forth by a more diligent attorney on the other side. *Id.* at 510-11.

85. *See In re: Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 314 F.R.D. 397, 400-01 (E.D. La. 2016) (“conflict”); *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, No. MDL 1358(SAS), 2012 WL 2044432, at \*3 (S.D.N.Y. June 6, 2012) (“tension”).



courts have uniformly held that the protections against disclosure afforded by the attorney-client privilege<sup>86</sup> and the work product doctrine are lost.<sup>87</sup> As to the latter, the loss of protection may extend to core attorney opinion work product.<sup>88</sup> As stated in a leading treatise: “There is little doubt that using documents to refresh memory on the witness stand waives or defeats a claim of attorney-client privilege by the calling party or a claim of work product protection by the lawyer.”<sup>89</sup> The basis for this conclusion, as expressed by the courts, is that the right of inspection and use recognized by Rule 612 with respect to a writing used while the witness is testifying is absolute.<sup>90</sup>

However, when a document protected by the attorney-client privilege or work-product doctrine is used to refresh a witness’s recollection before testifying at a trial or a deposition, and thus subject to a discretionary production, the courts are in wide disagreement on whether the protection is lost by such use. Various approaches to resolution of this issue have been taken.<sup>91</sup>

Several courts take the position that neither the attorney-client privilege nor work-product doctrine apply as a bar to production of an otherwise protected writing.<sup>92</sup> The apparent

86. See, e.g., *Beattie v. CenturyTel, Inc.*, 673 F. Supp. 2d 553 (E.D. Mich. 2009); *Jolly v. Coughlin*, No. 92 Civ. 9026 (JGK), 1995 WL 495641, at \*2 (S.D.N.Y. Aug. 21, 1995); *United States v. Finkielstain*, 718 F. Supp. 1187, 1192 (S.D.N.Y. 1989); *S & A Painting Co. v. O.W.B. Corp.*, 103 F.R.D. 407, 409 (W.D. Pa. 1984).

87. See, e.g., *Spivey v. Zant*, 683 F.2d 881, 885 (5th Cir. 1982); *Sperling v. City of Kennesaw Police Dep’t*, 202 F.R.D. 325, 328 (N.D. Ga. 2001); *S & A Painting Co.*, 103 F.R.D. at 409.

88. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616-17 (S.D.N.Y. 1977).

89. MUELLER & KIRKPATRICK, *supra* note 5, at 601.

90. *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 637 (E.D.N.Y. 1997) (“[B]eing phrased in mandatory language, Rule 612(1) prevails when pitted against a claim of privilege.”).

91. See generally *In re Rivastigmine Patent Litig.*, 486 F. Supp. 2d 241, 243-44 (S.D.N.Y. 2007) (describing three different approaches taken by the courts to resolve the issue); *Barrer v. Women’s Nat’l. Bank*, 96 F.R.D. 202, 204 (D.D.C. 1982) (noting the conflicting case law on interaction of Rule 612 and claims of attorney-client privilege or work-product protection).

92. See, e.g., *Ehrlich v. Howe*, 848 F. Supp. 482, 494 (S.D.N.Y. 1994) (attorney-client privilege and work-product); *United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 25 (N.D. Cal. 1985) (attorney-client privilege and work-product); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982) (work-product); *Marshall v. U.S. Postal Serv.*, 88 F.R.D. 348, 350 (D.D.C.

basis of these decisions is that it is always necessary in the interest of justice to have disclosure of documents used before testifying.<sup>93</sup> This approach has been the subject of criticism in the courts, with courts opining that such approach is “inconsistent with the advisory committee note indicting that Rule 612 does not bar the assertion of privilege [protection,]”<sup>94</sup> and that it eliminates judicial discretion when Congress intended discretion to be exercised in all before testifying situations.<sup>95</sup>

At the other extreme, a few courts have concluded that production of the writing protected by the attorney-client privilege or work-product doctrine can only be ordered if the protection has been waived by actions other than its use for refreshment purposes.<sup>96</sup> This approach was explained by one court as follows:

[T]he relevant inquiry is not simply whether the documents were used to refresh the witness’s recollection, but rather whether the documents were used in a manner which waived the attorney-client privilege. This could happen, for example, if privileged communications were disclosed to an individual outside the privileged relationship. On the other hand, the privilege would not be lost if an individual were to review his own already privileged documents.<sup>97</sup>

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1980); *Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs., Inc.*, 81 F.R.D. 8, 9 (N.D. Ill. 1978); *Berkey Photo, Inc.*, 74 F.R.D. at 616 (suggesting Rule 612 left privileges generally untouched).

93. *Derderian v. Polaroid Corp.*, 121 F.R.D. 13, 16 (D. Mass. 1988).

94. *In re Rivastigmine*, 486 F. Supp. 2d at 243.

95. *See Derderian*, 121 F.R.D. at 16.

96. MUELLER & KIRKPATRICK, *supra* note 5, at 601.

97. *Suss v. MSX Int’l. Eng’g Servs., Inc.*, 212 F.R.D. 159, 164 (S.D.N.Y. 2002) (citations omitted) (attorney-client privilege); *see also In re Managed Care Litig.*, 415 F. Supp. 2d 1378, 1381 (S.D. Fla. 2006) (attorney-client privilege and work-product); *U.S. Equal Emp’t Opportunity Comm’n v. Cont’l Airlines, Inc.*, 395 F. Supp. 2d 738, 744 (N.D. Ill. 2005) (deliberative privilege).

Criticism of this approach has been expressed by a court as follows:

However, there may well be instances where it is “necessary in the interest of justice” to require the production of a document as to which the privilege has not been waived in order to permit adequate cross-examination. For example, someone within the privileged relationship may be shown a document that he has never seen before in order to refresh his recollection, and it would be prejudicial to the party taking the deposition to be denied access to the document.<sup>98</sup>

A third approach, termed the “functional analysis” test, has been adopted by a substantial number of federal courts.<sup>99</sup> This approach has been described as “better reasoned” than the other two above stated approaches.<sup>100</sup> Under this approach, the protections afforded to witnesses protected by the attorney-client privilege and work-product doctrine are to be taken into account in the balancing approach, which is made under the “justice requires”/“interests of justice” standard,<sup>101</sup> and are significant factors to be considered.<sup>102</sup> In this regard, the interests of the party resisting production in protecting its confidential information in the writing balance against the need of the party seeking production to see the writing so as to test the witness’s credibility.<sup>103</sup> Under this approach the “justice requires”/“interests of justice” standard may sometimes, depending upon the given circumstances, require the production of a writing as to which its protections under the attorney-client

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98. *In re Rivastigmine*, 486 F. Supp. 2d at 243.

99. *Id.*

100. *See, e.g.*, *Calandra v. Sodexho, Inc.*, No. 3:06CV49 (WWE), 2007 WL 1245317, at \*4 (D. Conn. Apr. 27, 2007); *In re Rivastigmine*, 486 F. Supp. 2d at 243; *Bank Hapoalim, B.M. v. Am. Home Assurance Co.*, No. 92 Civ. 3561 (KMW), 1994 WL 119575, at \*5-6 (S.D.N.Y. Apr. 6, 1994).

101. *Wells Fargo Bank, N.A. v. RLJ Lodging Trust*, No. 13-cv-00758, 2014 WL 3830545, at \*3 (N.D. Ill. Aug. 4, 2014).

102. *See supra* notes 71-73 and accompanying text.

103. *See supra* notes 68-70 and accompanying text.

privilege or work-product doctrine has not been waived<sup>104</sup> and other times require denial of production.<sup>105</sup>

The court in *Baker v. CAN Ins. Co.* added another factor to be considered when attorney-client privilege and work-product doctrine protections are invoked.<sup>106</sup> There, the Court held that production of a writing is only required “where the witness, after having refreshed his recollection with the contested material, discloses a significant portion of the substance of that material.”<sup>107</sup> This holding, properly interpreted, requires a comparison of the documents reviewed with the witness’s testimony. Disclosure will be required if a significant part of the testimony overlaps with the content of the documents reviewed. It has been criticized as follows:

This interpretation is unfair to the party refreshing the witness’s recollection, however, because portions of any document may fortuitously overlap with the substance of the witness’s testimony but not have been used by the witness to refresh his recollection. As a consequence, the second interpretation potentially requires the production of a broad range of confidential materials that have no relevance to the quality of the witness’s recollection. Thus, this standard is flawed on both counts – it either fails to address the adversarial need presented by the use of the materials or is unfair to the party calling the witness because the disclosure it compels is disproportionate to the need created.<sup>108</sup>

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104. See, e.g., *Server Tech., Inc. v. Am. Power Conversion Corp.*, No. 3:06-CV-006980-LRH, 2011 WL 1447620, at \*10 (D. Nev. Apr. 14, 2011) (attorney-client privilege); *Lawson v. United States*, No. 97CIV.9239(AJP)(JSM), 1998 WL 312239, at \*1 (S.D.N.Y. June 12, 1998) (work-product).

105. See, e.g., *Nutramax Labs., Inc. v. Twin Labs. Inc.*, 183 F.R.D. 458, 468-70 (D. Md. 1998); *Derderian v. Polaroid Corp.*, 121 F.R.D. 13, 16-17 (D. Mass. 1988); *In re Joint E. & S. Dist. Asbestos Litig.*, 119 F.R.D. 4, 5 (E.D.N.Y. & S.D.N.Y. 1988).

106. *Baker v. CNA Ins. Co.*, 123 F.R.D. 322 (D. Mont. 1988).

107. *Id.* at 327.

108. RICE ET AL., *supra* note 52, at 270.

Two discernable trends in applying this functional analysis are present. One trend is to deny production when the writing would disclose an attorney's "mental impressions, conclusions, opinions, or legal theories," core opinion work product which is specifically protected from disclosure by F.R.C.P. 26(b)(3)(B).<sup>109</sup> The other trend is to order production of a writing, otherwise protectable, excepting core opinion work product, when there is evidence of improper witness "coaching."<sup>110</sup>

A recent decision from the District of Columbia Court of Appeals, *In re Kellogg Brown & Root, Inc.*, must be noted as it expressed concern about the application of the functional analysis standard in the context of a business's internal investigation led by company attorneys.<sup>111</sup> In a *qui tam* action under the Federal False Claims Act against Kellogg Brown & Root, Inc. ("KBR"), a federal defense contractor, Plaintiff-Realtor Barker alleged that KBR defrauded the U.S. Government by inflating costs and accepting kickbacks.<sup>112</sup> At issue was whether KBR must disclose documents related to its internal investigation concerning the underlying allegations that KBR conducted pursuant to its Code of Business Conduct, which was overseen by the company's Law Department.<sup>113</sup> The argument for disclosure was that prior to a deposition noticed to cover the KBR's investigation, KBR's designated employee for the deposition reviewed the internal investigation documents available, a review that triggered their production under Rule

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109. FED. R. CIV. P. 26(b)(3)(B); *See, e.g.*, *Barcomb v. Sabo*, No. 07-CV-877 (GLS/DRH), 2009 WL 5214878, at \*9 (N.D.N.Y. Dec. 28, 2009); *Napolitano v. Omaha Airport Auth.*, No. 8:08CV299, 2009 WL 1393392, at \*3-4 (D. Neb. May 11, 2009); *Lebow v. Meredith Corp.*, No. 05-2545-JWL, 2007 WL 1343744, at \*1-2 (D. Kan. May 4, 2007); *Nutramax*, 183 F.R.D. at 472-75; *In re Comair Air Disaster Litig.*, 100 F.R.D. 350, 353-54 (E.D. Ky. 1983).

