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A "Delicate and Difficult Task": Balancing the Competing Interests of Federal Rule of Evidence 612, the Work Product Doctrine, and the Attorney-Client Privilege

DAISY HURST FLOYD†

I. INTRODUCTION

In deciding *Hickman v. Taylor*,¹ the United States Supreme Court was charged with balancing a policy of liberal discovery with a basic tenet of the adversary system—that each party must develop and present its own case. In a mastery of understatement, the court noted: “[p]roperly to balance these competing interests is a delicate and difficult task.”²

Our legal system is full of “competing interests” undergirded by potentially conflicting policies. An attorney is admonished to be a zealous advocate, yet to be an officer of the court; a trial is a search for the truth, yet we have evidentiary rules that exclude plainly relevant evidence; the parties in civil cases are entitled to liberal discovery to encourage settlement, yet each party must rely on his or her own resources to prepare a case. As a consequence of these competing interests, courts are engaged in many “delicate and difficult tasks.”

One of these tasks is to resolve the tension between the need for a party to have everything necessary to cross-examine a witness effectively and the policies underlying protection of information through the work product doctrine and the attorney-client privilege. The legal rules causing this underlying tension are Federal Rule of Evidence 612,³ Federal Rule of Civil Procedure 26(b)(3),⁴ and the rules surrounding attorney-client privilege.⁵ Federal Rule

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1. 329 U.S. 495 (1947).

2. *Id.* at 497.

3. FED. R. EVID. 612.

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

5. All jurisdictions recognize the attorney-client privilege. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.3.1, at 250 (1986). For examples of state rules, see TEX. CIV. R. EVID.

of Evidence 612 is a rule of disclosure, while Federal Rule of Civil Procedure 26(b)(3) and the attorney-client privilege are rules of protection. Trial courts have had to struggle with reconciling these rules not only because they represent a fundamental tension in our system, but also because of poor draftsmanship of Federal Rule of Evidence 612.⁶

This Article suggests that the attempt to reconcile the rules has led to confusion and frustration in the courts that have considered the issue and that the confusion and frustration should be relieved by an amendment to Rule 612. Such an amendment would save parties and courts time, expense, and uncertainty, and would insure that the conflict is resolved consistently with congressional intent. The conflict has left trial courts bogged in discovery disputes and has led to inconsistent application of Rule 612. It also presents problems for the attorney who has a duty to properly prepare witnesses but wants to avoid waiver.⁷

II. THE ROOT OF THE PROBLEM—UNGUIDED JUDICIAL DISCRETION UNDER FEDERAL RULE OF EVIDENCE 612

Federal Rule of Evidence 612 codifies the "memory refreshment doctrine," allowing parties to examine a document used by a witness to refresh the witness's memory. At common law, a party was allowed to examine any document used by a witness at trial to refresh memory.⁸ The purpose behind the rule was to allow cross-examination of the witness about the source of his or her knowledge. A party whose testimonial dependence on a writing was so great that he or she could not testify from memory without it was

503; TEX. CRIM. R. EVID. 503; CAL. EVID. CODE § 954 (West 1995).

6. While a number of trial courts have struggled with resolving this conflict, the appellate courts have not been much help. Only two courts of appeals have addressed this issue. See cases discussed *infra* notes 151-84 and accompanying text.

7. Others commenting on this problem include Martha J. Aaron, Comment, *Resolving the Conflict Between Federal Rule of Evidence 612 and the Work-Product Doctrine: A Proposed Solution*, 38 KAN. L. REV. 1039 (1990) (summarizing the case development regarding this conflict and proposing that the solution is to adopt a more restrictive approach to what meets the definition of a document used for memory refreshment); Note, *Interactions Between Memory Refreshment Doctrine and Work Product Protection Under the Federal Rules*, 88 YALE L.J. 390 (1978) (criticizing the approach taken by the court in *Berkey Photo Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977), arguing that that decision unduly broadens discovery to the detriment of the work product rule).

8. The Advisory Committee's note to Rule 612 provides that "[t]he treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine." FED. R. EVID. 612 advisory committee's note. See also 1 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 9 (John W. Strong ed., 4th ed. 1992); Annotation, *Refreshment of Recollection by Use of Memoranda or Other Writings* § 60, 82 A.L.R.2d 473, 557 (1962) (discussing relevant cases).

subject to cross-examination about the true source of the testimony. A party was not, however, allowed to see a document that had been used by the witness to refresh his or her memory before testifying.⁹

In promulgating the Federal Rules of Evidence, the Advisory Committee recommended that the rule be changed to allow the opposing party to obtain documents used by a witness to refresh his or her memory whether that was done before testifying or while testifying.¹⁰ A debate about the soundness of this change in the rule resulted in a compromise in the House committee: a document used by a witness before testifying to refresh his or her memory would be available to the opposing party according to the exercise of the court's discretion. Therefore, while the rule requiring disclosure of a document used while testifying was left unchanged, documents used before testifying were discoverable when the court found disclosure necessary "in the interests of justice."¹¹ Rule 612 in its current version provides:

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if 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 interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.¹²

9. Most courts refused disclosure of documents under these circumstances, but there existed some authority for allowing disclosure within the court's discretion. See *Goldman v. United States*, 316 U.S. 129 (1942).

10. FED. R. EVID. 612 advisory committee's note.

11. H.R. REP. NO. 650, 93d Cong., 1st Sess. 13 (1973).

12. FED. R. EVID. 612. The rule further provides:

If it is claimed that the writing contains matters not related to the subject matter of the testimony the courts shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Id. Wright and Gold say that there are five questions that must be answered with regard to Rule 612: (1) When is a writing used to "refresh memory"? (2) What is a "writing" for purposes of Rule 612? (3) Who is an "adverse party"? (4) Can proceedings other than trials be considered "hearings"? (5) If Rule 612 recognizes a right to introduce portions of writ-

The Report of the House Committee on the Judiciary explains the basis for the compromise language that allows disclosure in the discretion of the trial court:

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 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.¹³

The laudable purpose of providing courts discretion on the disclosure decision as a necessary accommodation of the competing interests of protection and discovery has not been fulfilled. The lack of guidance in the rule as to how courts should exercise that discretion in the face of assertions of work product or attorney-client privilege has led to confused judicial analysis. The confusion in the courts is caused in part by the mixed signals emanating from the House Committee report, the congressional debate, and the language in the Advisory Committee's report about both the purposes behind disclosure and the effect of existing privileges and work product protection.

The House report indicates that Rule 612 was not meant to overcome existing protections against disclosure: "The Committee intends 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."¹⁴

An exchange on the House floor between the chair of the subcommittee charged with drafting the rules and a Congressman questioning the effect of the rule confirms that existing protections were not intended to be eliminated by Rule 612:

Mr. WHITE If there is, for instance, hypothetically, a personal injury ac-

ings, how does that provision interact with other rules that limit the admissibility of writings? 28 CHARLES A. WRIGHT & VICTOR J. GOLD, *FEDERAL PRACTICE AND PROCEDURE* §6183 (1993).

13. H.R. REP. No. 650, 93d Cong., 1st Sess. 13 (1973).

14. *Id.*

tion, that is, if a party to the personal injury action asks for the work of an attorney [to re]fresh his memory before he came to the [trial,] . . . then would the adverse attorney and adverse party have the opportunity to inspect that work? MR. HUNGATE [T]he attorney's work product would not be subject to . . . inspection.

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

If it were 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 refresher. 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 [at] 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.¹⁵

The Advisory Committee's note, written in support of the original version of the rule that required disclosure even when the document was used to refresh memory before testifying, indicates that the purpose of the rule is "to promote the search of credibility and memory."¹⁶ Consistent with the Advisory Committee's approach, courts and commentators have recognized that the policy behind Rule 612, even in its current form, is to ensure that testimony is based on the witness's own memory and not on a "false memory" planted there by a lawyer during refreshment.¹⁷ Rule 612 is thus seen as protecting a party's right to effective cross-examination, that is, as allowing a party the necessary tools to identify and impeach false memories.

III. CONTRIBUTING FACTORS—THE WORK PRODUCT PROTECTION AND THE ATTORNEY-CLIENT PRIVILEGE

A. *Work Product Protection*

The purpose behind Federal Rule of Evidence 612—that in many instances disclosure of documents used to refresh memory is necessary to allow full cross-examination—sometimes presents a conflict with another deeply held tenet of the adversary system—that each party should be responsible for preparing his or her own case. That tenet is the basis for the work product protection, first officially recognized in the Supreme Court's decision in *Hickman v. Taylor*¹⁸ and now embodied in Federal Rule of Civil Procedure 26.¹⁹

In *Hickman v. Taylor*, the Court was faced with the issue of whether statements taken by a lawyer representing a tugboat company were discoverable pursuant to discovery requests made under the relatively new Federal Rules of Civil Procedure. The statements had been taken from several witnesses to a tugboat accident in which five crew members were killed.²⁰ The statements were taken close to the time of the accident "with an eye toward . . .

