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Inspection of Privileged Materials Under Rule of Evidence 612

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INSPECTION OF PRIVILEGED MATERIALS UNDER RULE OF EVIDENCE 612

Witnesses routinely use privileged materials to refresh their memories for the purpose of testifying. Under the common law inspection of privileged, memory-refreshing materials was limited to those materials that a witness actually reviewed while testifying. Privileged materials reviewed by a witness prior to testifying were not subject to inspection. Recently enacted rules of evidence on both the federal and state levels have superseded the common law in this area, and there are indications that inspection of privileged materials may be expanded under the various evidentiary rules. This Note will examine the federal and Minnesota rules of evidence dealing with the inspection of memory-refreshing materials, and the impact these rules may have on witness preparation.

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I. INTRODUCTION

Attorneys unhesitatingly use documents to refresh a witness' memory either before or during testimony. The materials reviewed by the witness often consist of an attorney's work product or are subject to an attorney-client privilege. Under the common law, an opponent's right to inspect privileged, memory-refreshing documents was dependent upon when the documents were reviewed by the witness. Privileged materials used by a witness while testifying were subject to inspection. Privileged

1. See P. Rothstein, RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 233-34 (2d ed. 1980). The author states that the practice of preparing witnesses with the help of files is extensive:
   One practice of lawyers to save time, effort, or expense has been to lighten up on witness preparation and give the witness the file . . . . Under this practice, expert or lay witnesses or party-witnesses are prepared in whole or part by delivering over to them the lawyer's case file or portions thereof, for them to examine at some time prior to the hearing.

   Id.

2. See note 30 infra and accompanying text.
materials reviewed prior to testifying generally were not subject to inspection. Federal Rule of Evidence 612 may alter this practice by allowing inspection of privileged materials that a witness has relied upon before actually testifying. If Rule 612 operates in this manner, attorneys must be more selective in what they permit a witness to review or be faced with the possibility of forced disclosure of privileged information.

To date only a handful of courts have dealt with the effect of Rule 612 on privileged documents. Their conclusions are conflicting. This Note considers the purpose of Rule 612 and how the countervailing policies of privilege and disclosure may be resolved in civil litigation. In particular, the various constructions that might be given Federal Rule of Evidence 612 are examined. The corresponding Minnesota rule, identical to the federal rule for the purpose of this Note, is analyzed to determine if comparable interpretations are justified.

3. See note 29 infra and accompanying text.
4. FED. R. EVID. 612. The rule states in part:
   
   [I]f a witness uses a writing to refresh his memory for the purpose of testifying, either—

   (1) while testifying, or

   (2) before testifying, if the court in its discretion determines it is necessary in the interest of justice,

   an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

   Id. See also notes 32-35 infra and accompanying text.

5. Two federal district courts have held that privileged documents are subject to inspection under Rule 612. See Marshall v. United States Postal Serv., 88 F.R.D. 348, 350 (D.D.C. 1980); Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc., 81 F.R.D. 8, 9-10 (N.D. Ill. 1978). Two other federal district courts have indicated a willingness to employ the rule in a similar manner. See Cambridge Indus. Prods. Corp. v. Metal Works, Ltd., 4 Fed. R. Evid. Serv. 835, 837-38 (D. Mass. 1979); Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 616 (S.D.N.Y. 1977), rev'd in part on other grounds, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). Another district court has interpreted Rule 612 to permit inspection of work product that has been used to refresh a witness' memory, but not similarly used attorney-client materials. See Ramsey v. County of Fresno, 7 Fed. R. Evid. Serv. 950, 954 (E.D. Cal. 1980). Finally, one district court has refused to permit the rule to be used to allow inspection of any privileged documents used to revive a witness' memory prior to testifying. See Joseph Schlitz Brewing Co. v. Muller & Phipps, Ltd., 85 F.R.D. 118, 119-20 (W.D. Mo. 1980).

6. See notes 64-102 infra and accompanying text.

7. Rule 612 applies to both civil and criminal litigation. The purpose of the rule is the same as that of the Jencks Act § 102, 18 U.S.C. § 3500 (1976), to promote credibility of witnesses. See FED. R. EVID. 612, Advisory Committee's Note; 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 612[02], at 612-22 to 23 (1978). This Note, however, will consider only the application of the rule in civil cases.

8. MINN. R. EVID. 612.

9. The Minnesota rule is subject to the Minnesota Rules of Criminal Procedure. Id. ("Except as otherwise provided in criminal proceedings by the rules of criminal procedure"). The federal rule in criminal actions is limited by 18 U.S.C. § 3500 (1976). Regarding civil litigation, the Minnesota rule's wording is substantially similar to that of the federal rule. Compare MINN. R. EVID. 612 with FED. R. EVID. 612.
II. PRERULE PRACTICE

Because of the substantial length of time between events that give rise to a lawsuit and the actual trial, witnesses may not be able to recall important aspects of a case. To overcome this problem a witness is permitted to refresh his memory with a variety of aids, most often written documents. While this practice facilitates accurate testimony, it presents several problems. A witness’ memory may not in fact be revived, and his testimony may be based solely upon the memorandum. The proper purpose of the memorandum is to prompt a witness’ independent memory and not merely to substitute the writing for the witness’ actual recollection. Improper use of a writing by a witness may be deliberate or subconscious. The memorandum also may enable counsel to suggest to a witness what the witness’ memory should be. Finally, few standards have been developed to assure trustworthiness of memory-refreshing

10. See United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946) (“a song, a scent, a photograph, and allusion, even a past statement known to be false” can be used to revive a witness’ memory), cert. denied, 329 U.S. 806 (1947); C. MCCORMICK, MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE § 9, at 15-16 (2d ed. E. Cleary ed. 1972); 3 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 758, at 125 (J. Chadbourn rev. 1970).

11. See note 15 infra and accompanying text.

12. See United States v. Riccardi, 174 F.2d 883, 889 (3d Cir.), cert. denied, 337 U.S. 941 (1949). In Riccardi, Judge Kalonder described the difficulty of measuring the impact a writing can have on a witness as follows:

Of course, the categories, present recollection revived and past recollection recorded, are clearest in their extremes, but they are, in practice, converging rather than parallel lines; the difference is frequently one of degree. Moreover, it is in complication thereof that a cooperative witness, yielding to suggestion, deceives himself, that a hostile witness seizes an opportunity, or that a writing is used to convey an improper suggestion.

Id.

13. Cf. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233 (1940) (document may result in improper communication with witness by counsel); NLRB v. Federal Dairy Co., 297 F.2d 487, 489 (1st Cir. 1962) (improper to refresh witness’ memory with specially prepared testimonial notes); United States v. Riccardi, 174 F.2d 883, 889 (3d Cir.) (“trial judge must determine whether the device of refreshing recollection is merely a subterfuge to improperly suggest to the witness the testimony expected of him”), cert. denied, 337 U.S. 941 (1949); Note, Interactions Between Memory Refreshment Doctrine and Work Product Under the Federal Rules, 88 YALE L.J. 390, 403 (1978) (inspection may prevent improper communication).