110. *See, e.g.*, *Donjon Marine Co., v. Buchanan Marine, L.P.*, CIV. No. 3:09CV1005 (WWE), 2010 WL 2977044, at \*2 (D. Conn. July 21, 2010); *Parry v. Highlight Indus., Inc.*, 125 F.R.D. 449, 452 (W.D. Mich. 1989); *Derderian*, 121 F.R.D. at 16-17; *Boring v. Keller*, 97 F.R.D. 404, 407 (D. Colo. 1983) (ordering production because "immunized materials should not remain undiscoverable after they have been used to influence and shape testimony." (citation omitted)).

111. *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015).

112. *Id.* at 140.

113. *Id.*

612.<sup>114</sup> The District Court ordered production.<sup>115</sup> Concluding the documents were protected by the attorney-client privilege and the work-product doctrine, the Circuit Court concluded that their production could not be ordered pursuant to Rule 612, and reversed the District Court.<sup>116</sup> The basis for its ruling was that the balancing standard could not be used in the circumstances to obtain the documents.<sup>117</sup> It noted that production could not be ordered where, as here, the party seeking production caused the protected documents to be reviewed by placing them in issue at the deposition.<sup>118</sup> In this connection, the Court commented: “[a]llowing privilege and protection to be so easily defeated would defy ‘reason and experience,’ and ‘potentially upend certain settled understandings and practices’ about the protections for such investigations.”<sup>119</sup>

#### G. Scope of Production

Once a court determines that production is appropriate, the entire writing is not produced. Rather, as directed by Rule 612(b), the court upon request must limit disclosure to that portion of the writing used for refreshing recollection purposes which “relates to” the witness’s testimony as refreshed.<sup>120</sup> Thus, unexamined parts or parts that were looked at but not relied upon should be redacted from the portion prior to its production.<sup>121</sup> Such redaction should be done by the court at an

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114. *Id.* at 143.

115. *United States ex rel. Barko v. Halliburton Co.*, 75 F. Supp. 3d 532 (D.D.C. 2014), *vacated*, *In re Kellogg Brown & Root, Inc.*, 796 F.3d at 152.

116. *Id.* at 149.

117. *In re Kellogg Brown & Root, Inc.*, 796 F.3d at 144-45.

118. *Id.* at 144 (“To prepare adequately for the deposition, [the employee] had no choice but to review documents related to the . . . investigation.”).

119. *Id.* at 145 (citations omitted).

120. *S & A Painting Co. v. O.W.B. Corp.*, 103 F.R.D. 407, 410 (W.D. Pa. 1984) (“‘testimony’ should be interpreted to mean only testimony which was refreshed by the writing . . . [to] prevent[] the unfairness which would result from broad disclosure merely because other parts of the writing, not used to refresh recollection, may coincide with other parts of the deponent’s or witness’s testimony.”); *see also* *United States v. Darden*, 70 F.3d 1507, 1540 (8th Cir. 1995).

121. *See, e.g., United States v. Howton*, 688 F.2d 272, 276 (5th Cir. 1982); *Hollister Inc. v. E.R. Squibb & Sons, Inc.*, No. 84 C 1987, 1988 WL 129988, at

*in camera* review.<sup>122</sup>

### III. New York's Refreshing Recollection Doctrine as Developed and Applied to Testifying Witnesses

#### A. Introduction

Unlike the doctrine in the federal courts, the refreshing recollection doctrine in New York has been developed entirely by the courts through its power to develop and formulate a common law of evidence.<sup>123</sup> This development has largely been achieved by Court of Appeals rulings, with numerous decisions from the Appellate Division Departments applying those rulings to fill in the proverbial gaps created by them. Notably, this development by the Court of Appeals has been achieved exclusively in the context of witnesses testifying at the trial level. It has not addressed issues such as whether the doctrine applies to witnesses testifying at a deposition or whether the doctrine applies to a witness before testifying at a trial or deposition.

The basics of this doctrine, *i.e.*, when a writing or object can be used to refresh the recollection of a witness while testifying, the mechanics of how it is done, and the right of the opposing party to inspect and use the material used will be addressed in Part B. Part B will also explore the application of these two aspects of the doctrine to a witness testifying at a deposition. Part C will address when, if ever, a claim of privilege can defeat the production right granted by the doctrine, an issue on which the case law is sparse.

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\*1 (N.D. Ill. Dec 1, 1988).

122. See *Smith & Wesson, Div. of Bangor Punta Corp. v. United States*, 782 F.2d 1074, 1083 (1st Cir. 1986).

123. *People v. Conyers*, 420 N.E.2d 933, 936 (N.Y. 1981) ("our judicial responsibility . . . to protect the integrity of the truth-finding process"); *Fleury v. Edwards*, 200 N.E.2d 550, 554 (N.Y. 1964) (Fuld, J., concurring) ("The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigation. . . . Absent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts in civil cases.").

## B. Refreshing Recollection Doctrine

## 1. Basics

In New York, it has long been established that, in both civil and criminal trial practice, an examining attorney may seek to refresh the recollection of a witness during examination when the witness exhibits difficulty recalling facts once known.<sup>124</sup> In the first reported decision invoking this rule, *Lawrence v. Barker*,<sup>125</sup> the Supreme Court of Judicature of New York in 1830 concisely stated: “The rule is that a written memorandum may be referred to by a witness to refresh his memory. . . .”<sup>126</sup> When the witness’s memory is refreshed, the witness thereon testifies from his or her independent recollection. The writing is not admitted, as the witness’s testimony as refreshed is the evidence and not the writing.<sup>127</sup>

The emergence of the refreshing recollection rule in New York was the result of judicial recognition of its necessity as otherwise a “party’s rights [would be] dependent upon unusual strength of memory.”<sup>128</sup> The rule was also supported by English common law cases, cited by the New York courts, which recognized the rule is based upon an accepted theory that certain matters, acting as stimuli, brought to the witness’s attention can start a chain of associations which prompts the witness to recall that forgotten matter.<sup>129</sup>

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124. See discussions in 5 ROBERT A. BARKER & VINCENT C. ALEXANDER, *EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS* § 6:80 (2d ed. 2011); RICHARD T. FARRELL, PRINCE, *RICHARDSON ON EVIDENCE* § 6-213 (11th ed. 1995); EDITH L. FISCH, *FISCH ON NEW YORK EVIDENCE* § 332 (2d ed. 1977); 2 ROLAND FORD, *NEW YORK LAW OF EVIDENCE* § 211 (1935); MICHAEL M. MARTIN ET AL., *NEW YORK EVIDENCE HANDBOOK* § 6.13 (2d ed. 2003).

125. *Lawrence v. Barker*, 5 Wend. 301 (N.Y Sup. Ct. 1830).

126. *Id.* at 305.

127. See *Howard v. McDonough*, 77 N.Y. 592, 593-94 (1879); *Marcy v. Shults*, 29 N.Y. 346, 351 (1864); *People v. Reger*, 213 N.Y.S.2d 298, 307 (App. Div. 1961). See also BROUN ET AL., *supra* note 4, at 51.

128. *Wise v. Phoenix Fire Ins. Co. of Hartford Conn*, 4 N.E. 634, 634 (N.Y. 1886); see also *Howard*, 77 N.Y. at 594.

129. See, e.g., 3 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 758, at 127 (James H. Chadbourn ed. 1970) (citing *Lawes v. Reed*, 2 Lewin 152, 153 (1835)). See also Dillard S. Gardner, *Perception and Memory*



While the Rule in New York had its roots in written memorandum prepared by the witness, that limitation was rejected by the Court of Appeals in 1852 in *Huff v. Bennett*.<sup>130</sup> The Court stated:

Although the rule is that a witness in general can testify only to such facts as are within his own knowledge and recollection, yet it is well settled that he is permitted to assist his memory by the use of any written instrument, memorandum or entry in a book, and it is not necessary that such writing should have been made by the witness himself, or that it should be an original writing, provided after inspecting it he can speak to the facts from his own recollection.<sup>131</sup>

Consistent with *Huff*, subsequent judicial decisions have approved the use of virtually any sort of writing.<sup>132</sup> Decisions also recognized that the rule was not limited to the use of writing as the refreshing mechanism, permitting, for example, the use of sound recordings.<sup>133</sup> Although no New York case can be found on point, it is likely as well that the courts would even approve “a song, a scent, a photograph, and allusion. . . .”<sup>134</sup> What matters, in sum, is whether the writing or item used to refresh recollection actually serves that purpose and not the document

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of *Witnesses*, 18 CORNELL L. REV. 391, 392 (1933); Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence—Memory*, 41 HARV. L. REV. 860, 861-62 (1928).

130. *Huff v. Bennett*, 6 N.Y. 337 (1852).

131. *Id.* at 339.

132. See FISCH, *supra* note 124, at 216-17; MARTIN ET AL., *supra* note 124, at 545 (collecting cases and noting “[t]here is no limit on the sort of writing that may be used to stimulate memory . . .”).

133. See *Seaberg v. N. Shore Lincoln-Mercury, Inc.*, 925 N.Y.S.2d 669, 672 (App. Div. 2011); *People v. Reger*, 213 N.Y.S.2d 298, 307 (App. Div. 1961).

134. FISCH, *supra* note 124, at 217 (citing *United States v. Rappy*, 157 F.2d 964, 967 (2d Cir. 1946), *cert. denied*, 329 U.S. 806 (1947)); see also *Fanelli v. U.S. Gypsum Co.*, 141 F.2d 216, 217 (2d Cir. 1944) (“The creaking of a hinge, the whistling of a tune, the smell of seaweed, the sight of an old photograph, the taste of nutmeg, the touch of a piece of canvas, may bring vividly to the foreground a consciousness the recollection of events that happened years ago and which would otherwise have been forgotten.”).

or item used to refresh the recollection.<sup>135</sup>

The only prerequisite for the invoking of the rule is a showing that the witness's memory is "exhausted."<sup>136</sup> This requirement of exhaustion is liberally construed as the courts deem it permissible to seek to refresh the witness's recollection merely upon the witness's response of "I do not recall" or "I cannot remember" to a question.<sup>137</sup>

This view is confirmed by the Court of Appeals decision in *People v. Oddone* where it permitted refreshment upon the fact the witness's testimony was equivocal.<sup>138</sup> In this case, Defendant was charged with murder, based upon an allegedly excessive headlock on the victim, whom he was trying to subdue. When a defense witness was questioned regarding the time frame, the witness replied "I wasn't keeping track of time. But it could have been a minute or so. I don't know."<sup>139</sup> Defense counsel sought to refresh her recollection by showing the witness her prior statement in which she said the time frame was "maybe 6 to 10 seconds."<sup>140</sup> The trial court refused to permit the defense counsel to do so, stating that the witness had "given no indication she needs her memory refreshed."<sup>141</sup> The Court held the trial court erred and refreshing recollection should have been permitted because the witness's responses indicated, albeit indirectly, that she had perceived the event and had some memory of it.<sup>142</sup> Properly read, *Oddone* shows the "exhaustion" requirement should be liberally construed, and not strictly applied, lest relevant evidence is kept from the jury.<sup>143</sup>

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135. See *Baker v. State*, 371 A.2d 699, 705 (Md. Ct. Spec. App. 1977) (referring to the common law rule in the United States, "[a]ll that is required is that [the object] may trigger the Proustian moment.").