15. 120 CONG. REC. 2381-82 (1974).

16. FED. R. EVID. 612 advisory committee's note.

17. 28 WRIGHT & GOLD, *supra* note 12, § 6183.

18. 329 U.S. 495 (1947).

19. FED. R. CIV. P. 26. Rule 26 does not use the label "work product," but instead refers to "trial preparation materials." *Id.* Because courts and commentators have continued to use the "work product" label, this article does as well.

20. 329 U.S. at 498.

litigation"²¹ and were recorded in memoranda prepared by the attorney.

The argument in the lower courts centered on privilege; it was clear that the discovery provisions of the Federal Rules of Civil Procedure were not meant to require disclosure of privileged information.²² The party resisting discovery, therefore, argued that the memoranda prepared by the attorney after interviewing witnesses were covered by attorney-client privilege.²³ The Court rejected that argument, holding without discussion that the memoranda fell outside of the scope of the privilege. Nevertheless, the Court held that the statements were not discoverable, based on an assessment of the traditional characteristics of the adversary system:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in . . . our system of jurisprudence to promote justice and to protect their clients' interests. . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interest of the clients and the cause of justice would be poorly served.²⁴

The Court held that the statements might be discoverable upon a sufficient showing of need for the information or that the lack of production of that information would "unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice."²⁵ Such a showing had not been made on the facts of *Hickman*: "Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing."²⁶ Further, the identity of the witnesses who had been interviewed was known to the party seeking the statements, and those witnesses were available to

21. *Id.*

22. *Hickman v. Taylor*, 4 F.R.D. 479, 481-82 (E.D. Pa. 1945).

23. *Id.* at 508.

24. *Id.* at 510-11.

25. *Id.* at 509.

26. *Id.* at 513.

him.²⁷ That party had access to testimony given by those witnesses during public hearings that took place just after the accident, and "the essence of what petitioner seeks either has been revealed to him already . . . or is readily available to him direct from the witnesses"²⁸

The Court hinted at what it might consider sufficient need:

Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty.²⁹

In addition to requiring a showing of need for the material sought to be disclosed and prejudice resulting from a lack of disclosure, the Court indicated in its opinion that such a showing would be nearly impossible to make when the information sought contained an attorney's mental impressions.³⁰

After years of judicial struggle to define the parameters of the rule set out in *Hickman*, the Federal Rules of Civil Procedure were amended in 1970 to incorporate the work product doctrine.³¹ Rule

27. *Id.* at 508.

28. *Id.* at 509.

29. *Id.* at 511.

30. *Id.* at 511-12.

31. FED. R. CIV. P. 26(b)(3) (1970 amend.). The enactment of Rule 26(b)(3) did not end the struggle over the scope of work product. There is continuing disagreement over what categories of information are protected from discovery by the work product doctrine. This disagreement stems in part from the fact that Rule 26(b)(3) covers only tangible work product, while *Hickman* seemingly encompassed both tangible and intangible work product. Also, there is some uncertainty over how the 1993 amendments to Rule 26(a), requiring automatic disclosure of certain information during discovery, will impact the work product doctrine. See James Holmes, Note, *The Disruption of Mandatory Disclosure With the Work Product Doctrine: An Analysis of a Potential Problem and a Proposed Solution*, 73 TEX. L. REV. 177 (1994).

The debate over work product extends beyond what the rule's parameters are. It includes calls for the elimination of work product protection. See Elizabeth Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515 (1991), where the author states:

The discovery process was designed to correct unequal distribution of information and to ensure that the trier of fact has access to all relevant information. The work product doctrine prevents the discovery process from functioning as it was designed to function. Instead, work product protection hides relevant information, increases costs, and exaggerates the inequality of wealth and information of the parties to a lawsuit. Further, the work product doctrine fails to achieve its own objectives of assuring the best and most complete possible adversarial presentation of evidence at trial. These objectives would be better served by much nar-

26(b)(3) provides:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things, otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation.³²

The Advisory Committee's note to the original version of the rule echo the concern of the Court in *Hickman* that the nature of the adversary system not be undermined by the work product protection:

[T]he requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side.³³

Just as the Court in *Hickman* did, the drafters of Rule 26 provided for two categories of information entitled to work product protection.³⁴ The first is information contained in documents or

lower rules that would address real concerns and would have an equal impact on the parties.

Id. at 1582-83; Kathleen Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 WIS. L. REV. 305 (1985).

[Work product protection for witness statements] causes unnecessary duplication in the development of facts, can deprive parties of the most reliable eyewitness accounts, and leads to unnecessary costs for litigants. Furthermore, the doctrine as applied is biased toward large institutional litigants. . . . [W]ork product protection for witness statements glorifies the adversary system at great costs to litigants and to the detriment of the search for truth in the courtroom.

Id. at 305.

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

33. FED. R. CIV. P. 26 advisory committee's note.

34. Much of the difficulty of applying the work product doctrine arises from the need to distinguish the two types of work product—so-called "ordinary" work product, which does not involve an attorney's mental impressions, and "opinion work product" which does. A detailed discussion of this distinction is outside the scope of this article. For a thorough analysis, see Kevin M. Clermont, *Surveying Work Product*, 68 CORNELL L. REV. 755 (1983). According to FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE §5.11 (4th ed. 1992), there are

tangible things, prepared in anticipation of litigation, that does not contain an attorney's mental impressions, conclusions, opinions, or legal theories. That information is not absolutely protected from discovery, but is instead afforded "qualified immunity;"³⁵ it can be discovered only upon a showing of substantial need for the information and that the substantial equivalent of the information is not discoverable without undue hardship to the party seeking disclosure.³⁶ As to those documents and tangible things that include mental impressions, conclusions, opinions, or legal theories, the rule provides that the court shall protect against disclosure. Courts have disagreed about the nature of the second protection, some finding it to be absolute, but others finding information within it discoverable but only upon a greater showing of need and hardship than that required for disclosure of the first category of information.³⁷

The Sixth Circuit has set out a suggested analysis to be followed when evaluating a claim of work product that is illustrative of the approach generally taken by courts.³⁸ First, the party seeking discovery must show that the documents or things sought are otherwise discoverable, that is, that they are relevant and not priv-

four categories of materials in Rule 26(b): 1) witness statements, always obtainable by that witness, 2) attorney's mental impressions, 3) expert opinions, and, 4) all other trial preparation materials.

35. See, e.g., *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 733 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975).

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

37. See, e.g., *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573 (9th Cir. 1992). In *Holmgren*, the court held that opinion work product is not immune from discovery but that a greater showing is required than that required to obtain ordinary work product. The court ordered disclosure of the mental impressions of an insurance agent because the mental impressions were at issue, the need for the information was "compelling," and the information sought was unavailable elsewhere. *Id.* at 577-78. Compare with *Duplan Corp.*, 509 F.2d at 734, where the court held that "no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions, or legal theories." *Id.* The disagreement in the courts has been noted by commentators. According to one, the inconsistency arises in part because "[o]pinion work product has historically been the neglected orphan of the work product doctrine. Both case law and commentators have focused primarily on ordinary work product. Traditionally, opinion work product gets little more than a ceremonial incantation that it should receive greater protection than ordinary work product." Kathleen Waits, *Opinion Work Product: A Critical Analysis of Current Law and a New Analytical Framework*, 73 OR. L. REV. 385, 385 (1994).

There is some agreement that even opinion work product can be overcome by either of two exceptions: when the information is at issue, and when the information is developed to perpetuate fraud or criminal conduct. See Andrea L. Borgford, Comment, *The Protected Status of Opinion Work Product: A Misconduct Exception*, 68 WASH. L. REV. 881 (1993); see, e.g., *In re National Mortgage Equity Corporate Mortgage Pool Certificates Litigation*, 116 F.R.D. 297 (C.D. Cal. 1987); .