Not only can counsel improperly coach a witness under the guise of memory refreshment, he can expose the jury to inadmissible documents. See, e.g., Goings v. United States, 377 F.2d 753, 760 (8th Cir. 1967) (improper for counsel to read contents of document before the jury under pretext of refreshing witness’ recollection) (quoting Young v. United States, 214 F.2d 232, 238 (D.C. Cir. 1954)); Freeland v. Peltier, 44 S.W.2d 404, 409 (Tex. Civ. App. 1931) (trial court properly excluded testimony based solely upon contents of memorandum).
memoranda because the witness' testimony, not the document, is the evidence.

Two basic safeguards were developed under the common law to counter these potential abuses. The first safeguard was designed to structure the discretion of the trial court in allowing the use of memory-refreshing aids. Courts were to use a three-step analysis. First, a court had to find that a witness' memory on a particular topic was exhausted. The court then had to find that the possibility of undue influence from the use of the document outweighed the chance of the

14. For example, the memory-refreshing document need not be made by the witness. See, e.g., Thompson v. United States, 342 F.2d 137, 139-40 (5th Cir.), cert. denied, 381 U.S. 926 (1965); Johnston v. Earle, 313 F.2d 686, 688 (9th Cir. 1962), cert. denied, 373 U.S. 910 (1963); People v. Griswold, 405 Ill. 533, 539, 92 N.E.2d 91, 95 (1950); Commonwealth v. McDermott, 255 Mass. 575, 578, 152 N.E. 704, 706 (1926); Litchfield v. Paynesville, 258 Minn. 210, 216, 103 N.W.2d 402, 407 (1960) (quoting Ostrowski v. Mockridge, 242 Minn. 265, 274, 65 N.W.2d 185, 191 (1954)).

The writing need not be the original. See, e.g., Lugo v. United States, 370 F.2d 992, 994-95 (9th Cir. 1967); Johnston v. Earle, 313 F.2d 686, 688 (9th Cir. 1962), cert. denied, 373 U.S. 910 (1963); Ammon v. Illinois Cent. R.R., 120 Minn. 438, 442, 139 N.W. 819, 820 (1913); Douglas v. Leighton, 57 Minn. 81, 83, 58 N.W. 827, 827-28 (1894).

As long as the event was still fresh in the witness' mind when the writing was made, the writing does not have to have been made contemporaneously with the event. See, e.g., United States v. Tolbert, 367 F.2d 778, 781 (7th Cir. 1966); Litchfield v. Paynesville, 258 Minn. 210, 216, 103 N.W.2d 402, 406-07 (1960); Farmers Elevator Co. v. Great N. Ry., 131 Minn. 152, 155, 154 N.W. 954, 956 (1915); Sagers v. International Smelting Co., 50 Utah 423, 427, 168 P. 105, 107 (1917); State v. Little, 57 Wash. 2d 516, 519, 358 P.2d 120, 122 (1961); 3 J. WIGMORE, supra note 10, § 791, at 133.

Some courts also do not require the witness to verify the accuracy of the memorandum. See United States v. McKeever, 169 F. Supp. 426, 428-29 (S.D.N.Y. 1958). But see Ostrowski v. Mockridge, 242 Minn. 265, 274, 65 N.W.2d 185, 191 (1954); cf. Tebeau v. Baden Equip. & Constr. Co., 295 S.W.2d 184, 189 (Mo. Ct. App. 1958) ("witness . . . may be permitted to refer to another's writing or record that he himself knows to be correct").


If the memorandum does not refresh the witness' recollection, the memorandum may be admitted into evidence under the past recollection recorded exception to the hearsay rule. See MINN. R. EVID. 803(5). To be admissible as past recollection recorded, however, the document must meet several qualifications: (1) the witness must have once had knowledge of the matter the document relates to; (2) the document must be shown to have been made or adopted by the witness; (3) when the event was still fresh in the witness' memory; and (4) the document must reflect such knowledge accurately. See id. These stringent requirements considerably narrow the materials that are admissible pursuant to Rule 803(5) as opposed to the material that can prompt testimony as a memory refresher. See C. MCCORMICK, supra note 10, § 9, at 16; note 14 supra.

The difference between past recollection recorded and present recollection revived is a constant source of confusion to the courts. See generally Comment, Witness' Use of Memoranda: Present Recollection Revived and Past Recollection Recorded, 6 CUM. L. REV. 471 (1975).

16. See C. MCCORMICK, supra note 10, § 9, at 17; 3 J. WEINSTEIN & M. BERGER, supra note 7, ¶ 612[01], at 612-12.

17. See 3 J. WEINSTEIN & M. BERGER, supra note 7, ¶ 612[01], at 612-12.

18. See Goings v. United States, 377 F.2d 753, 760 (8th Cir. 1967); City of Minneapolis v. Price, 280 Minn. 429, 435, 159 N.W.2d 776, 781 (1968) ("memoranda should not be used to refresh a witness' memory unless it is first ascertained whether the witness can
witness’ memory being revived.\textsuperscript{19} Finally, the court had to find that the witness’ recollection actually was refreshed by the aid.\textsuperscript{20}

The second and arguably more effective safeguard,\textsuperscript{21} now embodied in Rule 612, was to allow opposing counsel to inspect the memory-refreshing document and use it in the cross-examination of the witness.\textsuperscript{22} In this way opposing counsel was afforded “a good opportunity to test the credibility of the witness’s claim that his memory has been revived, and to search out any discrepancies between the writing and the testimony.”\textsuperscript{23} Under the common law, an opposing party had an absolute right to inspect an unprivileged, memory-refreshing document when memory refreshment occurred on the witness stand.\textsuperscript{24} When a witness reviewed unprivileged, memory-refreshing material prior to testifying it was within the discretion of the trial court whether to allow inspection.\textsuperscript{25} Courts usually found inspection was not warranted\textsuperscript{26} because it was
feared that inspection of such materials would result in excessive prying into an opponent's files. The modern trend rejected this reasoning, apparently under the premise that the danger of false or misleading testimony exists in both on-the-stand and prior-to-trial review.

As with unprivileged documents, a party's right of inspection of privileged material under the common law was dependent upon the time of the witness' review. Inspection of privileged documents used prior to testifying was within the discretion of the court. If review occurred during the witness' testimony, however, inspection was allowed because use of privileged material on the stand constituted a waiver of the privilege.

III. Federal Rule 612

To determine the effect that Rule 612 should have on privileged material, three areas must be considered: (1) the plain language of the rule and its legislative history; (2) the practical consequences of permitting inspection under the rule; and (3) the conflicting policies of privilege and disclosure.