136. *Reger*, 213 N.Y.S.2d at 307; *Sofranski Bros., Inc., v. H. C. F. Koch & Co.*, 147 N.Y.S. 1142, 1143 (App. Term 1914) (per curiam).

137. See *Cohen v. Sun Ins. Off.*, 91 N.E. 265, 265-66 (N.Y. 1910); *Nappi v. Gerdtz*, 477 N.Y.S.2d 202, 203 (App. Div. 1984).

138. *People v. Oddone*, 3 N.E.3d 1160, 1164 (N.Y. 2013).

139. *Id.*

140. *Id.* (internal quotation marks omitted)

141. *Id.*

142. *Id.* ("[T]he inference that her recollection could benefit from being refreshed is a compelling one.").

143. See *BARKER & ALEXANDER*, *supra* note 124, at 640.

However, where the witness professes no lack of memory, the rule cannot be invoked.<sup>144</sup> For example, in *People v. Boice*, a prosecution for criminally negligent homicide arising out of the death of a pedestrian struck by a motorcycle driven by Defendant, the trial court permitted the prosecution to refresh the recollection of an eyewitness to the accident called on the People's direct case.<sup>145</sup> The witness "had unequivocally testified at trial that she believed the motorcycle to be travelling between 30 and 45 miles per hour," and the Prosecutor sought to refresh her recollection of the speed by showing her a copy of her prior grand jury testimony at which she testified to a higher speed.<sup>146</sup> The Appellate Court held the trial court erred because the witness's testimony showed that, "there was no need to have her memory refreshed."<sup>147</sup> Likewise in *Berkowsky v. New York City Ry. Co.*, a wrongful death action arising out of Plaintiff's decedent's fall from a platform of one of Defendant's cars, the trial court was found to have committed error when it permitted the Plaintiff to refresh the recollection of a police officer who was an eyewitness to the accident.<sup>148</sup> The police officer, called by the Plaintiff, testified that he saw decedent fall from the platform before it stopped, testimony which was contrary to what he had written in a memorandum after the accident.<sup>149</sup> Despite his repeated and persistent statements that his memory was clear and needed no refreshing, Plaintiff was permitted to try to refresh the witness's recollection by reading to him his memorandum in the presence of the jury.<sup>150</sup> Among other errors committed by the trial court in allowing such refreshment, the Appellate Court held error was present because the witness insisted that his memory needed no refreshing.<sup>151</sup>

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144. See, e.g., *People v. Ballard*, 607 N.Y.S.2d 816, 816 (App. Div. 1985); *People v. Fross*, 496 N.Y.S.2d 313, 314 (App. Div. 1985); *People v. Boice*, 455 N.Y.S.2d 859, 860 (App. Div. 1982); *Munro Athletic Prods. Co. v. Universal Carloading & Distrib. Co.*, 53 N.Y.S.2d 170, 170 (App. Term 1944).

145. *Boice*, 455 N.Y.S.2d at 859.

146. *Id.* at 860.

147. *Id.*

148. *Berkowsky v. N.Y.C. Ry. Co.*, 111 N.Y.S. 989 (App. Div. 1908).

149. *Id.*

150. *Id.*

151. *Id.*

The trial court retains discretion to control the refreshing recollection process.<sup>152</sup> This discretion is to be exercised in determining whether the witness's recollection has in fact been refreshed, and the witness is not just relating what he or she just read.<sup>153</sup> The concern was expressed by one court as follows: "There is danger in allowing a witness to refresh his memory by a statement because he may not remember the facts in issue but may very well testify to what he reads in the statement."<sup>154</sup> Additionally, the trial court must ensure that the contents of a document being used by the examining attorney to refresh a witness's recollection are not disclosed to the jury as "it is not proper under the guise of refreshing the recollection of [a witness] to place before a jury matter or documents otherwise inadmissible."<sup>155</sup>

While the refreshing recollection rule has its roots in the examination of a witness at trial, it should also be applicable at a deposition when the witness-deponent is having difficulty in recalling a relevant fact.<sup>156</sup> The reason is that since the risk of a witness's memory loss is precisely the same whether the witness is testifying at a trial or at a deposition, there is no principled reason to not apply the rule in both situations. This is especially true when one considers the distinct possibility the witness's deposition will become admissible at trial as trial evidence as permitted by C.P.L.R. 3117.<sup>157</sup> In fact, it can be compellingly argued that the Legislature has so provided as C.P.L.R. 3113(c) which governs depositions, provides in pertinent part that "[e]xamination and cross-examination of deponents shall

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152. See *People v. Sexton*, 80 N.E. 396, 401 (N.Y. 1907); *People v. Di Loretto*, 541 N.Y.S.2d 260, 261-62 (App. Div. 1989), *appeal denied*, 543 N.E.2d 756 (N.Y. 1989).

153. BARKER & ALEXANDER, *supra* note 124, at 642 ("Courts also perform a supervisory role to assure that the witness really has an independent recollection and that the material is being used merely to refresh that recollection.").

154. *Brown v. W. Union Tel. Co.*, 274 N.Y.S.2d 52, 56 (App. Div. 1966).

155. *People v. Reger*, 213 N.Y.S.2d 298, 307 (App. Div. 1961).

156. The Court of Appeals has not addressed this issue. At least one decision has recognized, albeit indirectly, that the refreshing recollection process is applicable at a deposition. See *McDonough v. Pinsley*, 657 N.Y.S.2d 33, 34 (App. Div. 1997).

157. N.Y. C.P.L.R. 3117 (McKinney 2016).

proceed as permitted in the trial of actions in open court . . . .”<sup>158</sup> In *Thompson v. Mather*, the Court, citing to C.P.L.R. 3113(c), held that the well-settled rule that an attorney for a non-party witness had no right to object during or participate in the trial at which the witness was called to testify was equally applicable to the attorney for a non-party witness at a deposition.<sup>159</sup> Although the specific holding of *Thompson* has been legislatively overruled by an amendment to C.P.L.R. 3113(c),<sup>160</sup> it nonetheless supports the application of the trial refreshing recollection rule to a deposition.<sup>161</sup>

Overall, it is appropriate to view New York’s refreshing recollection rule as applicable to all testifying witnesses, whether testifying at trial or deposition. Succinctly stated, this rule provides that if a witness at a trial or deposition has personal knowledge of a relevant fact but while testifying at the trial or deposition has difficulty in recalling it, the witness may use any writing or object, without restriction as to authorship, guaranty of accuracy or time of making, to stimulate his or her recollection, and may thereafter testify to the fact from his or her own memory. As so stated, New York’s rule is consistent with the refreshing recollection rule recognized in the federal courts<sup>162</sup> and all other state courts.<sup>163</sup>

### C. Right of Inspection of the Writing or Object Used for Refreshing Recollection

New York law has also long recognized as an important component of the refreshing recollection doctrine that the opposing party has the right to inspect the writing or object used for refreshing recollection purposes at the trial or deposition,

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158. N.Y. C.P.L.R. 3113(c) (McKinney 2014).

159. *Thompson v. Mather*, 894 N.Y.S.2d 671, 672 (App. Div. 2010).

160. Act of Sept. 23, 2014, ch. 379, § 1, 2014 N.Y. Laws 379 (amending N.Y. C.P.L.R. 3113(c) (McKinney 2014)).

161. Of note, this argument based on C.P.L.R. 3113(c) is fully consistent with the federal court decisions applying FED. R. EVID. 612 to deposition testimony by reason of FED. R. CIV. P. 30(c)(1). See *supra* notes 35-37 and accompanying text.

162. See *supra* notes 35-43 and accompanying text.

163. FISHMAN & MCKENNA, *supra* note 6, § 32.7 (reviewing state evidence codes).

and then to use the writing or object on cross-examination for impeachment purposes.<sup>164</sup> This inspection and use right is derived from early English common law cases as a means to preclude perjured testimony.<sup>165</sup> As stated by a New York court in 1870:

The right of a party to protection against the introduction against him of false, forged or manufactured evidence, which he is not permitted to inspect, must not be invaded a hair's breadth. It is too valuable to be trifled with, or to permit the court to enter into any calculation as to how far it may be encroached upon without injury to the party.<sup>166</sup>

The cross-examination permitted gives the opposing party the opportunity to determine through the use of the writing or object whether the witness's testimony is actually the product of a revived recollection or merely a recitation of the facts contained in the writing, the essence of "manufactured evidence."<sup>167</sup> Only those parts of the writing or object that relate to the witness's testimony may be used for cross-examination and admitted into evidence.<sup>168</sup> A failure to permit such use will constitute error.<sup>169</sup>

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164. See BARKER & ALEXANDER, *supra* note 124, at 643; FISCH, *supra* note 124, at 217-18; MARTIN ET AL., *supra* note 124, at 547; FARRELL, *supra* note 124, at 365. A writing used may be admitted for substantive purposes if a hearsay exception, such as the past recollection recorded exception, encompasses it. See MARTIN ET AL., *supra* note 124, at 546-47.

165. See WIGMORE, *supra* note 129, at 136, citing *Sinclair v. Stevenson*, 1 Car. & P. 582 (1824); *Gregory v. Taversen*, 6 Car. & P. 281 (1833); *Palmer v. McLean*, 1 Sw. & Tr. 149 (1858).

166. *Tibbetts v. Sternberg*, 66 Barb. 201, 203 (N.Y. Gen. Term 1870). The Court of Appeals endorsed this view of the inspection right *Tibbetts* recognized in *People v. Gezzo*, 121 N.E.2d 380, 393-94 (N.Y. 1954).

167. See *Peck v. Valentine*, 94 N.Y. 569, 571 (N.Y. 1884); *Schwicker v. Levin*, 78 N.Y.S. 394, 395-96 (App. Div. 1902). See also BROWN ET AL., *supra* note 4, at 55 ("With the memorandum in hand, the cross-examiner has a good opportunity to test the credibility of the witness's claim that her memory has been revived, and to search out any discrepancies between the writing and the testimony.").