38. *Toledo Edison Co. v. G A Technologies, Inc.*, 847 F.2d 335 (6th Cir. 1988).

ileged. The burden then shifts to the party resisting disclosure to show that the document or tangible thing was "prepared in anticipation of litigation" by a party or the party's representative.³⁹ Upon such a showing, the burden shifts back to the party seeking disclosure to show the existence of a substantial need for the document and that its substantial equivalent cannot be obtained without undue hardship.⁴⁰ "Attention is directed at alternative means of acquiring the information that are less intrusive to the lawyer's work and whether or not the information might have been furnished in other ways."⁴¹ Finally, if the requisite showing is made, the party opposing discovery can show the court that the documents or things contain the attorney's mental impressions, conclusions, opinions, or legal theories and are, therefore, entitled to greater protection.⁴²

Because Rule 26 does not define substantial need and undue hardship, courts have been left to develop those standards. Although these are necessarily fact-dependent standards, some generalizations about what will constitute the required showing can be made. According to a comprehensive survey of work product, the substantial need requirement is the "least uniformly applied"⁴³ element of Rule 26. "Most cases skim over the substantial need requirement by simply stating that it has been met."⁴⁴ The importance of the materials, that is, whether the party seeking discovery needs the materials to prove its case, and whether the information will be useful for impeachment purposes, are factors that courts have found to be relevant in showing substantial need.⁴⁵

The undue hardship requirement, "the single most important factor" in deciding whether work product is overcome,⁴⁶ is a little clearer. To meet the requirement, a party must "try but be unable to obtain the information contained in requested documents without going to great lengths; lack knowledge of where else to obtain the information; or show that the information is completely unavailable elsewhere."⁴⁷ For some courts, lapse of time will be enough to meet the requirement on the theory that "statements taken from witnesses close to the time of the occurrence are

39. *Id.* at 339.

40. *Id.* at 339-40.

41. *Id.* at 340.

42. *Id.*

43. Clermont, *supra* note 34, at 802.

44. *Id.* at 802 n.247.

45. *Id.* at 802; 28 WRIGHT & GOLD, *supra* note 12, at §6188.

46. CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 82, at 595 (5th ed. 1994).

47. Clermont, *supra* note 34, at 801.

unique."⁴⁸ A party does not meet the substantial equivalent requirement of Rule 26(b)(3) by showing unavailability of identical information; "the party is not entitled to discover a document merely because he cannot get the same information from the same person."⁴⁹

One commentator has summed up the judicial approach to work product in this way:

Building upon the Advisory Committee notes, courts have identified several recurring situations that, as a group, cover most discovery situations. These characterizations include contemporaneous statements, unavailability or death of witnesses, proven hostility or reluctance of witnesses, a strong possibility of material, impeaching discrepancies between a witness's statements, inability of the plaintiff to obtain counsel until after the incident giving rise to the action, lapse of time since the original statement, and, in unique cases, the expense of obtaining discovery. Courts often view proof that one's case fits within one of these characterizations as satisfying the rule 26(b)(3) test for permitting discovery of protected materials.⁵⁰

The requisite showing of substantial need and undue hardship is not the only basis upon which work product is discoverable. A claim of work product protection can be waived. Because the purpose underlying the work product protection is to preserve the characteristics of the adversarial system, courts have held that waiver of work product occurs only when the information is voluntarily disclosed to an adversary or under circumstances that will enable an adversary to have access to the information.⁵¹ Involuntary disclosure, pursuant to a court order, has been held not to constitute a waiver.⁵² Similarly, disclosure to a third person who is not an adversary will not effect a waiver.⁵³ The United States Su-

48. 28 WRIGHT & GOLD, *supra* note 12, at § 6184. This judicial approach is consistent with the Advisory Committee's note to Rule 26, which also indicates that a lapse in time may satisfy requirements for discovery. FED. R. CIV. P. 26 advisory committee's note.

49. Clermont, *supra* note 34, at 802-03.

50. *Id.* at 803-04 (footnotes omitted).

51. See, e.g., *Westinghouse Electric Corp. v. The Republic of the Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1992) ("[A] party who discloses documents protected by the work-product doctrine may continue to assert the doctrine's protection only when the disclosure furthers the doctrine's underlying goal."); *In re John Doe*, 662 F.2d 1073, 1082 (4th Cir. 1981) (attorney's disclosure of information covered by work product protection "substantially and freely increased the possibility of disclosure" and therefore effected a waiver).

52. *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379 (5th Cir. 1989). If the disclosure pursuant to a court order is made without objection, however, the court might find that it was voluntary rather than involuntary. *Id.*; see also *Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349 (5th Cir. 1983).

53. This distinguishes waiver of the work product protection from waiver of the attorney-client privilege. Because the attorney-client privilege is based on a need to protect confidentiality, disclosure to anyone outside of the confidential relationship will result in a

preme Court has held that "testimonial use" of material containing work product can result in a waiver.⁵⁴ Disclosure of information protected by work product to an ally does not effect a waiver; such a disclosure strengthens rather than weakens the adversary system.

A specialized application of a conflict between the work product doctrine and disclosure of a document used to prepare a witness to testify arises when the witness is a testifying expert. Rule 26(b)(4) provides special rules applicable to discovery when expert witnesses are involved in a matter, and Rule 26(b)(3) states at the outset that it is subject to 26(b)(4).⁵⁵ The current version of Federal Rule of Civil Procedure 26(b)(4) provides:

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.⁵⁶

Rule 26(a)(2), dealing with disclosure of expert testimony, provides:

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a writ-

waiver. *Shields*, 864 F.2d at 379.

54. *United States v. Nobles*, 422 U.S. 225 (1975). The Court did not consider the effect of Rule 612 because the trial took place before the Federal Rules of Evidence were effective. *Id.* at 231 n.6.

55. *FED. R. CIV. P. 26(b)(3)*. See *Toledo Edison Co. v. G A Technologies, Inc.*, 847 F.2d 335 (6th Cir. 1988):

The court may not order discovery of materials if discovery of such materials would violate Rule 26(b)(4) involving trial preparation, i.e., experts. Different standards and procedures are set forth because of the nature of experts and the different purposes for which they are employed. Experts are used by parties for different purposes just as information is prepared or acquired by parties for different purposes. . . . Rule 26(b)(4) specifically and exclusively deals with the standards and methods of discovery of facts known and opinions held by experts acquired or developed in anticipation of litigation or for trial. Subdivision (b)(4) does not apply to facts known or opinions held by experts not acquired or developed in anticipation of litigation or for trial. If it is shown that the facts or opinions of the expert were so acquired the standards and procedures of subdivision (b)(4) apply.

Id. at 340.

56. *FED. R. CIV. P. 26(b)(4)(A)*.

ten report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).⁵⁷

Most of the scholarship regarding whether trial preparation materials used to prepare an expert for testifying should be disclosed have focused on a 26(b)(4) justification for disclosure rather than a 612 disclosure.⁵⁸ Many courts have seen an internal conflict between the protective aspects of the work product doctrine as codified in (b)(3) and special rules applying to discovery of information from experts in (b)(4).

Along with other changes made to the discovery process in the 1993 amendments to the Federal Rules of Civil Procedure, 26(b)(4)

57. FED. R. CIV. P. 26(a)(2).

58. Much of the discussion of disclosure of work product as necessary to allow effective cross-examination has focused on the internal conflict between the protections of Rule 26(b)(3) and the disclosure provisions of Rule 26(b)(4) pertaining to discovery of expert witnesses. See, e.g., Jan W. Henkel & O. Lee Reed, *Work Product Privilege and Discovery of Expert Testimony: Resolving the Conflict Between Federal Rules of Civil Procedure 26(b)(3) and 26(b)(4)*, 16 FLA. ST. U. L. REV. 313 (1988). The authors discuss the conflict between Rule 26(b)(3) and Rule 612, but conclude that the courts' resolution of that conflict is not helpful in resolving the internal conflict of Rule 26:

Cases analogizing the conflict between Rule 26(b)(3) and FRE 612 with the conflict between Rules 26(b)(3) and 26(b)(4) are ill-founded because of the differing purposes of Rule 26(b)(4) and FRE 612. The Supreme Court promulgated the two rules for different reasons. The purpose of Rule 26(b)(4) was to provide opposing counsel with an economic and efficient alternative for gaining information. Federal Rule of Evidence 612, on the other hand, provides opposing counsel with the only route available to obtain information necessary for a thorough cross-examination on the issue of witness credibility. This latter purpose presents a strong argument for resolving the conflict between Rule 26(b)(3) and FRE 612 in favor of FRE 612. The purpose associated with Rule 26(b)(4), however, is much less compelling, thus making an analogy between the two conflicts illogical.