A. Plain Language and Legislative History

On its face, Federal Rule 612 does not exempt privileged documents from its scope. Had the rule been meant to give special protection to privileged material, it would have been a simple matter to indicate this intention explicitly. The legislative history, however, makes a broad


27. See C. McCormick, supra note 10, § 9, at 18 ("Doubtless the courts have thought that to require inspection of such papers may unduly encourage prying into an opponent's file"). Furthermore, when a witness reviews documents out of court, the judge cannot be certain of which documents may have refreshed the witness' memory. Cf. Note, supra note 13, at 393 (because pretrial inspection does not occur before the judge, more difficult to determine scope of any inspection).


30. See id. ("counsel is entitled to inspect even a privileged document which is used by a witness to refresh his recollection when testifying"); Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 13 (N.D. Ill. 1972) (waiver of attorney-client privilege and work product by allowing witness to review documents during deposition); cf. United States v. Nobles, 422 U.S. 225, 239 n.14 (1975) ("where . . . counsel attempts to make a testimonial use of [work-product] materials the normal rules of evidence come into play with respect to cross-examination and production of documents").

31. For example, the Alaska rule specifically provides that when a claim of privilege arises the court shall inspect the document in camera and "rule on any claim of privilege
interpretation difficult.

1. On-The-Stand Review

The language of Rule 612 gives an opposing party an unqualified right to inspect writings used by a witness while testifying. The fact that the document is privileged does not seem to indicate a different result. The Advisory Committee’s Note states the rule’s “treatment of writings used to refresh recollection while on the stand is an accord with settled doctrine.” Since prereule practice allowed inspection of privileged documents that were used while testifying, Rule 612 should not alter the right of inspection.

In the only reported case involving Rule 612 and on-the-stand review of privileged documents, *Cambridge Industrial Products Corp. v. Metal Works, Ltd.*, the federal district court for the District of Massachusetts declined to order disclosure of an attorney’s work product that a witness had reviewed during his deposition. In apparent disregard of the plain language of Rule 612, the *Cambridge* court held a party’s right to inspect privileged materials used to refresh a witness’ memory during testimony is not absolute. Rather, the right to inspect is within the court’s discretion.

raised.” ALASKA R. EVID. 612(c). If the court upholds the privilege, the privileged or irrelevant portions of the refreshing document are not subject to adverse inspection even if the review occurred on the witness stand. See id. 612(a).

32. See FED. R. EVID. 612.
33. Id., Advisory Committee’s Note.
34. See note 30 supra.
35. [T]here is no room to doubt that in accordance with pre-Rules practice the operation of privilege law and the work product doctrine is very different. Quite simply, the questioning party waives any claim of privilege which he might otherwise have when he uses a writing to refresh the recollection of a witness while testifying, at least to the extent necessary to satisfy the purposes of Rule 612.


Discussion on the floor of the House also indicates that work product used to refresh a witness’ memory while testifying is subject to disclosure under the rule: “If [work product] . . . was used to refresh the memory of a witness would it not then be subject to inspection? If it were used while testifying, [sic] If it were used before testifying there are different limitations on it.” 120 CONG. REC. 2381 (1974).

37. Id. at 835-37.

The Federal Rules of Evidence apply to depositions as well as trials. See FED. R. CIV. P. 30(c) (“Examination and cross-examination of witnesses in depositions may proceed as permitted at trial under the provisions of the Federal Rules of Evidence”). The corresponding Minnesota rule of procedure is not as explicit, referring only generally to the examination of hostile witnesses and adverse parties. See MINN. R. CIV. P. 30.03. Deposition testimony is admissible evidence under Minnesota practice. See id. 32.01. Therefore, it would seem logical that MINN. R. EVID. 612, which acts to test the accuracy of testimony, would apply to deposition proceedings.

38. See 4 Fed. R. Evid. Serv. at 837. In part, the *Cambridge* court based its holding on
The result in Cambridge stemmed from the district court’s reliance on another federal district court decision, Berkey Photo, Inc. v. Eastman Kodak Co. In Berkey, the court denied a Rule 612 motion to inspect work-product documents that had been reviewed by witnesses prior to testifying. Because the witnesses’ review occurred before the witnesses had given their testimony, the Berkey court clearly was within the plain meaning of Rule 612 by exercising its discretion against disclosure. The Cambridge court, however, did not concern itself with the distinction embodied within the language of the rule between on-the-stand and prior review. The Cambridge court merely followed the reasoning of Berkey, even though the factual circumstances were distinctly different. The Cambridge decision, therefore, is questionable and should not be viewed as a correct application of Rule 612. Although the Cambridge court may have misconstrued Rule 612 with respect to the instant case, the court did not reject out of hand the possibility that Rule 612 may be used to overcome privilege claims. Instead, the court indicated that in future cases any party resisting disclosure of privileged documents used to refresh a witness’ memory would have the burden of persuading the court that inspection was not proper under the circumstances.

39. 74 F.R.D. 613 (S.D.N.Y. 1977), rev’d in part on other grounds, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). The Cambridge court’s reliance upon Berkey is emphasized by this statement: “[T]his court has chosen to borrow a page—if not a chapter—from Judge Frankel in Berkey Photo, Inc....” 4 Fed. R. Evid. Serv. at 836.

40. 74 F.R.D. at 615-17.

41. See note 43 infra and accompanying text.

42. [T]his court does not intend to suggest that in all, or any, future cases, a balancing test such as used in the present case should be the proper approach. . . . Thus, this order should not be construed as precedent to be mechanistically applied in the future. To the contrary, it should be considered as a suggestion to the Bar that the interplay between Rule 612 and the work product doctrine (and perhaps other non-constitutional privileges) is a real one . . . . Accordingly, in future cases which are referred to this court, counsel who resist disclosure of work product material vis a vis application of Rule 612 should be prepared to make a clear and compelling showing why the provisions of Rule 612 (and the underlying rationale of those provisions) should yield to the qualified work product privilege.

4 Fed. R. Evid. Serv. at 837-38. Judge Frankel, in Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977), rev’d in part on other grounds, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980), similarly warned that in future cases the court would be less inclined to reject claims for disclosure of privileged materials under Rule 612. Id. at 617 (“To put the point succinctly, there will be hereafter powerful reason to hold that materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties.”).
2. Prior Use

The effect of Rule 612 on privileged material used to refresh a witness' memory prior to testifying is even less clear. Inspection in instances of prior use is allowed "if the court in its discretion determines [inspection] . . . is necessary in the interests of justice." Retention of this discretionary aspect of the rule corresponds to the common-law approach and may indicate that Congress did not intend to modify the past practice of prohibiting inspection of documents used prior to testifying. This interpretation is supported by the fact that as originally proposed Rule 612 would not have recognized a distinction between prior and concurrent use. Regardless of when a witness reviewed documents, the opposing party would have had an absolute right of inspection.

In *Joseph Schlitz Brewing Co. v. Muller & Phipps, Ltd.*, the federal court for the Western District of Missouri stated that Rule 612 was a mere codification of the common law. The court interpreted this to mean that "little if any widening of disclosure obligations" resulted from the enactment of the rule. The court further indicated that privileged documents should be given "special discretionary safeguards against disclosure."