168. See MARTIN ET AL., *supra* note 124, at 647.

169. See *Caupain v. Johnson*, 247 N.Y.S.2d 345, 346 (App. Div. 1964)

Notably, this inspection right provides the opposing party with an absolute entitlement to inspect any writing or object used during a trial or deposition.<sup>170</sup> There are no qualifications imposed on this right, and this right is not subject to the exercise of judicial discretion.<sup>171</sup> Furthermore, as this right is “too valuable to be trifled with,”<sup>172</sup> a denial of the right may not be subject to a harmless error analysis.<sup>173</sup>

New York’s inspection and use right as to writings used by witnesses while testifying is consistent with the mandatory and unconditional production rule followed in the federal courts pursuant to F.R.E. 612(b)<sup>174</sup> and its state counterparts.<sup>175</sup> The only difference is that New York’s right is recognized under the common law while in all other jurisdictions it is recognized by legislative enactment.

#### D. Use of Privileged Matter

When the right of inspection is triggered, just as what occurs under Rule 612, an issue will arise when the party in possession of the writing claims that inspection and use of it at trial on cross-examination pursuant to that right is barred because the document contains materials which are protected from disclosure under other provisions of New York law.<sup>176</sup> The sources of such protection are the statutory testimonial privileges set forth in Article 45 of the Civil Practice Law and Rules, most commonly the attorney-client privilege,<sup>177</sup> and the

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(“Trial Court erred in refusing to permit in evidence, when offered by defendant, a report used by one of plaintiffs’ witnesses to refresh his recollection. That report, made by a third party, was admissible on the question of the credibility of the witness.”) (citations omitted).

170. *People v. Gezzo*, 121 N.E.2d 380, 383 (N.Y. 1954). *See also* *People v. Brown*, 153 N.Y.S.2d 744 (App. Div. 1956).

171. *See* *People v. Woodrow*, 238 N.Y.S.2d 555, 556 (App. Div. 1963); *Miller v. Greenwald Petticoat Co.*, 183 N.Y.S. 97, 99 (App. Div. 1920).

172. *Tibbetts v. Sternberg*, 66 Barb. 201, 203 (N.Y. Gen. Term 1870)

173. *See Gezzo*, 121 N.E.2d at 383; *Schwicker v. Levin*, 78 N.Y.S. 394, 395-96 (App. Div. 1902).

174. *See supra* notes 68-70 and accompanying text.

175. *See* FISHMAN & MCKENNA, *supra* note 6, § 32:7 (reviewing state evidence codes).

176. *See supra* notes 91-119 and accompanying text.

177. N.Y. C.P.L.R. 4503(a) (McKinney 2004 & Supp. 2017). The attorney

New York's work-product doctrine, consisting of the attorney work-product privilege<sup>178</sup> and the material prepared for litigation privilege.<sup>179</sup> The issue presented is whether the refreshing recollection doctrine's inspection right overrides any such privilege claim based upon these sources.

Unlike in the federal courts where this same issue has been resolved in favor of disclosure through interpretation of the mandatory language of Rule 612 and its underlying legislative history,<sup>180</sup> resolution of this issue in New York will be made strictly under the common law. Rules of statutory interpretation, in other words, have no rule in determining the issue in New York, and the principles of the common law will instead play a prominent role. Nonetheless, the federal decisions can form a backdrop to the issue here in New York due to the fact that New York's right of inspection and privileges are similar to the federal right of inspection and federal privileges.

Initially, it must be noted that this issue has not been addressed by the Court of Appeals in any of its seminal decisions adopting and applying the refreshing recollection doctrine's

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client privilege protects confidential communication between the client and the client's attorney, including the client's and attorney's agents, permitting when invoked the client to refuse to disclose the communication and to prevent any other privileged person from disclosing the communication. *See generally* MARTIN ET AL., *supra* note 124, §§ 5.2.1-5.2.7.

178. N.Y. C.P.L.R. 3101(c) (McKinney 2007 & Supp. 2017). This section, captioned "Attorney's Work Product," provides: "The work product of an attorney shall not be obtainable." *Id.* The New York courts follow the definition of attorney work product set forth in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), holding that it embraces such items as "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs," conducted, prepared or held by the attorney. *See Kenford Co. v. Cty of Erie*, 390 N.Y.S.2d 715, 718 (App. Div. 1977) (referring to attorney work-product as a privilege).

179. N.Y. C.P.L.R. 3101(d)(2) (McKinney 2007 & Supp. 2017). This section, captioned "Materials" provides in pertinent part that "[M]aterials otherwise discoverable . . . prepared in anticipation of litigation or for trial . . . may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Id.* It encompasses, as the statute states, any matter prepared in anticipation of litigation, excepting only materials that are deemed attorney work product. *Id.* It creates, in essence, a "conditional privilege." *Beach v. Touradji Cap. Mgmt., LP*, 949 N.Y.S.2d 666, 670 (App. Div. 2012). *See* DAVID D. SIEGEL, *NEW YORK PRACTICE* § 348 (5th ed. 2011).

180. *See supra* notes 90-95 and accompanying text.



inspection right.<sup>181</sup> A decision from the Appellate Division First Department, *McDonough v. Pinsley*,<sup>182</sup> has held that when a witness uses a writing to refresh recollection while testifying at a deposition, any privilege protecting that writing from disclosure is waived by such use, observing that the opposing party “is entitled to inspect the entire document.”<sup>183</sup> However, there is no analysis of the issue of waiver versus disclosure and the only decision the Court cited in support of its holding involved the use of a claimed privileged writing used to refresh the recollection of a witness before the witness’s deposition.<sup>184</sup> Decisions from the trial courts are similarly sparse, lack any precedential value, and reach conflicting conclusions.<sup>185</sup> Only one referred to the underlying conflicting policies, concluding that “[i]t is this court’s opinion that an adversary’s right to examine writings used to refresh memory must be limited by the greater sanctity accorded confidential communications between attorney and client.”<sup>186</sup>

It is appropriate to start analysis by first looking at the nature of the protection given against disclosure by these privileges under New York law. As to the attorney-client privilege, the Court of Appeals has held that it is not necessarily absolute in the sense that it must always preclude disclosure of the underlying privilege communication once its stated requirements are met.<sup>187</sup> Rather, the Court has observed, the

181. See *supra* notes 159-73 and accompanying text. The writings used for refreshing recollection purposes in these cases were non-privileged.

182. *McDonough v. Pinsley*, 657 N.Y.S.2d 33 (App. Div. 1997).

183. *Id.* at 34.

184. *Id.* (citing *Grieco v. Cunningham*, 512 N.Y.S.2d 432 (App. Div. 1987)).

185. See *Falk v. Kalt*, 253 N.Y.S.2d 188 (Sup. Ct. 1964) (disclosure was barred as the papers were protected by the attorney-client privilege); *E.R. Carpenter Co. v. ABC Carpet Co.*, 415 N.Y.S.2d 351, 353 (Civ. Ct. 1979) (privilege claim cannot bar disclosure).

186. *Falk*, 253 N.Y.S.2d at 189 (citing *In re Van Gorder’s Will*, 176 N.Y.S.2d 1018 (Sur. Ct. 1957)).

187. See *Priest v. Hennessy*, 409 N.E.2d 983, 985-86 (N.Y. 1980) (“The privilege, however, is not limitless. It has long been recognized that ‘the attorney-client privilege constitutes an “obstacle” to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose.’”) (quoting *In re Jacqueline F. v. Segal*, 391 N.E.2d 967, 969 (N.Y. 1979)); see also MARTIN ET AL., *supra* note 124, § 5.2.8 (“Notwithstanding the desirable purposes of the privileges, the courts

privilege must “yield in a proper case, where strong public policy requires disclosure.”<sup>188</sup> The Court has also recognized various situations where the privilege must yield either because the privilege holder has engaged in conduct involving the confidential communication which is inconsistent with the privilege’s confidentiality requirement, such as a disclosure of the communication to a third party,<sup>189</sup> or other policy concerns unrelated to protecting against disclosure, such as furthering criminal activity,<sup>190</sup> which situations provide a compelling basis to preclude application of the privilege.

With respect to the work-product privileges, the courts have uniformly held that as to a writing protected as attorney work-product, the privilege granted is “absolute and unqualified.”<sup>191</sup> The basis for this absolute protection is the strong public policy for providing protection in litigation against disclosure to an adverse party in litigation.<sup>192</sup> On the other hand, the materials prepared for litigation privilege is a “qualified” privilege.<sup>193</sup> The reason for this treatment is that C.P.L.R. 3101(d) requires disclosure when a “court finds that [the covered material] can no longer be duplicated and that denying disclosure will result in ‘injustice or undue hardship.’”<sup>194</sup>

Turning now to the right of inspection and use of the writing or object used to refresh the witness’s recollection, it is largely premised upon the judicially expressed view that inspection and the potential for inspection of the refreshing tool will help

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apply it cautiously because it impedes the truth-finding process.”).

188. *Priest*, 409 N.E.2d at 986 (citing *Jacqueline F. v. Segal*, 391 N.E.2d 967, 986 (N.Y. 1979)).

189. *MARTIN ET AL.*, *supra* note 124, at 294-99 (waiver situations).

190. *Id.* at 328-33 (exceptions).

191. *See, e.g.*, *Gama Aviation Inc. v. Sandton Cap. Partners, L.P.*, 951 N.Y.S.2d 519, 521 (App. Div. 2012) (“attorney work product . . . is subject to an absolute privilege.”); *Beach v. Touradji Cap. Mgmt. LP*, 949 N.Y.S.2d 666, 670 (App. Div. 2012); *Beasock v. Dioguardi Enter., Inc.*, 499 N.Y.S.2d 560, 560 (App. Div. 1986) (“absolute privilege”); *Kenford v. Cty of Erie*, 390 N.Y.S.2d 715, 718 (App. Div. 1977) (“unqualified privilege”).

192. *Beasock*, 499 N.Y.S.2d at 560 (citing *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)).

193. *See Beach*, 949 N.Y.S.2d at 670; *Kenford*, 390 N.Y.S.2d at 718; *see also* 4 THOMSON REUTERS, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 45:29 (Robert L. Haig ed., 4th ed. 2015).

194. *Kenford*, 390 N.Y.S.2d at 718 (citing N.Y. C.P.L.R. 3101(d) (McKinney 2014)).

protect against the introduction of “false, forged or manufactured evidence . . . .”<sup>195</sup> Such purpose is so important that it would be entirely inappropriate “to permit the court to enter into any calculation as to how far it may be encroached upon without injury to the party.”<sup>196</sup>

Balancing the interests sought to be protected by the competing privilege right and inspection and use right in order to determine whether these competing interests can be accommodated or whether one right prevails over the other is a proper way to resolve the issue presented. After all, such balancing is the “inevitable element of the common-law process” generally engaged in by the court to determine the rule or portion to adopt.<sup>197</sup>

With such balancing employed, attorney-client privilege protection should not be available for a writing otherwise protectable by the privilege, as the invocation of the privilege would restrict the ability to determine if the refreshing recollection process was being used to create fraudulent or perjured testimony – the purpose of the inspection right. The truth-seeking purpose of the inspection right should therefore prevail.<sup>198</sup> As to the materials prepared for litigation privilege, it too should yield to the inspection right. In that regard, the protection interest of the privilege should not preclude the inspection right because in the circumstances – witness is testifying – the privilege’s qualifying condition, the need for the material in the interest of justice, is present.<sup>199</sup>

Whether the work product privilege should give way presents a more difficult situation due to that privilege’s “absolute nature.” As the conflict essentially amounts to

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195. *People v. Gezzo*, 121 N.E.2d 380, 394 (N.Y. 1954).