Id. at 334.

was amended to allow automatic discovery from experts.⁵⁹ It is unclear what effect this change will have on the judicial resolution of the conflict between work product and discovery of information shown to experts. However, because the amendments allow for easier discovery of expert opinions, it can be predicted that the amendments will bolster decisions that hold that work product protection is overcome when a document is used to inform a testifying expert's opinion.

B. *Attorney-Client Privilege*

Another protection from disclosure of material relevant to litigation arises from the attorney-client privilege. The privilege protects confidential communications between a client and his or her attorney. The privilege is the oldest of many recognized privileges and has its roots in both constitutional protections and policy considerations.⁶⁰ The most noted purpose of the attorney-client privilege is to encourage effective, truthful communication between the

59. The former version of Rule 26(b)(4) provided:

Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

FED. R. CIV. P. 26(b)(4) (1988) (amended 1993).

60. See Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605 (1986), for discussion and criticism of the traditional justifications for the attorney-client privilege.

attorney and client.⁶¹ Its constitutional foundations include the right to counsel and the right against self-incrimination.⁶² Both the Federal Rules of Civil Procedure discovery provisions⁶³ and the Federal Rules of Evidence⁶⁴ recognize the existence of the attorney-client privilege.

Like work product protection, the attorney-client privilege prevents the disclosure of information that is relevant and that might greatly contribute to the fact-finding process.⁶⁵ Unlike work product, however, the attorney-client privilege is not overcome by application of a balancing test; it is overcome only by showing that it has been waived.

The privilege encompasses only communications between the attorney and client and then only communications that are intended to be confidential.⁶⁶ The scope of the privilege encompasses any advice sought from or given by the attorney even if the attorney-client relationship never progresses beyond an initial consultation; the privilege generally extends beyond the existence of the attorney-client relationship.⁶⁷ The privilege extends to those acting as an agent or representative for the attorney or the client.⁶⁸

The question of who is a representative of the attorney for purposes of the privilege has caused some difficulty in the context of Rule 612. According to one commentator, those covered under the privilege include the following representatives:

[L]aw clerks, paralegals, investigators, and similar agents as well as members of the office staff who assist in transmitting messages back and forth

61. WOLFRAM, *supra* note 5, § 4.4, at 163-64.

62. For a discussion of the constitutional basis for the privilege, see CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *MODERN EVIDENCE* § 5.8, at 463-64 (1995); WOLFRAM, *supra* note 5, §6.2, at 248-49.

63. FED. R. CIV. P. 26. In fact, privilege is the only limitation on the discovery of relevant information. *Id.*

64. The Federal Rules of Evidence do not recognize particular privileges, but they provide for application in federal court of federal common law privileges and state law privileges in civil cases "with respect to an element of a claim or defense as to which State law supplies the rule of decision." FED. R. EVID. 501. Federal common law and all states recognize the attorney-client privilege. WOLFRAM, *supra* note 5, § 6.3.1, at 250.

65. Just as is the case with the work product protection, there is a crime-fraud exception to the attorney-client privilege. Invocation of this exception requires one to show that the attorney was consulted or retained to promote criminal or fraudulent activity and that the communications asserted to be privileged were in furtherance of the crime or fraud. *See, e.g., In re National Mortgage Equity Corp. Mortgage Pool Certificates Litig.*, 116 F.R.D. 297, 300 (C.D. Cal. 1987); CAL. EVID. CODE § 956 (West 1995); TEX. CIV. R. EVID. 503(d)(1); TEX. CRIM. R. EVID. 503(d)(1).

66. MUELLER & KIRKPATRICK, *supra* note 62, §§ 5.12, 5.13, at 480-92.

67. *Id.* § 5.9, at 464.

68. *Id.* § 5.10, at 472-75.

between lawyer and client such as secretaries, receptionists, messengers, and other office personnel. . . . The privilege also reaches outside experts employed to assist the attorney in providing legal services to the client, such as an accountant, physician, psychotherapist, appraiser, patent agent, interpreter, polygraph examiner, or similar consultants. . . . Experts hired to testify are generally not viewed as representatives of the client for purposes of the privilege because their communications are subject to disclosure at trial and therefore cannot be considered confidential.⁶⁹

Unlike the work product protection, materials within the attorney-client privilege are discoverable only upon a waiver of the privilege. The privilege rules do not recognize anything akin to the balancing test of substantial need and undue hardship that can overcome work product protection. Waiver of the attorney-client privilege occurs through "the client's voluntary disclosure or consent to disclosure of any significant part of the privileged communication or matter in a non-privileged setting."⁷⁰ Difficult issues arise with regard to waiver of the attorney-client privilege, including matters of partial or selective disclosure, and voluntary versus inadvertent disclosure. Courts have also had to decide what persons are within the circle of people to whom information can be disclosed without effecting a waiver:

Sharing with co-parties has long been immunized against waiver, as has sharing with nonparties who have a common foe, and courts are fairly free in finding common interests sufficient to avoid a waiver. But disclosure to a close relative or other confidant can be expected to result in a waiver unless this further communication is itself privileged, such as a communication to a spouse or psychotherapist.⁷¹

Although the client is the holder of the privilege, the attorney has some implied authority to waive it on behalf of the client.⁷² The person seeking the disclosure bears the burden of proving that a waiver has occurred.⁷³

Waiver may occur purposely or inadvertently, although some courts disagree about the circumstances under which inadvertent waiver occurs. The waiver most frequently occurs through the client's or lawyer's disclosure of the confidential communication to someone other than those included within the scope of the privi-

69. *Id.* § 5.10, at 472-74 (footnotes omitted). Mueller and Kirkpatrick also note, with greater certainty than is warranted based on the cases discussed in this article, that "the opinions and reports of such testifying experts constitute work product, the discovery of which is regulated by FRCP 26(b)(4)." *Id.*

70. *Id.* §5.28, at 561.

71. Marcus, *supra* note 60, at 1638.

72. MUELLER & KIRKPATRICK, *supra* note 62, § 5.28 at 562.

73. *Id.*

lege. Courts have found a waiver of the attorney-client privilege when the communication either initially takes place in a nonconfidential setting, that is, in the presence of a third person who is not within the scope of the privilege or when the communication is repeated to a third person who is not within the scope of the privilege.⁷⁴

IV. ATTEMPTED SOLUTIONS AND RESULTING CONFUSION

A. *The Berkey Photo Approach*

The starting point for much of the confusion that exists today in Rule 612 analysis is *Berkey Photo, Inc. v. Eastman Kodak Co.*,⁷⁵ one of the earliest cases to address the potential conflict between Federal Rule of Evidence 612 and the work product doctrine. In *Berkey Photo*, the plaintiff moved to compel disclosure of four notebooks used by the defendant to prepare its economic expert. The notebooks were prepared by defendant's counsel and were his "synthesis of the facts and factual issues."⁷⁶ The magistrate ordered disclosure of the notebooks based on Rule 612.⁷⁷ The district court reluctantly reversed the magistrate's decision, expressing doubts that it was correct in doing so.⁷⁸ The district court first found that the notebooks had been used to refresh a witness's memory and, therefore, were within the scope of Rule 612.⁷⁹ Relying on the Advisory Committee's note to provide a standard, the court held that the notebooks had had "'an impact upon the testimony of the witness.'"⁸⁰

The court next looked to see if production under 612 was either barred by privilege or not "'necessary in the interests of justice.'"⁸¹ The court held that although the notebooks were work product, work product protection could be waived.⁸² It was not

74. For a discussion of the circumstances under which the attorney-client privilege has been held to be waived, see WOLFRAM, *supra* note 5, § 6.3.7, at 264-66; MUELLER & KIRKPATRICK, *supra* note 62, § 5.13.

75. 74 F.R.D. 613 (S.D.N.Y. 1977). The decision in *Berkey Photo* is typical in that the court had to resolve the Rule 612 issue in the context of a discovery dispute. According to Wright and Gold, even though Rule 30 "provides little support for extending the scope of Rule 612 to depositions," the "vast majority" of courts have held that Rule 30 means that Rule 612 applies in depositions. 28 WRIGHT & GOLD, *supra* note 12, at 452-53.

76. 74 F.R.D. at 614.

77. *Id.* at 615.

78. *Id.* at 617.

79. *Id.* at 614-15.

80. *Id.* at 615.

81. *Id.* at 616.