The legislative history of Rule 612, however, clearly shows that the rule was intended to be more flexible. The Advisory Committee's Note expresses the view that the rule is a step away from the rigid, common-law classification between prior and concurrent review. The report of

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44. *See* note 25 *supra* and accompanying text.
45. *See* note 26 *supra* and accompanying text.
46. The rule, as initially promulgated, read in part: "If a witness uses a writing to refresh his memory, either before or while testifying, an adverse party is entitled . . . to inspect it . . ." Fed. R. Evid. 6-12 (Preliminary Draft 1969), *reprinted in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES 134-35 (1969) (emphasis added).
47. 85 F.R.D. 118 (W.D. Mo. 1980).
48. *Id* at 119 (dictum) ("The language ultimately adopted is said to codify 'existing federal law.' "). *See generally* 3 D. LOUISELL & C. MUELLER, *supra* note 35, § 351, at 534-36.
49. 85 F.R.D. at 119.
50. *Id* at 120.
51. The bulk of case law has, however, denied the existence of any right of access by the opponent when the writing is used prior to taking the stand, though the
the House Committee on the Judiciary also indicates that the discretionary aspect of the rule was retained to prevent the wholesale disclosure of a large number of documents that a witness might have reviewed prior to testifying. This appears to be a concession to practicality rather than an approval of prerule practice. The theory, therefore, that Rule 612 represents a new attitude toward disclosure of documents used to refresh a witness' recollection cannot be dismissed easily.

Regardless of how Rule 612 changes past practice, the rule should not be construed mechanically so that all materials reviewed prior to testifying are either immune from disclosure or open to inspection. Except for privileged materials, the rule may promote inspection of most materials used prior to testifying. This construction conforms to both the view of the Advisory Committee that the rule generally favors disclosure and the statement by the House Committee on the Judiciary 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." Thus, under this interpretation the rule would represent an expansion over the common law in that many materials reviewed prior to testifying would be open to inspection although privileged documents would remain protected.

An interpretation that favors inspection of only nonprivileged materials used before the witness takes the stand may harmonize conflicting views of Rule 612, but such a construction may not be justified.

FED. R. EVID. 612, Advisory Committee's Note (citations omitted).

52. The Committee amended the Rule so as still to require the production of writing 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. The Committee considered that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial.


53. Representative Hungate described some of the potential problems that concerned the Committee:

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.

120 CONG. REC. 2381-82 (1974).

54. See note 51 supra.

55. REPORT OF COMMITTEE ON THE JUDICIARY, supra note 52, at 13.

56. See Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 616 (S.D.N.Y. 1977) ("There are intimations that Rule 612 was intended to leave privileges generally untouched, but other evidences weigh against a conclusion that the subject can approach
House Committee’s comment with respect to the assertion of privileges is not limited to cases of prior review, and inspection of privileged documents used by a witness on the stand seems to be permissible. It appears to be incorrect, therefore, to read the House Committee’s comment as a prohibition of the use of Rule 612 to inspect any privileged materials.

The wording of Rule 612 and its legislative history provide courts with no concrete guidelines for applying the rule. The legislative history has been viewed to prohibit inspection of privileged documents reviewed prior to testifying. Courts that have allowed, or are willing to allow, Rule 612 to overcome privilege claims, however, obviously have not regarded the legislative history as dispositive on the issue of inspection.

**B. Practical Consequences of the Rule**

At least with respect to the inspection of privileged documents, the strongest arguments against interpreting Rule 612 as a sweeping, substantive change in the common law are the practical consequences of such a construction. The most obvious problem is the ease with which the rule could be circumvented in cases of prior review. Instead of simply handing documents over to a witness for review, an attorney could use the privileged materials to coach the witness verbally. This practice, apart from avoiding Rule 612, would present the danger of substituting counsel’s testimony for that of the witness. When the witness reviews documents, he should be refreshing his own memory independently.

Furthermore, forcing a “stark” choice between allowing a witness to review privileged documents and testify fully or testify from his un-

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57. See notes 32-35 supra and accompanying text.
60. Because the witness had never reviewed the document personally, Rule 612 may not apply. Opposing counsel, however, could argue that the document has affected the witness’ memory just as if he had reviewed the document itself and thereby be within the scope of the rule. Although such an argument may be technically correct, no criteria exist to determine exactly which documents in fact refreshed the witness’ recollection. In all likelihood, the witness would not know which particular document had been used by counsel, if the witness even realized that his memory had been refreshed by the use of a writing. Therefore, it would be difficult both to determine if the rule’s requirements are initially met and which documents, if any, were relied upon by the witness in formulating his testimony. See notes 89-96 infra and accompanying text.
refreshed recollection actually may deprive the court of valuable information. Counsel may in fact decide to withhold the privileged documents from a witness because of the possibility of forced disclosure. This would preclude the witness with an uncertain or blank memory from testifying. Ironically, the rule, rather than promoting "the ascertainment of the truth" by bringing more information before the court, could result in less information or inaccurate testimony. In one federal district court's view, the risk of "fabrication and mistake" that could result from not permitting inspection of privileged materials used to revive a witness' recollection simply does not outweigh the benefits gained by allowing unfettered witness review. Certainly, the use of nonprivileged documents to refresh a witness' memory would avoid disclosure problems. There may be circumstances, however, in which the only thing that could refresh the witness' memory is privileged.

C. Privilege and Disclosure

Any meaningful evaluation of Rule 612 must take into account the conflicting principles of privilege and disclosure. In fact, the manner in which courts have interpreted the rule corresponds with the priority that the particular court has given the two doctrines. Courts that consider protection of privileged materials to be of greater importance than allowing a party to inspect documents that a witness has reviewed probably will not allow Rule 612 to overcome a privilege. The federal court for the Western District of Missouri, in Joseph Schlitz Brewing Co. v. Muller & Phipps, Ltd., explained that the need to keep confidential matters secret "overrides" the need for disclosure. On the other hand, courts willing to permit inspection of privileged documents under Rule 612 emphasize the desirability of permitting disclosure to as great a degree as possible. These courts rely upon the premise that the "paramount purpose" of the rules of discovery and evidence is the "ascertainment of the truth," and that this purpose is best achieved by making available to

62. See notes 66-67 infra and accompanying text.
63. See Joseph Schlitz Brewing Co. v. Muller & Phipps, Ltd., 85 F.R.D. 118, 120 n.2 (W.D. Mo. 1980).
64. 85 F.R.D. 118 (W.D. Mo. 1980).
65. Id. at 120 n.2.
67. See Cambridge Indus. Prods. Corp. v. Metal Works, Ltd., 4 Fed. R. Evid. Serv. 835, 837 (D. Mass. 1979) ("the spirit—if not the letter—of Rule 612 is the ascertainment of the truth, and that worthy goal might well outweigh the rationale underpinning the work product doctrine"); Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc., 81 F.R.D. 8, 10 (N.D. Ill. 1978) ("If the paramount purpose of federal discovery rules is the ascertainment of the truth, the fact that a document was used to refresh one's recol-
the parties and the court as much reliable information as possible. Since Rule 612 enables a party to test the accuracy of witnesses' testimony more thoroughly, a broad application of the rule is justified under this view.