196. *Tibbetts v. Sternberg*, 66 Barb. 201, 203 (N.Y. Gen. Term 1870).

197. *Broadnax v. Gonzalez*, 809 N.E.2d 645, 649 (N.Y. 2004).

198. It should be noted that this loss of protection will occur when the client or another privileged person is the person whose recollection is being refreshed. When the witness is a third-party, the disclosure to that witness will defeat the privilege doctrine as a waiver of the privilege has occurred based on disclosure to a non-privileged person. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 cmt. d (AM. LAW. INST. 2000).

199. *See Yasnogorsky v. City of New York*, 722 N.Y.S.2d 248, 249 (App. Div. 2001) (need for witness statement); *Rochford v. Long Island R.R. Co.*, 710 N.Y.S.2d 84, 85 (App. Div. 2000) (need for witness statement).

protecting the attorney's opinions, etc. versus ascertaining the truth, public policy would strongly suggest the truth interest should prevail.<sup>200</sup> To be sure, the Court in *Beach v. Touradji Capital Management, LP* concluded otherwise with respect to an attorney work product privilege claim asserted with respect to privileged document used to refresh a witness's recollection prior to testifying at a deposition.<sup>201</sup> The Court held that the absolute nature of the privileged precluded a waiver.<sup>202</sup> However, different interests are involved when the refreshing recollection doctrine is used before a witness testifies at deposition, which can justify the holding.<sup>203</sup> Alternatively, the result in *Beach* reflects a questionable policy choice. In short, *Beach* does not support a loss of attorney work product privilege protection when a testifying witness is involved.

Nonetheless, support for a conclusion that the work product protection, despite being viewed as absolute, is lost can be found in federal court decisions decided before Rule 612 became effective and state court decisions based on state common law interpreting their states' refreshing recollection doctrine. These decisions held that the inspection right under the common law trumped any right against disclosure.<sup>204</sup> These decisions are all based upon a finding that the use of the privileged document effected a waiver of the privilege applicable to the document. This waiver basis was expressed by the Supreme Judicial Court of Massachusetts in *Commonwealth v. O'Brien* as follows:

Although the [refreshing recollection] rule does not address itself directly to the issue of writings protected by the work product doctrine, Federal courts have held that the use of protected writings

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200. See *Commonwealth v. O'Brien*, 645 N.E.2d 1170, 1175 (Mass. 1995); *City of Denison v. Grisham*, 716 S.W.2d 121, 123 (Tex. App. 1986).

201. *Beach v. Touradji Cap. Mgmt., LP*, 949 N.Y.S.2d 666 (App. Div. 2012).

202. *Id.* at 670.

203. See RICE ET AL., *supra* note 52, at 146.

204. See, e.g., *Lennon v. United States*, 20 F.2d 490, 494 (8th Cir. 1927); *Bailey v. Meister Brau, Inc.*, 55 F.R.D. 211, 213 (N.D. Ill. 1972); *O'Brien*, 645 N.E.2d at 1175; *Summerlin v. State*, 271 N.E.2d 411, 414 (Ind. 1971); see also BROUN ET AL., *supra* note 4, at 59, 577 (at the common law any applicable privilege lost when privileged document used to refresh recollection).

to refresh memory on the stand constitutes a waiver of that protection and the material used to refresh memory must be shown to the opposing party if requested.<sup>205</sup>

Three justifications have generally been advanced for this waiver approach.<sup>206</sup> First, it has been argued that waiver is proper as the examining attorney on behalf of his or her client has intentionally relinquished the applicable privilege as established by the knowing choice of a privileged writing, rather than a non-privileged writing, to show the witness.<sup>207</sup> As noted by a commentator, “[w]here the choice lies with the privilege holder as to waive or not to waive, waiver upon disclosure to a witness should be a no-brainer and should follow as the night follows the day.”<sup>208</sup> A second argument is that as the testimony prompted by the document will necessarily disclose the contents of a document used for refreshing recollection purposes, the disclosure has effected a waiver.<sup>209</sup> The third argument is that as a rule precluding disclosure in the circumstances involved would impair fairness of the trial process, a waiver rule is necessary to prevent that result.<sup>210</sup> As forcefully stated in *O’Brien*:

It is clear to us that a rule against disclosure in these circumstances would impair the fairness of the trial process. For example, examining counsel might choose only protected materials to refresh a witness’s recollection in order to avoid a potentially damaging cross-examination by opposing counsel. There is also, obviously, the

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205. *O’Brien*, 645 N.E.2d at 1175 (footnote omitted).

206. See WRIGHT & GOLD, *supra* note 70, at § 6185 (discussing the strengths and weaknesses of these justifications).

207. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977); *Bailey*, 55 F.R.D. at 213.

208. 1 EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 750 (6th ed. 2017).

209. 1 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, *FEDERAL RULES OF EVIDENCE MANUAL* 706 (5th ed. 1990).

210. *Commonwealth v. O’Brien*, 645 N.E.2d 1170, 1176 (Mass. 1995) (footnote omitted).

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danger of witness prompting by examining counsel. Without the right to inspect the protected writing, opposing counsel would have no opportunity to cross-examine the witness as to the accuracy of the writing and its effect on his or her memory. Results such as these would go a long way toward impairing the judicial process and are therefore clearly unacceptable.<sup>211</sup>

The *O'Brien* unfairness rationale underlying its finding of a waiver of privilege provides a separate and independent reason for New York's acceptance of a rule requiring the loss of privileged status of a writing when used to refresh the recollection of a witness while testifying. In that regard, it is consistent with New York Law which recognizes the waiver of a privilege when the privileged document is being used as a sword and not as a shield, which would, if permitted, create an unfair or unjust result.<sup>212</sup> Such is the situation when the privileged document is being used to refresh recollection, with the potential of creating manufactured evidence.

In sum, New York's refreshing recollection doctrine as applied to testifying witnesses should include a waiver of privilege component and it is likely that the Court of Appeals when it addresses the issue will so rule. Such a rule complements the doctrine's right of inspection and use of the writing used to refresh the testifying witness's recollection, and truly makes the right absolute.

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211. *Id.* (footnote omitted); see also BROWN ET AL., *supra* note 4, at 59 ("Finding a waiver when the writing is consulted by the witness while testifying is obviously warranted; it would be patently unfair for a witness to consult the writing while testifying in open court but refuse to allow the opposing counsel to see the writing.").

212. *Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co.*, 837 N.Y.S.2d 616, 622 (App. Div. 2007); see also *McKinney v. Grand St., Prospect Park & Flatbush R.R. Co.*, 10 N.E. 544, 544 (N.Y. 1887).

#### IV. Applying New York's Refreshing Recollection Doctrine to Witnesses before Testifying

##### A. Introduction

An attorney in New York, as in all jurisdictions,<sup>213</sup> can both legally and ethically meet with a witness before the witness testifies at a trial or a deposition in pending litigation to review the witness's knowledge about the subject matter of the witness's testimony and, in the course of that review, show the witness a writing or other object to refresh the witness's recollection.<sup>214</sup> Whether the opposing party then has any right to have that writing or object disclosed, as under Rule 612, is an issue that the Court of Appeals has not addressed.<sup>215</sup> While there are numerous Appellate Division decisions holding the common law right of inspection and use of writings and objects used to refresh a witness's recollection while testifying at a trial or deposition extends to the witness preparation situation, these decisions, as will be shown, are conflicting and, for the most part, lack any in-depth analysis of the issue presented. The governing rules on this issue are uncertain.

Under the New York's common law, there are essentially three possible approaches: (1) deny a right of inspection and use; (2) recognize an unqualified right of inspection and use; and (3) authorize a court to grant a right of inspection and use in its discretion.<sup>216</sup> As to the third approach, it raises a further issue as to whether the discretionary authority permits the court to override any privilege claims or whether privileges must always be respected in the exercise of that authority. Rule 612, as previously discussed, can be used for guidance.<sup>217</sup> This part will address these approaches, note the federal approaches, and in doing so advocate a position that the New York courts should

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213. See *supra* notes 7-11 and accompanying text.

214. See *In re Eldridge*, 82 N.Y. 161, 171 (1880). However, there are specific limitations set forth in Rule 4.2 of the New York's Rules of Professional Conduct. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (2009) (limitations on contacting represented individuals).

215. See *supra* notes 15-18 and accompanying text.

216. See BROUN ET AL., *supra* note 4, at 577.

217. See *supra* notes 86-119 and accompanying text.

consider and adopt.

### B. Applicability of the Doctrine

At common law, the early cases in the United States refused to extend the recognized right of inspection with respect to writings or objects to refresh a witness's recollection to writings or objects reviewed by a witness for refreshing recollection purposes prior to testifying.<sup>218</sup> The basis for this conclusion was stated by the Massachusetts Supreme Judicial Court as follows:

The right of an opposing party to examine any paper used to refresh the recollection of any witness on the stand at the trial is beyond doubt. . . . But to extend this right to every paper seen by a witness in the preparation of the case before trial is a different matter. Such an extension of the principle might turn every trial into a fishing expedition and place a powerful weapon in the hands of an unscrupulous attorney.<sup>219</sup>

This result was criticized by the leading evidence scholars at the time. Thus, Dean Wigmore wrote that the right of inspection and use as applied to a testifying witness

should apply . . . to a memorandum *consulted* for refreshment *before trial* and not brought by the witness into court; for, though there is no objection to a memory being thus stimulated, yet the risk of imposition and the need of safeguard is just as great. It is simple and feasible enough for the court to require that the paper be sent for and exhibited before the end of the trial.<sup>220</sup>

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218. See, e.g., *Lennon v. United States*, 20 F.2d 490, 494 (8th Cir. 1927); *Leonard v. Taylor*, 53 N.E.2d 705, 707 (Mass. 1944); *State v. Magers*, 58 P. 892, 896 (Or. 1899).

219. *Leonard*, 53 N.E.2d at 707 (citation omitted).