82. *Id.* In its analysis, the court did not consider the fact that the witness to whom the

clear, however, what type of work product the court found the notebooks to be. At one point, the court indicated that the notebooks contained mental impressions of the lawyer,⁸³ yet at another point in the opinion, the court seemed less certain: "counsel's selection and ordering come close to the vital area of maximum protection under *Hickman*."⁸⁴

Although the court acknowledged that "there are intimations that Rule 612 was intended to leave privileges generally untouched,"⁸⁵ it found that the privilege could be waived:

There is much to be said for a view that a party or its lawyer, meaning to invoke the privilege, ought to use other and different materials, available later to a cross-examiner, in the preparation of witnesses. When this simple choice emerges the decision to give the work product to the witness could well be deemed a waiver of the privilege.⁸⁶

The court stopped short, however, of finding a waiver in this case, because of the unsettled nature of the law.⁸⁷ The court warned lawyers that the result would be different in the future: "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."⁸⁸

The court noted the distinction between qualified and absolute privilege, but seemed to establish a bad faith or misconduct test for overcoming the absolute immunity of opinion work product. According to the court, waiver would apply to even opinion work product materials if the "immunized materials have been deliberately employed to prepare—and thus, very possibly, to influence and shape—testimony, with the anticipation that these efforts should remain forever unknowable and undiscoverable. It ought not to be comfortably supposed that a claim that extreme must necessarily be sustained."⁸⁹ The court also said that there would be "room for allowing discovery, either on a theory of waiver or of qualified privilege, where an attempt is made to exceed decent limits of preparation on the one hand and concealment on the

notebooks were shown was an expert. Therefore, the court did not find that Rule 26(b)(4) was a basis for waiver of work product; nor did the court have to consider whether the expert should come within the attorney-client relationship for purposes of protection by the attorney-client privilege because the parties did not assert attorney-client privilege.

83. *Id.*

84. *Id.* at 616 n.8.

85. *Id.* at 616.

86. *Id.*

87. *Id.* at 617.

88. *Id.*

89. *Id.* at 616-17.

other."⁹⁰ The court found, however, that those circumstances did not exist in this case.

The *Berkey Photo* decision has been repeatedly cited by other courts faced with resolving the conflict between disclosure of a document used to prepare a witness and work product or attorney-client privilege.⁹¹ Although the court in *Berkey Photo* did not order disclosure and although it dealt only with a claim of work product protection, *Berkey Photo* has been cited for the proposition that either the work product protection or the attorney-client privilege has been waived when a document is shown to a witness in preparation for trial. The case has also been cited for the proposition that disclosure, even of mental impressions, will be required on a misconduct theory—"where an attempt is made to exceed decent limits of preparation on the one hand and concealment on the other."⁹² The gaps in the *Berkey Photo* court's analysis have generated confusion in subsequent decisions that have attempted to rely on *Berkey Photo* in resolving the conflict between Rule 612 and either work product or attorney-client privilege.

The court in *James Julian, Inc. v. Raytheon Co.*,⁹³ faced the same issue as did the court in *Berkey Photo*. It did not, however, show the same reluctance to apply a waiver theory to the parties before it; it ordered disclosure of a binder prepared by counsel for the plaintiff.⁹⁴ The binder had been reviewed by officers and employees of the plaintiff in preparation for deposition testimony.⁹⁵ Just as in *Berkey Photo*, most of the documents contained in the binder had already been turned over during discovery.⁹⁶ Therefore, it was not the documents themselves or the information contained in them that the plaintiff objected to turning over; rather, it was the disclosure of which documents had been selected to prepare the witnesses to which the plaintiff objected.⁹⁷ Unlike *Berkey Photo*, however, the witness book in *Raytheon* was shown to a party rather than to a non-party.

The court had no trouble labelling the binder opinion work product, but found that the plaintiff had waived the right to assert work product protection.⁹⁸ In its decision, it discussed the history of the common law memory refreshment doctrine, as well as the

90. *Id.* at 617.

91. See *infra* notes 93-150 and accompanying text.

92. *Id.*

93. 93 F.R.D. 138 (D. Del. 1982).

94. *Id.* at 146.

95. *Id.* at 144.

96. *Id.*

97. *Id.*

98. See *id.* at 144-46.

"ambiguous" legislative history of Rule 612.⁹⁹ The court stated that "Congress left the task of striking a balance between the competing interests of full disclosure and the maintenance of confidentiality for case by case determination."¹⁰⁰

The decision in *Raytheon* evidences some confusion about the proper analysis for resolving the Rule 612-work product conflict. In relying on a waiver theory, the court was not required to analyze whether the need to prepare for effective cross-examination satisfied the substantial need and undue hardship test of Rule 26. Yet, the court addressed the application of a balancing test in response to an argument that opinion work product should be given greater protection than ordinary work product: "[i]n a given case the fact that the privileged documents contained attorneys' mental impressions might cause the Court to strike the balance in favor of non-disclosure."¹⁰¹ This was apparently not that "given case" since the court resolved the conflict solely on a waiver theory.

The decision in *Raytheon* was in turn the basis for another district court's ordering disclosure of a document in *In Re Comair Air Disaster Litigation*.¹⁰² The document sought in that case was an accident report prepared by defendant's employee, which was used by a different employee to prepare for a deposition.¹⁰³ Despite the court's reliance on *Raytheon*, however, there were actually several things about this case that made the analysis different from that in *Raytheon*. First, the court did not apply a waiver theory. Instead, it examined the language in Rule 26 that work product would not be protected upon a showing of substantial need and undue hardship.¹⁰⁴ In doing so, it linked the language of Rule 612, allowing the court discretion to decide whether to order disclosure, and the policy behind Rule 612, which is to safeguard a party's right to effective cross-examination, with the substantial need requirement of Rule 26.¹⁰⁵ The court held that Rules 612 and 26(b)(3) "dovetail[]";¹⁰⁶ the policy permitting disclosure as an aid to effective cross-examination supported a finding that the work product protection does not apply because of "substantial need." "When . . . a witness has used such materials [work product] to refresh his recollection prior to testifying, F. R. Evid. 612 weights

99. *Id.*

100. *Id.* at 145.

101. *Id.* at 146.

102. 100 F.R.D. 350 (E.D. Ky. 1983).

103. *Id.* at 352.

104. *Id.* at 353.

105. *Id.*

106. *Id.*

the balance in favor of finding that the 'substantial need' exists, because of the policy in favor of effective cross-examination."¹⁰⁷ Therefore, while applying the substantial need test, the court indicated that Rule 612 required a finding that the test was met. The court found that in this case the interests of justice required disclosure.¹⁰⁸

This decision, as were others, was less than clear about the distinction between ordinary work product and opinion work product for purposes of Rule 612. The court specifically noted that it gave "great weight to the fact that no attorneys were involved in preparation of the report."¹⁰⁹ It is not clear from the opinion exactly what difference this made to the court's decision, but it may have been either an indication that the court felt that Rule 612 would not overcome attorney-client privilege as easily as it did work product or an indication that the court's decision was based on the sought-after document being ordinary work product rather than opinion work product.¹¹⁰

Two opinions, one very recent, from the same district that decided *Berkey Photo* show the continuing confusion of courts that have ordered disclosure of a document used to refresh a witness's memory. In *In Re Joint Eastern and Southern District Asbestos Litigation*,¹¹¹ the district court ordered disclosure of ordinary work product used by the plaintiff to prepare for a deposition.¹¹² The court, relying to some extent on *Berkey Photo*, applied a balancing test.¹¹³ According to the court, "the 'interests of justice' standard of Rule 612 incorporates as part of the balancing analysis the protection afforded by the work-product doctrine, . . . while the 'substantial need' requirement of Rule 26 can take into account the

107. *Id.*

108. *Id.* at 353-54.

109. *Id.* at 354.

110. The court indicated a greater protection for opinion work product because it allowed the disclosing party to have an in camera inspection to determine whether mental impressions, etc. should be redacted from the report "if such deletion would not result in unfairness to the opposing party." *Id.*

111. 119 F.R.D. 4 (E.D. & S.D.N.Y. 1988).

112. *Id.* The book reviewed by the plaintiff was a "product book, containing pictures of defendants' products, logos, boxes, containers and trade dress as well as the corporate histories of the defendants, [and] was produced by the attorneys in anticipation of litigation." *Id.* at 5. Although the witness who was shown the product book was the plaintiff, the court did not address the issue of whether attorney-client privilege should prevent disclosure.

113. *Id.* at 5-6. But it did not apply the test to the circumstances in which the *Berkey Photo* court had indicated that a balancing test would be appropriate; here, the district court found that the document used to refresh the witness's memory was ordinary rather than opinion work product. *Id.* at 6.

need for disclosure under Rule 612."¹¹⁴ This seems to be a sensible approach and a helpful way of analyzing the Rule 612-Rule 26 conflict. Yet, the court confused matters by identifying two seemingly independent options for a party seeking to compel disclosure of work product: disclosure will be ordered "either upon a showing of substantial need or upon evidence that it was used by the witness to refresh his recollection."¹¹⁵ This indicates that, contrary to the court's assertion, Rule 612 and Rule 26 are not being reconciled, but rather are distinct bases for ordering disclosure, and that under 612, a showing that the document had been used to refresh recollection mandates disclosure.