1. Waiver

In light of the long-standing recognition given privileges by the courts, the policy of full disclosure, without more, would not justify inspection under Rule 612 of privileged materials reviewed by a witness. The very purpose of privileges is to protect certain information from disclosure. When the privilege has been expressly or impliedly waived, however, inspection of privileged documents under the rule may be warranted. Indeed, the decisions involving privileges under Rule 612 discuss the possible applicability of waiver.

To be protected from disclosure in judicial proceedings, information covered by a privilege must be kept confidential. A breach of confidentiality is deemed a waiver of the privilege and the information is subject to disclosure. When a client consents to a witness reviewing documents

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68. See, e.g., United States v. Goldfarb, 328 F.2d 280, 281 (6th Cir.) (communications between attorney and client are "privileged from disclosure, even for the purposes of the administration of justice"); cert. denied, 377 U.S. 976 (1964); Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 144 (D. Del. 1977) (same); National Textile Corp. v. Hymes, 282 N.W.2d 890, 895 (Minn. 1979) (attorney-client communications are protected from disclosure); Kahl v. Minnesota Wood Specialty, Inc., 277 N.W.2d 395, 398 (Minn. 1979) (same); 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291, at 554 (McNaughton rev. 1961) ("the privilege remains an exception to the general duty to disclose").


70. See, e.g., United States v. Pipkins, 528 F.2d 559, 563 (5th Cir.) (it is essential to claim of privilege that communication was made and maintained in confidence); cert. denied, 426 U.S. 952 (1976); In re Horowitz, 482 F.2d 72, 81-82 (2d Cir.) (same); cert. denied, 414 U.S. 867 (1973); In re Berkley & Co., 466 F. Supp. 863, 870 (D. Minn. 1979) (same); In re Victor, 422 F. Supp. 475, 476 (S.D.N.Y. 1976) (same); Schwartz v. Wenger, 267 Minn. 40, 42, 124 N.W.2d 489, 491 (1963) (attorney-client privilege limited to confidential communications); Brown v. St. Paul City Ry., 241 Minn. 15, 34, 62 N.W.2d 688, 700 (1954) (same). See generally 8 J. WIGMORE, supra note 68, § 2311.

71. See, e.g., In re Horowitz, 482 F.2d 72, 81 (2d Cir.) ("disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of the privilege"); cert. denied, 414 U.S. 867 (1973); United States v. Cote, 456 F.2d 142, 145 (8th Cir. 1972) ("disclosure effectively waived the privilege"); In re Langswager, 392 F. Supp. 783, 786 (N.D. Ill. 1975) (once information is "revealed to third persons the element of confidentiality is
that are protected by the attorney-client privilege, it is apparent that the client does not consider the contents of such documents to be sufficiently sensitive to be kept secret. The witness' testimony in open court about the topic, at least indirectly, serves to support the assumption that the party no longer should be afforded the protection of the privilege. In principle the same argument applies to attorneys who permit witnesses to review work product. A waiver may occur from witness review,

72. See, e.g., United States v. King, 484 F.2d 924, 927-28 (10th Cir. 1973) (putting former attorney on stand to testify about privileged matters waives attorney-client privilege); People v. Poulin, 27 Cal. App. 3d 54, 64, 103 Cal. Rptr. 623, 630 (1972) (failure to object to testimony concerning privileged information that witness overheard waives privilege); State ex rel. Schuler v. Tahash, 278 Minn. 302, 308, 154 N.W.2d 200, 205 (1967) (by discussing professional communication client impliedly waives privilege); cf. Julrik Prods., Inc. v. Chester, 38 Cal. App. 3d 807, 811, 113 Cal. Rptr. 527, 529 (1974) (waiver where client testified on cross-examination as to privileged topic).

73. The attorney-client privilege and the work-product privilege are based upon different policy considerations. Therefore, the waiver of one does not necessarily mean that the other also is waived. See Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 483 n.12 (4th Cir. 1973). Because the purpose of the work-product doctrine is to shield attorney's mental impressions, opinions, and legal theories from opposing counsel, see Hickman v. Taylor, 329 U.S. 495, 509-12 (1947), courts have held that merely showing work-product documents to third parties does not constitute a waiver. See, e.g., GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979); American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 446 (W.D. Mo. 1976). The rationale for this result is:

The work-product concept, however, designed as it is to promote the effectiveness of the lawyer's trial preparations, focuses on litigation. The policies supporting the concept do not seem to require general secrecy, but merely secrecy from possible adversaries. In so far as trial preparations may be communicated to third persons without substantially increasing the opportunities for potential adversaries to obtain the information, it seems that work-product protection should continue. Therefore, disclosure of work-product materials to people with a general common interest, such as business advisers of a client, does not warrant the conclusion that the protection has been waived. Furthermore, the technical rules of waiver developed with respect to the attorney-client privilege have been influenced, at least in part, by the fact that the privilege is absolute. Since the work-product protection only exists in the absence of a showing of good cause, there is less need to look for behavior indicating a waiver.


On the other hand, courts have held testimonial use of work product to be a waiver. See, e.g., United States v. Nobles, 422 U.S. 225, 239 n.14 (1975); In re Murphy, 560 F.2d 926, 339 n.24 (8th Cir. 1977); Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222-23 (4th Cir. 1976). Refreshing a witness' memory with work-product documents and then having him testify would seem to fall within the testimonial-use waiver mentioned above:

The tendency has been to confine the [work-product] doctrine to analysis and trial strategy, as it is antithetical to any general policy favoring disclosure. Can an attorney who uses notes, memoranda, or other private material to refresh the
thereby eliminating any reason to protect the material from disclosure.

In *Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc.*, the federal court for the Northern District of Illinois used this analysis. The *Wheeling-Pittsburgh* court held that the plaintiff waived the attorney-client privilege by allowing a witness to review a privileged file in preparation for a deposition. Because the privilege was lost through the waiver, defendant was granted the right to inspect the file pursuant to Rule 612.

Another common-law waiver rule has application in cases of memory refreshment. This rule prevents a party from disclosing portions of a privileged communication selectively. Once disclosure passes a certain point, fairness dictates that the privilege be waived and that opposing

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The use of work product to refresh a witness’ memory may not be proper in any event because the practice could be tantamount to leading the witness. See 3 J. Weinstein & M. Berger, supra note 7, ¶ 612[04], at 612-33 (“Resort to notes embodying an attorney’s theories and mental impressions could be barred on analogy to the prohibition against leading [questions], without reaching the question of whether production of the notes would be barred by a work product rule.”) (footnote omitted). Moreover, since witnesses generally may testify only to facts not opinions, see Note, supra note 13, at 404 n.90, the opinions and thought processes contained in attorney’s work product are not proper topics for testimony.

74. 81 F.R.D. 8 (N.D. Ill. 1978).