220. WIGMORE, *supra* note 129, at 140-41 (emphasis in original) (footnote omitted).



Professor McCormick wrote: “[t]he reasons [for the testifying rule] seem equally applicable to writings used by the witness to refresh his memory before he testifies.”<sup>221</sup>

With this criticism, another view emerged, recognizing that the right of inspection should apply, not as an absolute right, but rather as a discretionary right subject to a court’s sound discretion.<sup>222</sup> Those courts expressing this view showed a clear repudiation of the earlier decisions, as shown in *State v. Mucci*.<sup>223</sup> The New Jersey Supreme Court used this case to revisit its earlier precedent rejecting the extension of the right to the pre-trial situation. In this criminal case, several of the State’s witnesses refreshed their recollection prior to trial by reading and discussing their earlier grand jury testimony. In the course of their cross-examination, Defendant applied to inspect the grand jury testimony admittedly used to refresh the witness’s recollection, and the application was denied by the trial court.<sup>224</sup> The New Jersey Supreme Court held this ruling to be reversible error. The Court emphasized that as a State’s witness may properly refresh his recollection by examining his grand jury testimony either before trial or while he is on the witness stand, Defendant must then be given the right to inspect the earlier testimony for purposes of cross-examination. The Court unequivocally rejected any distinction between the situation where the witness refreshes his recollection before trial from that where he refreshes it at trial, pointing out that “the one case is as compelling in reason and logic as the other,” citing Dean Wigmore.<sup>225</sup> In so concluding, the Court expressly disapproved of its earlier decisions denying access.<sup>226</sup>

The view expressed in *Mucci* has been followed in the vast majority of the state courts.<sup>227</sup> As commented by Professor

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221. CHARLES TILFORD MCCORMICK ET. AL., MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE 17-18 (Edward W. Cleary ed., 2d ed. 1972).

222. See, e.g., *Needelman v. United States*, 261 F.2d 802, 806-07 (5th Cir. 1958); *La Chemise Lacoste v. Alligator Co.*, 60 F.R.D. 164, 168 (D. Del. 1973); *Alpha Finley v. Daly Tankship Corp.*, 44 F. Supp. 809, 815 (E.D. Pa. 1942); *People v. Scott*, 193 N.E.2d 814, 820-21 (Ill. 1963).

223. *State v. Mucci*, 136 A.2d 761 (N.J. 1957).

224. *Id.* at 766-67.

225. *Id.* at 767.

226. *Id.* at 767-68.

227. See BROWN ET AL., *supra* note 4, at 58 (noting that “[t]he most

McCormick, “[d]oubtless the courts have thought that to require inspection of such papers may unduly encourage prying into the opponent’s file, but increasingly, the decisions reflect the view that there is a public interest in the full disclosure of the source of a witness’s testimony.”<sup>228</sup>

There is, however, a distinct minority of state courts that adhere to the earlier judicial view that the inspection right does not extend to pre-trial or pre-deposition situations.<sup>229</sup> The basis of their adherence to this no inspection rule is that the majority and federal rule, which permits a court to override a privilege, “weakens the attorney-client and work product privileges, both by actual disclosure and by the chilling effect of potential disclosure of documents.”<sup>230</sup>

In New York, prior to 1971, the status of the application of the right of inspection and use to witnesses prior to testifying at a trial or deposition was unclear.<sup>231</sup> The Second Department in *People v. Campiglia* held the trial court erred in not permitting Defendant to examine statements made by the prosecution witness and given to the police, which they had used to refresh their recollection before trial.<sup>232</sup> However, the Court cited no authority for its conclusion and its holding appeared to be limited to the precise facts before it – the review of the statements occurred “immediately prior to testifying.”<sup>233</sup> On the other hand, the Court in *Alfredsen v. Loomis* ruled that disclosure of a statement used by a witness to refresh his recollection the day before testifying at a deposition was required.<sup>234</sup> It noted “[t]he time when the memorandum of statement was referred to by the witness, whether at the trial or examination or prior thereto, would seem unimportant. The

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important factor in accelerating this trend has been the adoption of Federal Rule of Evidence 612.”). *See also* Las Vegas Dev. Assocs., LLC v. Eighth Jud. Dist. Court, 325 P.3d 1259, 1265 (Nev. 2014) (adopting the majority rule as it found “federal caselaw on this issue to be persuasive”).

228. MCCORMICK ET. AL., *supra* note 221, at 18.

229. *See State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13, 15 (Mo. 1995) (collecting cases).

230. *Id.* at 15.

231. JEROME PRINCE, RICHARDSON ON EVIDENCE § 467 (10th ed. 1973).

232. *People v. Campiglia*, 16 N.Y.S.2d 370, 370 (App. Div. 1939), *aff’d*, 39 N.E.2d 936 (N.Y. 1942).

233. *Id.*

234. *Alfredsen v. Loomis*, 148 N.Y.S.2d 468, 470 (Sup. Ct. 1956).

important fact is that it was used by him to refresh his recollection and that it accomplished that purpose.”<sup>235</sup> Other decisions seemed to reject the extension of the right to the pre-trial or pre-deposition situation, or at the very least were unclear as to the rule that applied in that situation.<sup>236</sup>

Post-1971, the rule became clear, namely, there is a right of inspection with respect to writings or objects used by a witness prior to testifying, the result of a series of Appellate Division decisions.<sup>237</sup> In *Doxtator v. Swarthout*, the first of these decisions, the Defendant physician in a medical malpractice action testified at her deposition that, “she had reviewed some notes made after the [underlying] incident. . . and that these were used by her to refresh her recollection with respect to the details of her testimony.”<sup>238</sup> The trial court denied production of the notes.<sup>239</sup> The Fourth Department phrased the issue before it as whether “the rule regarding inspection applied at an examination before trial should be no more stringent than the rule applicable to trial testimony.”<sup>240</sup> The Court then held there are “persuasive reasons to permit [the] inspection.”<sup>241</sup> Those reasons were expressed as follows:

Two of the leading texts on evidence in New York favor application of the same rule to writings consulted by a witness before trial as to those during trial . . . for the reason that the ‘risk to the adversary is precisely the same whether the witness refreshes his recollection by consulting a writing before trial or by consulting it while on the witness stand during trial.’ We think it a sound rule that writings used prior to testifying for the purpose of refreshing the memory of a witness be

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235. *Id.* (citation omitted).

236. *See* *Bata v. Chase Safe Deposit Co.*, 99 N.Y.S.2d 535, 578-79 (Sup. Ct. 1950), *aff’d sub nom. Bata v. Bata*, 108 N.Y.S.2d 659 (App. Div. 1951), *aff’d*, 115 N.E.2d 672 (N.Y. 1953); *In re Hewett’s Will*, 70 N.Y.S.2d 3 (App. Div. 1947), *aff’d*, 74 N.E.2d 482 (N.Y. 1947).

237. FARRELL, *supra* note 124, § 6-215, at 365.

238. *Doxtator v. Swarthout*, 328 N.Y.S.2d 150, 151 (App. Div. 1972).

239. *Id.*

240. *Id.* (citations omitted).

241. *Id.*

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made available to the adversary whether at the trial . . . or at pre-trial examination.<sup>242</sup>

All the other Appellate Division Departments have since followed *Doxtator*.<sup>243</sup>

Extending the right of inspection and use of writings and objects used to refresh the recollection of a witness before testifying at a trial or a deposition reflects sound public policy. While it may be true that such an extension can lead to fishing expeditions, trial delays due to the need to obtain a document protracted on cross-examination, and the abrogation of privilege rights, those concerns can be addressed in follow-up issues, specifically, whether the pre-trial or pre-deposition right is absolute and automatically granted and whether privilege policies should be respected or accommodated, as discussed *infra*.<sup>244</sup> In the end, the extension should be viewed by asking the following rhetorical question posed by a commentator: “[I]s there any reason why we should have one rule for a witness who refers to a writing on the witness stand to refresh his memory and a different rule for a witness who refers to a writing on the courthouse steps for the same purpose?”<sup>245</sup>

There is none.

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242. *Id.* at 151-52 (citations omitted).

243. *See, e.g.,* Grieco v. Cunningham, 512 N.Y.S.2d 432, 432 (App. Div. 1987); Rouse v. Cty. of Greene, 495 N.Y.S.2d 496, 496-97 (App. Div. 1985); Merrill Lynch Realty Commercial Servs. Inc. v. Rudin Mgmt. Co., 462 N.Y.S.2d 16, 17 (App. Div. 1983).

244. *See infra* notes 263-88 and accompanying text.

245. John C. Burke, *Witness Rules Change, Codify Nebraska Law*, 53 NEB. L. REV. 406, 414 (1974).

## C. Used to Refresh Recollection

New York law, as shown in the preceding section, authorizes the inspection of a writing or object if a witness used the writing or object while preparing to testify at a trial or deposition. What constitutes use by the witness? In the absence of Court of Appeals precedent, there are conflicting lines of authority.

The first line is represented by decisions from the First, Third, and Fourth Departments.<sup>246</sup> These decisions hold the right of inspection is triggered only when the witness had actually used the material to refresh recollection and the material has become the basis of pretrial or trial testimony.<sup>247</sup> This definition is consistent with the inspection right's purpose, *i.e.*, to examine fully the witness's credibility, lest manufactured evidenced is admitted.<sup>248</sup> It is also sound as it is responsive to the fishing expedition objection that material that has to be produced is limited to only the material actually used for refreshing recollection purposes. Expressed differently, if the materials were not used to refresh recollection and did not form the basis of the actual testimony, the materials have no relevance to the witness's credibility.<sup>249</sup> This foundation element for invoking the inspection right is consistent with federal case law interpreting Rule 612, which has helped to limit abuse of the inspection right.<sup>250</sup>

A foundation for a court to conclude the requisite use is present will have to be established. An example of a successful effort in establishing the foundation is in *Alfredsen v. Loomis*.<sup>251</sup> At a witness's deposition, the following questions were asked and answers given:

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246. *See, e.g.*, *Fernekes v. Catskill Reg'l Med. Ctr.*, 906 N.Y.S.2d 167, 169 (App. Div. 2010); *Stern v. Aetna Cas. & Sur. Co.*, 552 N.Y.S.2d 730, 730 (App. Div. 1990); *Rouse*, 495 N.Y.S.2d at 496-97; *Merrill Lynch Realty Commercial Servs. Inc.*, 462 N.Y.S.2d at 17.

247. *See Stern*, 552 N.Y.S.2d at 730.

248. *Tibbetts v. Sternberg*, 66 Barb. 201, 203 (N.Y. Gen. Term. 1870).

249. *See Rouse*, 495 N.Y.S.2d at 497.

250. *See supra* notes 54-67 and accompanying text.

251. *Alfredsen v. Loomis*, 148 N.Y.S.2d 468 (Sup. Ct. 1956).

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Q. Since that time, have you seen that statement that you gave to Mr. Cherin?

A. Yes, sir.

Q. When?

A. I have a copy of it.

Q. You have a copy of it? When did you last read it?

A. Yesterday.

Q. What was the purpose of your reading it yesterday?

A. To refresh me a little bit about the dates.

Q. And about the things there were in the statement? Is that the purpose of it?

A. I remember some of – Well, yes. \* \* \*

Q. When you read it yesterday, did it help to refresh your recollection of a lot of things?

A. I remembered the things in the statement.<sup>252</sup>

The witness's answers showed to the Court the "important fact" that the statement was used by him to refresh his recollection and that it accomplished that purpose.<sup>253</sup>

On the other hand, the following Q and A was found to be insufficient to establish the requisite foundation in *Timm v. Mead Corp.*:<sup>254</sup>

Question: What did you do to prepare for this deposition today?