To add to the confusion, the court held that while Rule 612 did not mandate disclosure in this case because of a failure to show that the document refreshed memory, the substantial need test was met because the document was necessary to impeach the plaintiff's credibility: "Defendants have no other method of obtaining the identical material, i.e., the material that was shown to the plaintiff. Defendants cannot by other means learn whether the product book was used in a suggestive fashion so as to encourage plaintiff to recognize items he would not otherwise recognize."¹¹⁶

The court's analysis, therefore, seems to be a waiver theory disguised as a balancing test. The court concluded that if the document was used to refresh memory, it should automatically be disclosed under Rule 612, but that even in the absence of that showing, the document should be disclosed under Rule 26 because it would be helpful to impeach the witness's credibility.¹¹⁷ There does not seem to be much balancing required.

A more recent case, also from the Southern District of New York, further illustrates the continuing confusion generated by the lack of clarity in courts' articulation of a standard for resolving the conflict, this time pulling the attorney-client privilege into the fray.¹¹⁸ The district court in *Bank Hapoalim, B.M. v. American*

114. *Id.* at 5 (citation omitted).

115. *Id.* at 6.

116. *Id.*

117. *Id.*

118. In one of the early cases dealing with waiver of the attorney-client privilege under Rule 612, the district court in *Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc.*, 81 F.R.D. 8 (N.D. Ill. 1978), ordered disclosure of documents subject to attorney-client privilege. The court in *Wheeling-Pittsburgh* relied on a pre-Rule 612 case, *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11 (N.D. Ill. 1972). In *Bailey*, the court held that the attorney-client privilege had been waived by use of a document to refresh a witness's memory. *Id.* at 13. Although the court in *Wheeling-Pittsburgh* acknowledged Rule 612's distinction between documents used to refresh memory while testifying and those used before testifying, it did not find the distinction persuasive: "If the paramount purpose of federal discovery

Home Assurance Co.,¹¹⁹ ordered production of several of the requested documents under Rule 612, finding that Rule 612 overcomes both work product protection and the attorney-client privilege.¹²⁰ In doing so, the court confused the attorney-client privilege and the work product doctrine for purposes of the Rule 612 analysis, which in turn resulted in confusion between the effect of finding a waiver and the effect of finding substantial need and undue hardship under Rule 26.

The court summarized the rule used by courts in the circuit: "Provided that the privileged documents can be said to have had an impact on the testimony, courts then conduct a balancing test to determine whether Rule 612 requires disclosure, notwithstanding the existence of a privilege."¹²¹ The court used what it described as the *Berkey Photo*¹²² balancing test, as expanded by *In re Joint Eastern and Southern District Asbestos Litigation*.¹²³ That test, according to the court, requires examination of three factors: 1) whether the attorney exceeded the limits of proper preparation—concealment through improper assertion of the work product doctrine, 2) whether the work product sought is factual or opinion, and 3) "whether the document request 'constitutes a fishing expedition.'"¹²⁴

The court's reliance on that test was misplaced; that test is

rules is the ascertainment of the truth, the fact that a document was used to refresh one's recollection prior to his testimony instead of during his testimony is of little significance." 81 F.R.D. at 10. Similarly, in *Prucha v. M & N Modern Hydraulic Press Co.*, 76 F.R.D. 207 (W.D. Wis. 1977), the court ordered disclosure of two statements used by the plaintiff to refresh his memory in preparation for his deposition. *Id.* at 210. Both were statements made by the plaintiff to his attorneys. *Id.* at 208. Yet, the court did not address an assertion of attorney-client privilege in ordering disclosure. Instead, it appeared to have based its decision on a finding of substantial need, although it didn't directly address Rule 26:

In view of the increasingly liberal scope of permissible discovery, in view of the lapse of time between plaintiff's accident and the time when defendants were informed of it, which defendants allege has hampered them in the preparation of their case, and in view of the failure of the plaintiff to indicate to the Court any reasons why it should not exercise its discretion in favor of discovery in this matter, the Court finds that the ends of fairness are best served by allowing full disclosure. In so doing, the Court is not authorizing a 'fishing expedition' into the files of plaintiff's attorneys.

Id. at 210.

119. No. 92 CIV. 3561, 1994 U.S. Dist. LEXIS 4091 (S.D.N.Y. Apr. 1, 1994).

120. *Id.* at *16-*23.

121. *Id.* at *18.

122. 74 F.R.D. 613 (S.D.N.Y. 1977).

123. 1994 U.S. Dist. LEXIS 4091, at *18-*19 citing *In Re Joint Eastern and Southern District Asbestos Litigation*, 119 F.R.D. 4 (E.D. & S.D.N.Y. 1988).

124. *Id.* at *19 (citing *In Re Joint Eastern and Southern District Asbestos Litigation*, 119 F.R.D. at 6.)

from cases dealing with the clash between Rule 612 and the work product doctrine; the factors established by the court in *Asbestos Litigation* were based on an application of the substantial need test of Rule 26.¹²⁵ In *Bank Hapoalim*, however, the court was dealing with documents protected by the attorney-client privilege rather than by the work product doctrine.¹²⁶ The court neglected this distinction in its analysis, even though the test it relied on required the court to consider whether the document sought was protected by opinion or fact work product.

This case also differs from *Berkey Photo* and *Asbestos Litigation* in that the documents ordered disclosed were not otherwise available to the party seeking disclosure. In *Berkey Photo*, the documents themselves had already been disclosed during discovery; it was the selection of certain documents that were sought to be protected by work product.¹²⁷ Similarly, in *Asbestos Litigation*, the defendant was seeking information about which documents it had turned over to the plaintiff had been used by the plaintiff to prepare for his deposition.¹²⁸ In *Bank Hapoalim*, in contrast, the documents held to be covered by the attorney-client privilege were clearly not discoverable had they not been shown to the witness.¹²⁹ This difference may have led to a different conclusion than that reached by the courts in *Berkey Photo* and *Asbestos Litigation* as to whether the party seeking disclosure was engaged in a fishing expedition. Yet, the court failed to address that distinction in its opinion.¹³⁰

The magistrate in *Barrer v. Women's National Bank*,¹³¹ also

125. 119 F.R.D. at 6.

126. 1994 U.S. Dist. LEXIS 4091, at *15. The magistrate's order requiring production of nine documents was on review by the district court in *Bank Hapoalim*. *Id.* at *3-4. The documents had been reviewed by a supervisor for one of the parties in preparation for his deposition. *Id.* at *3. Eight of the documents were letters written by the party's attorney to either the witness or another employee of the party. *Id.* at *6. The ninth document was a handwritten note written by the witness. *Id.* The court found that two of the documents were not covered by the attorney-client privilege because they were written before an attorney-client relationship existed. *Id.* at *14. The other seven, according to the district judge, were covered by the privilege. *Id.* at *15.

127. 74 F.R.D. at 613.

128. 119 F.R.D. at 5.

129. 1994 U.S. Dist. LEXIS 4091, at *18.

130. The court affirmed the magistrate's finding that the witness had relied on the document. *Id.* at *20. The party resisting disclosure argued that the witness had only "looked" at the document. *Id.* The court found that the witness had relied on the document because he had spent two days preparing for the deposition and at his deposition he was able to identify specific documents he had examined during his preparation. *Id.* at *21. In addition, it didn't appear that the witness had had personal knowledge of the events, so the court concluded that he must have learned about the events through review of the documents. *Id.*

131. 96 F.R.D. 202 (D.D.C. 1982).

held that a waiver theory overcomes assertions of attorney-client privilege. The opinion is interesting in its discussion of the legislative history behind Rule 612 and its consideration of policy arguments against disclosure.¹³² The document at issue was a memo prepared by the president of the corporate defendant, which was reviewed by the president in preparing for her deposition.¹³³ The court held that the "interests of justice" standard of Rule 612 compelled disclosure, despite the defendant's argument that the legislative history of Rule 612 indicated an intent to leave privileges undisturbed.¹³⁴ According to the court, had Congress meant to grant total immunity to documents protected by the attorney-client privilege, it could have "used more specific and precise language."¹³⁵ The court noted that:

Congress could have explicitly included qualifying language to the effect that privileged matters should not normally be produced, unless the court found it absolutely necessary in the interests of justice. But Congress chose to use a much more general and broader standard, thus suggesting a wider range of judicial discretion in this area.¹³⁵

The court also addressed the practical impact of a waiver theory on trial preparation.¹³⁷ The defendant, who was opposing disclosure, argued that requiring disclosure of a document prepared for the attorney by the client at the request of the attorney would alter the ability of the attorney to represent the client effectively.¹³⁸ The magistrate conceded the need to prepare such a document at the outset of representation, but noted that the attorney-client privilege could have been preserved by not making the document available to the witness in preparation for the deposition.¹³⁹ By choosing to use the document to prepare the witness, the attorney had made it available. Any other decision, according to the court, would "ignore the unfair disadvantage which could be placed upon the cross-examiner by the simple expedient of using only privileged writings to refresh recollection."¹⁴⁰

One of the things that is interesting about the opinion in *Barrer* is the court's finding that disclosure was justified by the need

132. *Id.*

133. *Id.* at 202.