75. Id. at 9. A recent decision, Marshall v. United States Postal Serv., 88 F.R.D. 348 (D.D.C. 1980), has concurred with the *Wheeling-Pittsburgh* court that permitting a witness to refresh his memory with the use of privileged documents results in a waiver of such privilege. See id. at 350 (“it is also apparent that once a document is used to refresh the recollection of a witness, privileges as to that document have been waived”).

76. The *Wheeling-Pittsburgh* court stated: “[W]e find that Mr. Flanders’ use of said documents to refresh his recollection immediately prior to his deposition hearing, served as effective waiver of any such privilege. Consequently, said documents are discoverable pursuant to Rule 612 . . . .” 81 F.R.D. at 9.

77. See, e.g., Kungl Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 32 F.2d 195, 201 (2d Cir. 1929); Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976); IT & T Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973); Lee Nat’l Corp. v. Deramus, 313 F. Supp. 224, 227 (D. Del. 1970); cf: Swanson v. Domning, 251 Minn. 110, 118, 86 N.W.2d 716, 722 (1957) (client cannot testify to part of privileged communication and then try to exclude remainder).

The party against whom the waiver applies does not have to intend that the partial disclosure operate as a waiver. See Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954); 8 J. Wigmore, supra note 68, § 2327, at 636 (“when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not”). But see Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955) (must be evidence that client intended to waive privilege). Thus, when a witness is allowed to review privileged materials to refresh his memory and then testify on the subject matter of the privilege, a waiver should result, even
counsel be allowed an opportunity to inspect the document to prevent fraud or unfair advantage.\textsuperscript{78} A witness whose memory is refreshed by review of a privileged document may represent an example of such partial disclosure because the testimony may reflect only certain portions of the document. If a privilege bars an opponent from cross-examining the witness with the aid of the memory-refreshing document, the witness' testimony essentially would go unchallenged.\textsuperscript{79} Yet, the attorney, upon inspection, may be able to establish that the remainder of the document contains conflicting information or show that the witness misinterpreted parts of the document.

If the holder of the privilege reviews a document and then testifies, no waiver has occurred because no one outside the scope of the privilege sees the material. A waiver based upon partial disclosure, however, would encompass such a practice. This type of waiver is initiated by the mere act of revealing a portion of the privileged material.

Problems exist, however, with applying waiver theories to instances of memory refreshment. If the client has not consented directly to a witness reviewing the privileged materials in question, it is uncertain whether a waiver of the attorney-client privilege is appropriate. Since the privilege belongs to the client and not counsel,\textsuperscript{80} normally only the client may waive the privilege.\textsuperscript{81} If an attorney permits a witness to review privately though the party did not know that the witness' testimony would deal with the privileged topic.

\textsuperscript{78} See, e.g., International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 92 (D. Del. 1974) ("manifestly unfair to allow Fibreboard to make factual assertions and then deny International an opportunity to uncover the foundation for those assertions in order to contradict them"); IT & T Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973) ("privilege was intended as a shield, not a sword. Consequently, a party may not insist upon the protection of the privilege for damaging communications while disclosing other selected communications because they are self-serving."); American Optical Corp. v. Medtronic, Inc., 56 F.R.D. 426, 432 (D. Mass. 1972) ("Serious questions of fairness arise especially when a party makes statements under oath to secure for himself a benefit while denying his opponent, under a claim of privilege, the opportunity to contradict those statements."); cf. Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 42-43 (E.D.N.Y. 1973) (partial disclosure not a waiver in light of specific agreement between the parties to that effect).

\textsuperscript{79} In Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977), rev'd in part on other grounds, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980), the court stated:

\textit{[I]t is disquieting to posit that a party's lawyer may "aid" a witness with items of work product and then prevent totally the access that might reveal and counteract the effects of such assistance. . . . Again, however, the sweeping language of the cited authorities [on work product protection] has never been challenged by an instance where such immunized materials have been deliberately employed to prepare—and thus, very possibly, to influence and shape—testimony, with the anticipation that these effects should remain forever unknowable and undiscoverable.}

\textit{Id. at 616.}

\textsuperscript{80} See generally 8 J. WIGMORE, supra note 68, at § 2321.

\textsuperscript{81} See, e.g., Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir.
leged documents to refresh the witness’ recollection, it is unclear whether this constitutes a legitimate waiver of the client’s privilege. The courts that have construed Rule 612 to date have not been confronted with this issue. Nevertheless, when the control that an attorney possesses over the tactical decisions of litigation is considered, the attorney should be held to have the implied authority to waive the client’s privilege by allowing witness review.\(^{82}\) Because the client also gains the benefit of the witness’ testimony, a waiver would appear to be an equitable result.

An additional problem is posed by the application of waiver to memory refreshment given the limits of Rule 612. The rule is specifically designed to facilitate inspection of only those writings that have an effect on a witness’ testimony.\(^{83}\) It is not a general discovery device.\(^{84}\) Al-

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\(^{82}\) Since the attorney has implied authority from the client...


\(^{84}\) Under the discovery rules, a party can inspect materials “regarding any matter, not privileged, which is relevant... It is not ground for objection that the material sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” MINN. R. CIV. P. 26.02(1). The federal rule is to the same effect. See FED. R. CIV. P. 26(b)(1).

As a rule of evidence, Rule 612 is not concerned with materials that might lead to admissible evidence. The witness’ testimony, which may be in part the result of reviewing privileged materials, is already in evidence. The need to test the credibility of the testimony, therefore, is an immediate one. This need, however, is limited to only those documents that did in fact affect the testimony. The cases indicate that inspection of materials under Rule 612 have been restricted in exactly this manner. See Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc., 81 F.R.D. 8, 10-11 (N.D. Ill. 1978) (party cannot search an opponent’s files in “wholesale fashion”); Prucha v. M & N Modern Hydraulic Press Co., 76 F.R.D. 207, 210 (W.D. Wis. 1977) (“not authorizing ‘fishing expedition’ into files”).
though some courts have restricted waivers arising from partial disclosure to the narrow subject matter actually revealed,85 other courts have held such waivers to embrace all privileged documents dealing with the same topic.86 Without considering the relative merits of the two approaches in general, the former more clearly is suited to situations of memory refreshment.87 Any broader waiver would go beyond the purpose of Rule 612 because materials the witness had never seen, and which therefore could not have influenced the witness' testimony, suddenly would be open to the scrutiny of an opposing party.

A final problem is determining exactly which privileged documents the witness reviewed "for the purpose of testifying."88 A witness may very well review a number of documents. But if the documents do not affect the witness' testimony, neither waiver nor Rule 612 would be necessary because there would be no reason to test the witness' recollection against the document.

When review takes place on the witness stand, there is no difficulty in assessing the use of a particular document and its effect on the witness' testimony. The document is used before the court89 and, since a witness may not use a document unless his memory is exhausted,90 the very fact that the witness can continue his testimony demonstrates the document's impact on the testimony. In cases of review prior to testifying, however, these determinations are not made as easily. The only way to determine which documents the witness reviewed is to ask the witness and, as always, hope he answers truthfully.91 Establishing what "impact"92 prior

85. See, e.g., Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977) (inadvertent disclosure; waiver limited only to those documents produced); IBM Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 13 (D. Del. 1968) (waiver limited to specific materials disclosed).