Answer: When I copied all of the documentation I took another pass through it.

Question: Meaning you reviewed the documents as you copied them?

Answer: I copied them, took them whole, had the stack and kind of walked through to try to refresh my memory.

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252. *Id.* at 469.

253. *Id.* at 470.

254. *Timm v. Mead Corp.*, No. 91 C 5648, 1992 WL 32280, at \*1 (N.D. Ill. Feb. 7, 1992).

Question: When you say you walked through it or as you passed through them, does that mean you read each and every one of them. Or that you just took a glance at each page?

Answer: Basically, just took a glance.<sup>255</sup>

The Court took “[f]rom this testimony it is not possible to conclude that the deponent reviewed and relied upon the documents in giving his testimony, nor is it possible to conclude that the documents had any impact on his testimony.”<sup>256</sup> The Court denied production of the notes as a result.<sup>257</sup>

Of course, a witness could frustrate such an inquiry in order to preclude production of the materials by not being fully truthful in responding to the questions. However, such conduct could be overcome by the party seeking production by further questioning the witness concerning the circumstances surrounding the witness’s overall preparation, and the receipt and viewing of the materials, *i.e.*, only document reviewed, length of time reviewing. The answers can form sufficient circumstantial proof to establish the requisite use.<sup>258</sup>

The other line of authority is represented by a decision from the Second Department, *Crawford v. Lahiri*.<sup>259</sup> In this case, a wrongful death medical malpractice action, Plaintiff sought disclosure of any records reflecting treatment of the Plaintiff’s decedent reviewed by the Defendant physician in preparation for his deposition. The Court ordered disclosure stating:

[I]f [Defendant] reviewed any records regarding the plaintiff’s decedent’s treatment in preparation for his testimony, he was required to divulge that fact and turn over the records, whether or not his review was expressly admitted to be for purposes

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255. *Id.* at \*1-2.

256. *Id.* at \*6.

257. *Id.*

258. See *Chabica v. Schneider*, 624 N.Y.S.2d 271, 273 (App. Div. 1995) (witness “looked at” and “read” his diary immediately before trial; diary contained his notes of conversations with Defendant after the incident). See also *RICE ET AL.*, *supra* note 52, § 9:30, at 150-52.

259. *Crawford v. Lahiri*, 673 N.Y.S.2d 189 (App. Div. 1998).

of refreshing his recollection.<sup>260</sup>

Under this broad interpretation of “use,” the Court has set up a low threshold for invoking the inspection right, namely, a witness’s “looking at” a document prior to testifying.<sup>261</sup>

*Crawford* is an outlier in its adoption of such a low threshold for triggering the inspection right in view of the other Appellate Division decisions, and as well the federal case law interpreting Rule 612, which the other New York decisions follow, all of which require substantially more than just “looking at” the material.<sup>262</sup> The Second Department cited no precedent on point in support of its conclusion.<sup>263</sup> To the extent its purported justification is that this low threshold will prevent a witness from barring inspection by an averment that he or she did not rely on the material in refreshing recollection, such goal can be accomplished by other means, as just noted above. This view, which in effect condones fishing expeditions, has not withstood analysis and should not be followed.

#### D. Mandatory or Discretionary Right

Concluding that the right of inspection does apply to writings or objects actually used to refresh the recollection of witnesses before testifying at a trial or deposition does not end analysis of the right. The further issue that now needs to be addressed is whether New York’s common law should make this right mandatory or discretionary, the latter allowing the court to grant or withhold the right. As the backdrop for this issue, Rule 612 provides the right of inspection is discretionary in situations involving the preparation of trial witnesses or deposition witnesses.<sup>264</sup>

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260. *Id.* at 191 (citations omitted).

261. *Id.*

262. *See supra* notes 54-67 and accompanying text.

263. The cases cited in support, *McDonough*, *Chabica*, and *Stern*, in fact, stand for the proposition that the materials viewed were used for refreshing recollection purposes and that they became the basis for the witness’s testimony. *See McDonough v. Pinsley*, 657 N.Y.S.2d 33 (App. Div. 1997); *Chabica v. Schneider*, 624 N.Y.S.2d 271 (App. Div. 1995); *Stern v. Aetna Cas. & Sur. Co.*, 552 N.Y.S.2d 730 (App. Div. 1990).

264. *See supra* notes 68-70 and accompanying text.



The unanimous view of all of the Appellate Division Departments is that the right of inspection when invoked at either a trial or a deposition is a mandatory right.<sup>265</sup> Thus, once it is established that a witness used the writing or object for refreshing his or her recollection and the material formed the basis of his or her testimony at the trial or deposition, the Court must direct production of that material to the opposing party, subject to a possible privilege claim.<sup>266</sup> The rationale for holding this right to be mandatory in all situations was expressed by the Appellate Division Fourth Department as follows:

When these notes were used by [the] defendant to refresh her recollection, they became material affirmatively used in litigation and thus removed from the protection afforded under discovery practice, because her adversary then had a legitimate interest in inspecting this material in order to conduct a meaningful examination.<sup>267</sup>

The above stated rationale is certainly persuasive enough to support the mandatory nature of the right. This is especially true as it furthers the goal of this right to guard against manufactured evidence.<sup>268</sup> Nonetheless, problems can arise once production is directed as a matter of right, which might suggest this mandatory rule should be continued.

When the mandatory right is invoked at trial, and the witness does not bring the refreshing material to court, an adjournment of the trial would be in order to allow the witness to obtain it. If the material is readily available, *i.e.*, at the attorney's nearby office or the witness's nearby office or home, only a brief recess would be in order. However, even such a brief recess would be disruptive of the trial process, especially the cross-examination which is interrupted. Moreover, if the

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265. See, *e.g.*, *McDonough*, 657 N.Y.S.2d at 34; *Stern*, 552 N.Y.S.2d at 730; *Grieco v. Cunningham*, 512 N.Y.S.2d 432, 432 (App. Div. 1987); *Rouse v. Cty. of Greene*, 495 N.Y.S.2d 496, 496-97 (App. Div. 1985).

266. See *McDonough*, 657 N.Y.S.2d at 34; *Stern*, 552 N.Y.S.2d at 730; *Grieco*, 512 N.Y.S.2d at 432; *Rouse*, 495 N.Y.S.2d at 496-97.

267. *Doxtator v. Swarthout*, 328 N.Y.S.2d 150, 152 (App. Div. 1974).

268. See *Tibbetts v. Sternberg*, 66 Barb. 201, 203 (N.Y. Gen. Term. 1870).

material were at a distant location, a brief recess would turn into a lengthy one, making a delay in the trial even longer, causing scheduling problems and inconveniencing jurors.

It is certainly possible to prevent this problem by a court directive commanding all witnesses to bring to court with them material they reviewed so that in the event it is determined that the witness in fact used the material to refresh his or her recollection, thereby triggering disclosure, the material is available during cross-examination.<sup>269</sup> However, gathering the materials looked at, and bringing it to court could seriously inconvenience the witness. An additional issue could also arise if the witness fails to comply with such a direction, namely sanctions, if any, to be meted out for the failure, *e.g.*, contempt, monetary sanction, or even the striking of the witness's direct.

Similar problems arise with deposition witnesses. If it is determined that the witness used material to refresh his or her recollection before the testimony begins and the witness did not bring the material to the deposition or the material not otherwise readily available, the deposition will need to be adjourned and rescheduled, causing delays in the pre-trial discovery process. While motion practice seeking an order to compel production prior to the deposition could be pursued,<sup>270</sup> time and expense would have to be incurred to make the motion, which would be compounded if an appeal were taken from the order determining the motion.<sup>271</sup>

These problems cannot be labeled trivial. While enforcement of the "use" requirement should reduce the extent of these problems, it is clear there will be instances where the requirement is met, triggering the mandatory production required under current case law. The problems will, in sum, remain.

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269. New York's Third Judicial District established a local rule which provides that "[e]xperts who testify at trial must bring with them to Court their entire file and all documents considered in arriving at their opinion(s)." N.Y. State Unified Court Sys., *Trial Rules and Special Directives*, NYCOURTS.GOV (Feb. 2, 2016), <http://www.nycourts.gov/courts/3jd/JudgesRules/3JD-Judges%20Rules.shtml#trialrules>. No provision in the C.P.L.R. would bar a judge from adopting a similar rule with respect to fact witnesses.

270. *See Crawford v. Lahiri*, 673 N.Y.S.2d 189, 190 (App. Div. 1998).

271. *Id.*

A modification of the current common law established mandatory right of inspection is in order. The preferable approach, similar to the approach of Rule 612, is to modify current law by eliminating the mandatory nature of the right and in its place, require production of the material used only if a court in the exercise of its discretion decides disclosure is warranted “if justice so requires.”<sup>272</sup> The New York courts have considerable experience in applying such a standard as the basis for a judicial ruling in view of the numerous instances in the C.P.L.R. that direct a court to act in “the interest of justice.”<sup>273</sup> Sufficient room is left for a court to order production when circumstances warrant it, *e.g.*, suspicion of the creation of manufactured evidence.

#### E. Claim of Privilege

Before disclosure of the refreshing material used can be ordered by a court in the exercises of its discretion, it is necessary to determine whether the material used is protected by a privilege and, if it is so protected, whether the privileged status can preclude disclosure of material. As previously noted, the pertinent privileges are the attorney-client privilege, attorney work-product privilege, and materials prepared for litigation privilege.<sup>274</sup> As also previously noted, privilege protection for materials used to refresh a witness’s recollection while testifying is ordinarily lost, or should be lost, under a waiver theory.<sup>275</sup> Should this same result occur in the pre-trial or pre-deposition situation?

The New York courts are split on the issue. The split appears to turn upon conflicting views as to whether the strong interest in disclosure of material used for refreshing recollection purposes always overrides the interest of privileges in limiting disclosure to further other interests, or whether disclosure must

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272. FED. R. EVID. 612(c).

273. *See, e.g.*, N.Y. C.P.L.R. 2005 (McKinney 2005) (excusing delay or default); N.Y. C.P.L.R. 306-b (McKinney 2013) (extension of time to serve complaint); N.Y. C.P.L.R. 3403(a)(3) (McKinney 2007) (trial preferences); N.Y. C.P.L.R. 4404(a) (McKinney 2007) (motion for new trial).

274. *See supra* notes 177-79 and accompanying text.

275. *See supra* notes 210-12 and accompanying text.

yield at times to the separate and different interests of the particular privilege involved. Two lines of decision, with splits within each line as well, have emerged.