134. *Id.* at 204-05; see also *infra* note 143.

135. 96 F.R.D. at 204 n.2.

136. *Id.*

137. *Id.* at 203-05.

138. *Id.* at 204.

139. *Id.* at 204 n.1.

140. *Id.* at 205 (discussing *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138 (D. Del. 1982)).

to cross-examine effectively, that is, by the need to test whether the document has planted false memories in the witness's mind.¹⁴¹ This justification is inapposite when the document used to refresh the witness's memory was originally prepared by the witness herself. The same danger of planting false memories would not be present where the document shown to the witness was one prepared by the witness as it would be when the document was prepared by the attorney or someone else.¹⁴²

In *Boring v. Keller*,¹⁴³ the district court affirmed a magistrate's ruling requiring disclosure of two documents used by an expert in preparing to testify.¹⁴⁴ The documents were an unedited version of the plaintiff's deposition, with the defendant's lawyer's impressions and evaluations of the plaintiff's appearance and her demeanor as a witness,¹⁴⁵ and an "expert witness letter" that contained "general suggestions to experts for their deposition testimony, as well as counsel's impressions, thoughts and opinions regarding issues which are generally encountered in medical malpractice cases."¹⁴⁶ Relying in part on *Berkey Photo's* waiver analysis, the court found that even opinion work product is not protected when it has been shown to an expert.¹⁴⁷ The court based its decision on two theories: 1) the work product protection is waived when "counsel had delivered work product to an expert to be 'useful to the client,' but then withholds the material from an adversary who seeks to exploit the fact of this assistance in cross-examining the witness"¹⁴⁸ and 2) Rule 26(b)(4) requires disclosure of information disclosed to an expert that formed the basis for the expert's opinion.¹⁴⁹

B. *The Third Circuit Approach*

The Third Circuit is one of the few appellate courts that has weighed in on the issue of whether the use of work product to prepare a witness is a sufficient showing of need to require disclosure.¹⁵⁰ A pair of decisions from that court, both of which denied

141. 96 F.R.D. 202 (D.D.C. 1982).

142. The magistrate did not, however, order the document immediately disclosed to the opposing party. Instead, the magistrate ordered an in camera inspection to "strike the balance between plaintiff's interest in discovering any evidence favorable to him and the defendant's interest in protecting the attorney-client relationship." *Id.*

143. 97 F.R.D. 404 (D. Colo. 1983).

144. *Id.* at 408.

145. *Id.* at 404.

146. *Id.* at 405.

147. *Id.* at 407-08.

148. *Id.* at 407 (citing *Berkey Photo*).

149. *Id.* at 407-08.

150. The Third Circuit is not the only court of appeals to address the issue. The First

disclosure, provides examples of two different approaches to resolving the conflict.

In *Bogosian v. Gulf Oil Corp.*,¹⁵¹ the court resolved the conflict between disclosure and work product by relying on Rule 26, with only a footnote reference to Rule 612.¹⁵² The case came to the Third Circuit on a mandamus action.¹⁵³ The district court ordered production of a memorandum prepared by counsel and shown to an expert witness in preparation for a deposition.¹⁵⁴ Its order was based on a holding that in a conflict between 26(b)(3) and (b)(4), the work product rule was overridden by expert discovery rules.¹⁵⁵ The district court found that the only way to prepare properly for cross-examination of the expert was to have access to everything the expert had used in preparing his testimony.¹⁵⁶ On mandamus to the Third Circuit, the petitioner argued that the documents sought were opinion work product and therefore not discoverable even upon a showing of need.¹⁵⁷

The Third Circuit reversed the order compelling disclosure. Its decision, just as was the district court's, was based not on Rule 612, but rather on the perceived conflict between 26(b)(3) and (b)(4). The court based its decision both on a conclusion that the need to have the document for cross-examination was not strong and on the potential chilling effect of requiring attorneys to avoid production by orally preparing witnesses instead of using written memoranda.¹⁵⁸ As to the first, the court said: "[e]xamination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory."¹⁵⁹ As to the second,

[i]f attorneys are to feel free to commit to writing the mental processes by which they sift and evaluate various possible theories on which they will base their cases, they must feel confident that such material will be protected from disclosure. Otherwise, the freedom of thought essential to care-

Circuit, in *Smith & Wesson, Div. of Bangor Punta Corp. v. United States*, 782 F.2d 1074, 1083 (1st Cir. 1986), held, without discussion, that the trial court had not abused its discretion in applying Rule 612's interests of justice standard to deny a motion to disclose a report used by an expert witness to prepare.

151. 738 F.2d 587 (3d Cir. 1984).

152. *Id.* at 595 n.3.

153. *Id.* at 588.

154. *Id.* at 588-89.

155. *Id.* at 590-91.

156. *Id.* at 590.

157. *Id.* at 588.

158. *Id.* at 593-95.

159. *Id.* at 595.

fully reasoned trial preparation would be inhibited.¹⁶⁰

The court did not ignore Rule 612 altogether. It mentioned it in a footnote, stating that the same reasoning that supported its decision to deny disclosure on a Rule 26(b)(4) analysis would apply to support a conclusion that 612 does not overcome work product.¹⁶¹ Yet, even though the court was explicit that it did not rely on Rule 612, the balancing of interests it used is the same balancing used by other courts in reconciling the discretionary ruling under 612 with the substantial need test of work product.

There was a sharp dissent in *Bogosian*, in which the dissenting judge disagreed with the majority's conclusion that a document used to prepare a witness is not necessary for effective cross-examination.¹⁶² It suggested an in camera inspection and a balancing test to determine whether the documents' "impeachment value . . . would significantly outweigh the chill on development of legitimate attorney work product that would admittedly accompany disclosure."¹⁶³ Using language similar to that used by courts who analyze the issue under Rule 612, the dissent stated:

[t]urning to the exercise of discretion, one circumstance that must guide the district court in determining whether to quash the subpoena or, equivalently in this case, to deny discovery, is the adverse parties' need for the work product. I disagree with the majority's pronouncement—which it apparently believes to be one of law—that evidence demonstrating that an economist's theory did not originate or evolve as a result of his own research, but rather as a result of the hiring lawyer's suggestion, is of only 'marginal value.' Rather, such a revelation could, in some cases, critically alter the finder of fact's assessment of the expert's testimony. While the majority would (I think) concede that the expert could be cross-examined concerning the attorney's role in development of this theory, . . . the issue here is whether (and when) extrinsic evidence can be used to impeach an economist who denies or minimizes the lawyer's role in 'shaping' his 'expert' findings.¹⁶⁴

A year after *Bogosian*, in *Sporck v. Peil*,¹⁶⁵ the Third Circuit again dealt with the issue of whether documents used to prepare a witness for deposition should be disclosed. This time, the witness who reviewed documents selected and compiled by attorneys was

160. *Id.* at 593.

161. *Id.* at 595 n.3.

162. *Id.* at 597-99 (Becker, J. dissenting).

163. *Id.* at 598.

164. *Id.* (citation and footnote omitted).