86. See, e.g., Diematic Mfg. Corp. v. Packaging Indus., Inc., 22 Fed. R. Serv. 2d 1015, 1017 (S.D.N.Y. 1976) ("having disclosed portions of specific communications, defendants have waived attorney-client privilege as to entire contents of those communications"); Garfinkle v. Arcata Nat'l Corp., 64 F.R.D. 688, 690 (S.D.N.Y. 1974) ("entitled to all relevant documents"); IT & T Corp. v. United Tel. Co., 60 F.R.D. 177, 186 (M.D. Fla. 1973) ("if a party-client introduces part of his correspondence with his attorney, the production of all of the correspondence could be demanded"); Lee Nat'l Corp. v. Deramus, 313 F. Supp. 224, 227 (D. Del. 1970) ("all occasions when this subject matter was discussed with counsel [must] be revealed"); cf Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222 (4th Cir. 1976) (broad, subject-matter waiver may be applicable to disclosure of attorney-client privilege, but not work product).


88. See Fed. R. Evid. 612.

89. See State v. Grunau, 273 Minn. 315, 332, 141 N.W.2d 815, 827 (1966) ("obvious because paper or memorandum is present at the time the witness is testifying").

90. See note 18 supra and accompanying text.

91. See Note, supra note 13, at 394 & n.28.

92. "[A]ccess is limited only to those writings which may fairly be said in fact to have

http://open.mitchellhamline.edu/wmlr/vol7/iss2/5
an impact upon the testimony of the witness." FED. R. EVID. 612, Advisory Committee's Note.

93. Determining whether the writing contains matter not related to the subject matter of the testimony is somewhat more difficult . . . . A writing which on its face does not appear to refer to the subject matter of the witness' testimony may still, because of the vagaries of the human mind, be the stimulus which triggered the witness' recollection of the seemingly unrelated matter to which he testified.

3 J. WEINSTEIN & M. BERGER, supra note 7, ¶ 612[05], at 612-38.

94. Id.

95. Paragraph 612[05] speaks only to the general procedure under Rule 612. The interaction between the rule and the attorney-client or work-product privileges is discussed specifically in paragraph 612[04].

96. Permitting inspection of privileged materials in cases in which it is questionable whether the materials aided a witness' memory presents the possibility of the rule becoming more of a discovery device than a rule of evidence. If the contents of a document and a witness' testimony are so tenuously related that the memory-jogging value of the document is not readily apparent by in camera review, it is hard to imagine the usefulness of the document in promoting more thorough cross-examination. Privileged information would be revealed without advancing the ostensible purpose of the rule. See note 83 supra. A strong counterargument can be made even though it is unclear what effect review may have had on the witness' memory and testimony. This argument's rationale is based upon one of the fundamental weaknesses of privileges:

[B]enefits [of the attorney-client privilege] are all indirect and speculative; its obstruction [is] plain and concrete. . . . It is worth preserving for the sake of general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

8 J. WIGMORE, supra note 68, § 2292, at 554. Many courts have agreed with Professor Wigmore's restrictive interpretation of the attorney-client privilege. See, e.g., Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977); NLRB v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965). Thus, if a privilege is narrowly construed as an initial matter, inspection under Rule 612 should result if there is the slightest chance that the witness' memory has been influenced by the privileged document in question.
When waiver is acknowledged, Rule 612 in and of itself would not conflict with claims of privilege. The rule could be used after a waiver has rendered the once privileged material unprotected. Employed in this manner, the rule would harmonize the seemingly conflicting views of the Advisory and House Committees mentioned earlier. Parties generally would be able to inspect documents reviewed prior to testifying, something that often was not achieved under the common law. At the same time, the rule itself would not “bar the assertion” of any privilege. For example, if a witness reviews a document prior to testifying, an opponent could seek inspection of the document pursuant to Rule 612. If the document is unprivileged, disclosure should be ordered. If the document is subject to a privilege, the party that permitted the review could assert the privilege to thwart inspection. The opponent then could argue that the use of the privileged document by the witness constitutes a waiver of the privilege. If the court finds that a waiver did occur, disclosure would be appropriate, but not solely because of the rule. In *Joseph Schlitz Brewing Co. v. Muller & Phipps, Ltd.*, however, waiver and Rule 612 working together was expressly rejected. Therefore, any resolution of how Federal Rule of Evidence 612 operates with respect to privileged materials still is uncertain.

IV. THE MINNESOTA RULE

Consistent with past practice in Minnesota state courts, Minnesota Rule of Evidence 612 allows the inspection of writings used by a witness to revive his memory while testifying. The right of inspection is absolute. The Committee Comment appended to the rule also indi-

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97. See 3 D. Louisell & C. Mueller, *supra* note 35, § 351, at 536 (“It is not the operation of Rule 612. . . . that results in inspection, but the fact that voluntary disclosure waives the protection of privileges.”); P. Rothstein, *supra* note 1, at 142 (“A sensible view would be that if the holder of the privilege is responsible for its use by the witness, privilege is waived. This would not be a result of the rule, but of principles of waiver . . . .”); 3 J. Weinstein & M. Berger, *supra* note 7, ¶ 612[04], at 612-35 (“Generally, privileged material used to refresh before trial should not be shown [to opposing counsel] unless the use in refreshing waived the privilege.”).

98. See notes 54-55 *supra* and accompanying text.

99. See note 26 *supra*.


102. See id. at 120 n.2 (“Adoption of a waiver theory seems dubious as a matter of policy . . . .”).

103. *Minn. R. Evid. 612, Committee Comment* (“rule continues existing practice”).

104. *Minn. R. Evid. 612*.

105. In *State v. Grunau*, 273 Minn. 315, 141 N.W.2d 815 (1966), the Minnesota Supreme Court stated: “[W]e have followed the rule that where a witness uses any paper or memorandum on the stand for the purpose of refreshing his memory the opposing party has the right to inspect such paper or memorandum, and to use it for cross-examination or impeachment.” *Id.* at 331, 141 N.W.2d at 826 (emphasis in original).
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cates that "[t]he rule substantially expands the common law approach by requiring production, within the discretion of the Court, of writings that were reviewed by a witness in preparation for testifying." Thus, in general terms, the treatment of memory-refreshing documents under the Minnesota rule parallels the federal rule.

The Minnesota rule, however, may not leave as much room for argument on the effect of the rule on privileged documents as does the federal rule. The Committee Comment specifically states that in cases involving work product, common-law principles rather than the rule control a party's right of inspection. This explicit treatment of work product under the Minnesota rule cures one uncertainty present in the federal rule. Similar to the House Committee on the Judiciary, the Minnesota Committee Comment also contains the admonition that nothing in the rule be "read to disregard applicable privileges that are validly asserted." When the Minnesota Committee Comment regarding the treatment of work product is considered in conjunction with the above statement concerning other privileges, a strong argument is presented that the rule alone should not overcome privileges.