The First, Second, and Fourth Departments have expressed the view that “any” privilege which applies to the material used is automatically waived by that use.<sup>276</sup> This conclusion of waiver is based upon the courts’ view that the right of inspection is absolute.<sup>277</sup>

The other line of cases approaches and resolves the issue by considering the underlying policy of the particular privilege being asserted. Starting first with the attorney-client privilege, two reported decisions have considered attorney-client privilege claims. In *Falk v. Kalt*, Plaintiff used several confidential communications between Plaintiff and his attorney to refresh his recollection before his deposition.<sup>278</sup> The Court considered these communications to be protected by the attorney-client privilege.<sup>279</sup> The Court then held there was no waiver, based on its “opinion that an adversary’s right to examine writings used to refresh memory must be limited by the greater sanctity accorded confidential communications between attorney and client.”<sup>280</sup> On the other hand, in *E.R. Carpenter Co. v. ABC Carpet Co., Inc.*, the Court ordered disclosure of a claimed memorandum which Plaintiff argued was protected by the attorney-client privilege.<sup>281</sup> It held that even if the memorandum were protected by the privilege, waiver was present by reason of the use of the memorandum to refresh the Plaintiff’s recollection prior to his deposition.<sup>282</sup> Noting that the

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276. See *McDonough v. Pinsley*, 657 N.Y.S.2d 33, 34 (App. Div. 1997); *Stern v. Aetna Cas. & Sur. Co.*, 552 N.Y.S.2d 730, 730 (App. Div. 1990); *Grieco v. Cunningham*, 512 N.Y.S.2d 432, 432 (App. Div. 1987); *Merrill Lynch Realty Commercial Servs. v. Rudin Mgt. Co.*, 462 N.Y.S.2d 16, 17 (App. Div. 1983); *Doxtator v. Swarthout*, 328 N.Y.S.2d 150, 152 (App. Div. 1974). In none of these cases was the privilege invoked specified.

277. *McDonough*, 657 N.Y.S.2d at 34; *Stern*, 552 N.Y.S.2d at 730; *Grieco*, 512 N.Y.S.2d at 432; *Merrill Lynch Realty Commercial Servs.*, 462 N.Y.S.2d at 17; *Doxtator*, 328 N.Y.S.2d at 152.

278. *Falk v. Kalt*, 253 N.Y.S.2d 188 (Sup. Ct. 1964).

279. *Id.* at 189.

280. *Id.*

281. *E.R. Carpenter Co. v. ABC Carpet Co.*, 415 N.Y.S.2d 351 (Civ. Ct. 1979).

282. *Id.* at 353.

issue before it was a “most difficult question as it seemingly places the essential attorney-client privilege in direct conflict with the just-as-essential right of cross-examination,”<sup>283</sup> the Court held “basic considerations of fair play” and the inspection right’s goal of preventing the admission of “manufactured evidence,” outweighed the goal of the attorney-client privilege.<sup>284</sup>

The First Department, departing from its view that any privilege is waived, held in *Beach v. Touradji Capital Management, LP*<sup>285</sup> that use of materials protected by the attorney work-product privilege used for refreshing recollection purposes does not result in a waiver of the privilege.<sup>286</sup> Citing in support a decision from the Third Department<sup>287</sup> and a decision from the Fourth Department,<sup>288</sup> which previously so held, the First Department concluded that due to the absolute nature of protection accorded that privilege, it could not be abrogated merely by its refreshing recollection use.<sup>289</sup> On the other hand, the Second Department in *Grieco v. Cunningham* held to the contrary.<sup>290</sup> The Court rejected an effort to treat attorney work-product protected writings differently, due to its unique policy, from other privileges where waiver is automatic.<sup>291</sup>

There is unanimity, however, among the courts with respect to documents protected by the materials prepared for litigation privilege – this privilege is waived.<sup>292</sup> The basis for this conclusion is the privilege’s conditional nature, *i.e.*, the privilege is defeated if it is shown that withholding it would result in injustice or undue hardship,<sup>293</sup> and not absolute as with the

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283. *Id.*

284. *Id.*

285. *Beach v. Touradji Cap. Mgmt., LP*, 949 N.Y.S.2d 666 (App. Div. 2012).

286. *Id.* at 669.

287. *Fernekes v. Catskill Reg’l Med. Ctr.*, 906 N.Y.S.2d 167, 170 (App. Div. 2010).

288. *Geffers v. Canisteo Cent. Sch. Dist. No. 463201*, 482 N.Y.S.2d 635, 636 (App. Div. 1984).

289. *Beach*, 949 N.Y.S.2d at 669-70.

290. *Grieco v. Cunningham*, 512 N.Y.S.2d 432, 432 (App. Div. 1987).

291. *Id.*

292. *See, e.g., Beach*, 949 N.Y.S.2d at 669-70; *Rouse v. Cty. of Greene*, 495 N.Y.S.2d 496, 496-97 (App. Div. 1985).

293. *Rouse*, 495 N.Y.S.2d at 497.

attorney work-product doctrine.<sup>294</sup> In essence, the basis for the waiver is the privilege itself as depriving the cross-examiner access to the writing is an unjust result.<sup>295</sup> Notably, the First Department has pointed out the different waiver result depending upon whether the document is protected by the attorney work-product privilege or the materials prepared for litigation purposes.<sup>296</sup>

The First Department in *Matter of Lenny McN* added another factor for consideration when waiver is in issue, the nature of the proceeding involved.<sup>297</sup> In this case the Court held a social worker's review of a confidential case file of a social worker prior to testifying in a Family Court proceeding to determine custody in the best interest of an infant did not constitute a wholesale waiver of the privileges that attached to the file.<sup>298</sup> In the Court's view, "the confidentiality and sensitivity of Family Court custodial litigation clearly call for stricter limitations [on the refreshing recollection privilege waiver rule]."<sup>299</sup> Whether privileges could ever be waived in a Family Court proceeding has not been the subject of any further discussion.

The conflicting decisions create much uncertainty as to whether a privilege is waived when the privileged material is used to refresh a witness's recollection before testifying at a trial or a deposition, with a potentially sweeping risk of waiver looming large by such use. Clarification by the Court of Appeals, if not by the Legislature, is needed.

What should be the nature of such clarification? There is much to commend the view that the attorney-client privilege and the attorney work-product privilege is not waived by a pre-trial or pre-deposition use of the material protected, based on their protective policies. Likewise, the conclusion that the materials prepared for litigation privilege is waived by use of material

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294. *Id.*

295. See MARTIN ET AL., *supra* note 124, at 548.

296. *Beach*, 949 N.Y.S.2d at 670. The court remanded the case to the trial court to determine which of the two privileges are applicable to the various types of material used for refreshing recollection purposes. *Id.*

297. *In re Lenny McN*, 584 N.Y.S.2d 17 (App. Div. 1992).

298. *Id.* at 18.

299. *Id.*

protected by that privilege for refreshing recollection purposes pre-trial or pre-deposition is based on supportable policy grounds. Adoption of these conclusion as part of New York's common law would eliminate the current uncertainty with workable waiver rule.

To be sure, this position is at odds with the conclusion that use of a writing or object to refresh the recollection of a witness while testifying waives any privilege that attaches to such material.<sup>300</sup> However, different treatment is warranted. In this regard, the waiver rule applicable to testifying witnesses is largely based on unfairness concerns that would be present if one party could freely use the material to refresh a witness's recollection on the witness stand while preventing other parties from ever seeing the material.<sup>301</sup> This situation has been described as "bizarre."<sup>302</sup> However, when the privilege material is used before a trial or deposition, the risk of unfairness is not that great when a privilege bars production of materials used before a trial or hearing.<sup>303</sup>

Nonetheless, a broad anti-waiver rule would create an untenable situation where the material is reviewed for refreshing recollection purposes shortly before testifying. Since the review is intended to refresh the witness's recollection on a matter the witness will soon testify about, the refreshing recollection process is in essence the equivalent of refreshing recollection while testifying. To argue that waiver cannot automatically occur because the process is not occurring "while testifying" . . . elevates form over substance," and thus is a questionable argument.<sup>304</sup> Certainly, the waiver rule applicable to witnesses "while testifying" should apply in this situation.

On balance, a workable and fair resolution of the privilege waiver issue would be that the attorney-client privilege and the attorney work-product privilege is not waived by the use of a writing or object protected by either of those privileges for refreshing a witness's recollection before testifying at a trial or hearing, but the material proposed for litigation privilege is

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300. See *supra* notes 210-12 and accompanying text.

301. See *supra* notes 210-11 and accompanying text.

302. MUELLER & KIRKPATRICK, *supra* note 5, § 6:94, at 593.

303. *Id.* at 597-98.

304. Cf. RICE ET AL., *supra* note 52, § 9:40, at 260.

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waived. While a court would have no discretion to rule otherwise, it would have discretion to determine whether a refreshing recollection process should be deemed to have occurred “while testifying” when the process occurs close to the witness’s appearance at the trial or deposition.

## V. Conclusion

What can an attorney learn from the above discussion of New York law as to the consequences of a witness reviewing privileged documents before testifying at a trial or deposition? There is a right of inspection given to opposing attorneys of writings used in a witness preparation session to refresh the witness’s recollection about a relevant fact before testifying at a trial or deposition where that writing had a clear impact on the witness’s testimony.

The fact that the writing is protected against disclosure by a privilege recognized in New York law may or may not preclude the exercise of that inspection right. Present law is decidedly unclear about the effect of a privilege claim raised in response to a demand for inspection.

Present law will obviously have a substantial overall effect on an attorney’s decision as to what should be provided to the witness for review, and how the refreshing recollection process is handled. Viewing that decision from the perspective of the opposing attorney, it can be expected that the attorney on his or her examination of the witness will ask: “Have you reviewed any materials in preparation for your testimony here?”; and if the answer is “Yes”, the immediate follow-up question will be: “Please specifically identify the materials reviewed.” From that point, the attorney will explore whether that review was engaged in in order to refresh the witness’s recollection, thereby triggering the inspection right.

How then should an attorney proceed in preparing a witness in advance of the witness’s testimony at a trial or deposition? Initially, it is imperative that the attorney proceed cautiously, lest a privileged document containing sensitive information ends up in the hands of the opposing party’s attorney. Indeed, the attorney should presume that any document used in the preparation session to refresh the recollection of a witness will



end up in the hands of the opposing attorney. The attorney should not just provide the witness with all the writings that could refresh recollection at the start of the preparation and ask the witness to review them. Rather, the attorney should start by asking the witness whether the witness remembers an event to determine whether the witness needs memory help. If the witness does not, then the attorney should review the pertinent writings that have potential for refreshing recollection and determine which of those writings are protected by privilege. Only the non-privileged writings should be provided to the witness. Where the only writing available for refreshing recollection purposes is privileged, the attorney will need to decide whether the witness's testimony is so important to the attorney's case that the possible loss of privilege is outweighed by the need for the testimony.

In sum, under present New York law an attorney preparing a witness cannot reasonably expect that the confidentiality of writings used in the course of the preparation will remain confidential, even if privileged. Full understanding of the consequences of showing a privileged writing, as discussed in this article, is necessary for the attorney to competently represent the attorney's client.