This does not necessarily mean privileged materials may be used with impunity to prime a witness. A common-law waiver clearly can apply to work product; and, if the circumstances warrant, a waiver also could prevent a party from validly asserting a claim of privilege. Thus, while Rule 612 and waiver working together is a possible resolution of Rule 612 and its effect on privileged documents in federal cases, the combination seems to be required under the Minnesota rule before inspection of privileged materials is justified.

106. Minn. R. Evid. 612, Committee Comment. Prior to the enactment of the rule, the supreme court had expressed the view that no fundamental difference existed between prior and concurrent memory refreshment:

If the witness relies on the memorandum or notes to refresh his recollection, and his testimony is based upon such refreshed memory, we see no rational basis for distinguishing between a paper or memorandum referred to prior to the trial and one used while on the stand. In either case, the right to compare it with the witness' testimony rests on the same foundation.


107. See notes 32-35 (on-the-stand review under the federal rule), 43-46 (prior review under the federal rule) supra and accompanying text.

108. "The rule does not speak to the issue that will be raised in civil cases if the document that is used to refresh a witness' recollection falls under the work product doctrine. . . . The issue is left for development in the traditional common law fashion." Minn. R. Evid. 612, Committee Comment.


110. Minn. R. Evid. 612, Committee Comment.

111. See note 73 supra.

112. See notes 70-79 supra and accompanying text.

113. See notes 97-102 supra and accompanying text.
The Minnesota Supreme Court has not interpreted the scope of the Minnesota rule, and no other state courts have construed their versions of the rule.114 The federal decisions, therefore, currently represent the only case law on Rule 612 and privileges.115 Those decisions are far from being in agreement and lend further uncertainty as to exactly how the Minnesota court will view the rule.

V. Conclusion

The cases and legislative history concerning Rule 612 fail to provide definitive guidance regarding the treatment of privileged materials used to refresh a witness' recollection. Several alternative constructions exist: (1) Rule 612 codifies the common law, which allowed inspection of privileged documents only when review was on the witness stand; (2) Rule 612 itself overcomes privileges thereby allowing inspection of any privileged document used by a witness to refresh his memory; or (3) Rule 612 generally favors inspection of memory-refreshing materials with disclosure of privileged documents founded upon common-law waiver principles.

The dangers of improperly prompting witnesses and denying an op-

114. Many states have adopted rules that are for the most part identical to Fed. R. Evid. 612, see, e.g., Colo. R. Evid. 612; Ohio R. Evid. 612, but none apparently have decided what effect their respective rules will have on privileged material that is used to refresh the recollection of witnesses.

California courts have decided a small number of cases dealing with the use of privileged documents to refresh a witness' memory. These cases, however, are subject to Cal. Evid. Code § 771 (West 1966), which states in part: "[I]f a witness, either while testifying or prior thereto, uses a writing to refresh his memory . . . such writing must be produced . . . ." Id. § 771(a). This language resembles the preliminary draft of Rule 612, see note 46 supra, not the final version of the federal rule. Furthermore, as a student commentator has observed, the cases that have been decided under the California rule are inconclusive regarding the rule's effect on privileged materials:

Thus far no appellate court has required the production of a privileged writing under section 771, and all of the decisions have indicated that the judiciary is unwilling to allow the statute to be used as a device for compelling disclosure of privileged communications. On the other hand, the appellate courts have consistently avoided directly resolving the issue of whether privilege statutes should control over an adverse party's right to compel production. The courts have evaded the crux of the problem by finding, often on questionable grounds, either that there was a waiver of any privilege that might have existed, or that section 771 was somehow inapplicable.


115. Since the Minnesota rule was patterned after the federal rule, the federal case law on Rule 612 should have some influence on any interpretation of the Minnesota rule. Although the Minnesota Rules of Evidence indicate that state common-law principles control the applicability of privileges in state proceedings, see Minn. R. Evid. 501, it would not appear that Minnesota's treatment of privileges differs from that of the federal courts. The federal decisions on Rule 612 cannot be ignored on the ground that federal privilege law is incompatible with state law.
posing party the ability to adequately cross-examine witnesses undoub-
tedly exist in instances of memory refreshment. Preventing a party from
inspecting documents solely on the basis of a privilege would seem overly
restrictive. Parties could avoid the inspection process completely by the
expedient practice of using only privileged materials to refresh their wit-
tnesses. Similarly, an approach that would afford parties an unhindered
access to an opponent’s files could result in abuses. Using a waiver the-
ory to complement Rule 612, however, would avoid both of these ex-
tremes. Privileges would be respected, unless the privilege is not
applicable or has been waived.

No matter how the scope of Rule 612 eventually is settled, there are
procedures in the interim that prudent attorneys should follow. As a
precaution, counsel would be well advised not to allow a witness to in-
spect privileged documents at random. Otherwise, a court that believes
the rule is meant to broach privileges may order inspection of the docu-
ments that affected the witness’ testimony. It would be much safer to
provide the witness with unprivileged materials if at all possible. If privi-
leged documents are necessary to revive the witness’ recollection, only the
smallest number of documents that are needed to accomplish the pur-
pose should be reviewed. This assumes that the witness’ testimony is tact-
ically more advantageous than having the documents subject to possible
disclosure.

The rule may create offensive opportunities as well as defensive pre-
cautions. Counsel should ask opposing witnesses if they reviewed any-
thing in preparation for testifying. If the witness has, efforts to establish
which documents were relied upon should be made. The extent of the
witness’ reliance on the particular documents also should be determined.
A demand to inspect the relevant materials then should be made, and,
assuming the opponent refuses, a motion to the court for inspection pur-
suant to Rule 612 should follow.

Rule 612 has the potential for catching many attorneys by surprise.116
Attorneys suddenly may find sensitive documents that have been shown
to witnesses open to an opponent’s inspection. Two federal district
courts have already reached this result117 and two other courts have indi-

in part on other grounds, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980), the
court ruled that Rule 612 might represent a means of forcing disclosure of privileged docu-
ments that have refreshed a witness’ recollection in future cases. The Berkey court based
this holding, in part, on the fact that counsel in the instant case would not have been able
to foresee the use of the rule in gaining access to privileged documents: “No less impor-
tantly, given the current development of the law in this quarter, it seems fair to say that
counsel were not vividly aware of the potential for a stark choice between withholding the
notebooks from the experts or turning them over to opposing counsel.” Id. at 617.

Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc., 81 F.R.D. 8, 9-10
(N.D. Ill. 1978).
cated their willingness to construe the rule in a similar manner. On the other hand, another federal court has refused to allow inspection of privileged documents under Rule 612. Until the bounds of the rule have been established by future judicial decisions, attorneys should proceed with caution when refreshing witnesses' recollection with privileged materials.