165. 759 F.2d 312 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985).

the defendant.¹⁶⁶ Because the witness was not an expert, the court could not look to 26(b)(4) to help it resolve a conflict between disclosure and protection; instead, it based its decision on an analysis of Rule 612.¹⁶⁷

In *Sporck*, all the documents reviewed had already been turned over to plaintiffs in discovery; it was conceded that none in their original form contained work product.¹⁶⁸ The district court held that the selection and grouping of documents for witness preparation constituted work product.¹⁶⁹ But, the court held that it was not opinion work product entitled to absolute protection and that "the principles behind rule 612" supported the claim for disclosure.¹⁷⁰ The Third Circuit disagreed, holding that the selection and compilation of documents was opinion work product, relying on *Raytheon* and *Berkey Photo*.¹⁷¹ Unlike the courts in those two cases, however, the *Sporck* court did not find that such use of the documents required disclosure.¹⁷² Instead, it represented appropriate, even required, conduct by the attorney: "in selecting the documents that he thought relevant to Sporck's deposition, defense counsel engaged in proper and necessary preparation of his client's case."¹⁷³ The court noted that if disclosure were required, the witness would not have been well-prepared for the deposition, which would have been to the detriment of both parties.¹⁷⁴

The court rejected an argument that any work product protection attributable to the document had been waived by showing it to the client, citing *Bogosian* as having rejected the application of a waiver theory.¹⁷⁵ Rather than establishing a test to resolve a conflict between work product and 612, however, the court said that there was not a conflict.¹⁷⁶ According to the court, the two rules could be harmonized by the use of a simple procedure for deposing the witness.¹⁷⁷ The questioning attorney's need to know what documents the witness had reviewed in preparing to testify could easily be met by asking the witness what documents he reviewed relating

166. *Id.* at 313-14.

167. *Id.* at 317.

168. *Id.* at 313.

169. *Id.* at 314.

170. *Id.*

171. *Id.* at 316.

172. *Id.* at 316-17.

173. *Id.* at 316.

174. *Id.* at 317.

175. *Id.* at 317 n.6.

176. *Id.* at 318.

177. *Id.*

to the subject matter of the questions.¹⁷⁸ Then, the questioning attorney could use the document, which, after all, had already been disclosed and therefore was in the possession of the questioning attorney, to cross-examine.¹⁷⁹ Through that questioning, the attorney could determine whether the witness's testimony had been influenced by the attorney's selection of documents.¹⁸⁰ Such a resolution would protect the important policies underlying the work product protection but also allow effective cross-examination of the prepared witness: "In such a case, deposing counsel would discover the documents through his own wit, and not through the wit of his adversary."¹⁸¹

The court held that under Rule 612 a party must meet three conditions before disclosure would be ordered: "1) the witness must use the writing to refresh his memory; 2) the witness must use the writing for the purpose of testifying; and 3) the court must determine that production is necessary in the interests of justice."¹⁸² The issue in *Sporck* became difficult, according to the court, only because the requesting party failed to lay a proper foundation:

[I]f respondent's counsel had first elicited specific testimony from petitioner, and then questioned petitioner as to which, if any, documents informed that testimony, the work product petitioner seeks to protect—counsel's opinion of the strengths and weaknesses of the case as represented by the group identification of documents selected by counsel—would not have been implicated. Rather, because identification of such documents would relate to specific substantive areas raised by respondent's counsel, respondent would receive only those documents which deposing counsel, through his own work product, was incisive enough to recognize and question petitioner on. The fear that counsel for petitioner's work product would be revealed would thus become groundless.¹⁸³

The court's opinion in *Sporck* appears to be a good resolution of the conflict between disclosure and protection; however, it will work only in the situation in which the documents have already been disclosed. It will not work when the document sought is itself claimed to come within the work product protection—a different analysis is required for that situation, and the court's opinion in *Sporck* fails to provide guidance as to how such a situation should be handled.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 318-19.

182. *Id.* at 317.

183. *Id.* at 318.

Both approaches of the Third Circuit have been followed by the lower courts. In an echo of the concerns expressed by the Third Circuit in *Bogosian*, the court in *Intermedics, Inc. v. Ventritex, Inc.*,¹⁸⁴ also found it appropriate to base a decision regarding requested disclosure of communications from counsel to expert witnesses on the conflict between 26(b)(3) and (b)(4)¹⁸⁵ rather than on Rule 612.¹⁸⁶ However, the court did so for a different reason than did the Third Circuit in *Bogosian*. Instead of finding that a Rule 612 analysis would not make a difference in outcome, the court decided that the law was simply too confused to allow clear analysis under Rule 612: "[W]e are not satisfied that any court has explained sufficiently how, in light of its legislative history (at least in the House of Representatives), this Rule could be used to compel disclosure of communications that otherwise would be privileged or protected as work product."¹⁸⁷

Similarly, the district court in *S & A Painting Co. v. O.W.B. Corp.*,¹⁸⁸ relied on *Bogosian* for guidance on the issue of how much protection should be afforded work product, even though it used a Rule 612 analysis.¹⁸⁹ The court cited *Bogosian* for the conclusion that Rule 612 "should be construed narrowly in order to respect the protections of work product material embodied in Rule 26 (b)(3)."¹⁹⁰ The court explained, "[a]llowing disclosure under Rule 612 of documents protected by the work-product doctrine circumvents the requirement of 'substantial need' and 'undue hardship' prior to discovery under Rule 26(b)(3)."¹⁹¹ Yet, the court seemed not to question that any document actually used to refresh a witness's memory would be required to be disclosed, even in the face of an assertion of work product: "While even a narrow construction of Rule 612 mandates waiver of protections for portions of documents actually used to refresh, permitting discovery of the bulk of the notes converts Rule 612, a rule of evidence, into a discovery device."¹⁹² In *S & A Painting*, the party seeking disclosure had not

184. 139 F.R.D. 384 (N.D. Cal. 1991).

185. *Id.* at 391. The court also considered the tension between Rule 26(b)(3) and the Federal Rules of Evidence 702, 703 and 705. *Id.*

186. *Id.* at 386 n.1. Although the specific request that was the basis for the motion was rendered moot, the court took the opportunity to announce the "'law of the case' that will govern discovery of communications from counsel to experts who will offer testimony in conjunction with motions or trial." *Id.* at 385.

187. *Id.* at 386 n.1.

188. 103 F.R.D. 407 (W.D. Pa. 1984).

189. *Id.* at 409-10.

190. *Id.* at 409.

191. *Id.*

192. *Id.*

shown actual use of the sought-after documents by the deponent, except for several references to dates and one portion read aloud during the deposition.¹⁹³ The court framed the issue in this case as whether the entire document must be disclosed when a portion of it has been used by the witness during the deposition.¹⁹⁴

Other courts have relied on the Third Circuit's opinion in *Sporck v. Piel*. For example, *Sporck* was followed in the 1995 case of *Stone Container Corp. v. Arkwright Mutual Insurance Co.*¹⁹⁵ In this insurance case, the district court affirmed a magistrate's order denying a motion to compel.¹⁹⁶ The documents sought were used by a deposition witness to "recall 'somewhat' the circumstances and events relating to"¹⁹⁷ an insured loss. The witness was the Risk Manager for the defendant insurer.¹⁹⁸ The court relied on *Sporck* to hold that the selection of documents used to prepare the witness was opinion work product and therefore entitled to 26(b)(3) protection.¹⁹⁹ In this instance, as in *Sporck*, all the documents used to prepare a witness had already been turned over during discovery.²⁰⁰

As [the party seeking disclosure] already had all of the documents it sought to compel, and thus could test [the witness's] recollection and credibility without knowledge of the specific documents . . . counsel selected for [the witness's] review, this Court concludes that [the party seeking disclosure] has not shown that the production of documents was necessary in the interests of justice.²⁰¹

The *Stone Container* court found that the selection of documents for review by the witness would require the attorney to reveal his "evaluation of the documents and his opinion of the most important legal and factual issues in the litigation."²⁰² For that reason, the selection of documents should not have to be disclosed, especially when the documents had already been revealed during discovery.²⁰³

Similarly, in a 1988 decision, a magistrate rejected an argument that use of a document to refresh memory meant that the

193. *Id.* at 409-10.

194. *Id.* at 410.

195. No. 93 CIV. 6626, 1995 U.S. Dist. LEXIS 2400 (N.D. Ill. Feb. 22, 1995).

196. *Id.* at *13.

197. *Id.* at * 2.

198. *Id.* at *1-*2.

199. *Id.* at *11.

200. *Id.*

201. *Id.* at * 7.

202. *Id.* at *11.

203. *Id.*

document was needed for cross-examination and that, therefore, the "substantial need" requirement of Rule 26(b)(3) had been met. In *Derderian v. Polaroid Corp.*,²⁰⁴ the magistrate denied a motion to compel discovery of notes made by the plaintiff in a sex discrimination suit, which she reviewed the night before giving her deposition. The plaintiff contended that the notes were protected by both the attorney-client privilege and work product,²⁰⁵ and the magistrate agreed. The magistrate noted that without these protections, the documents would be discoverable because they are relevant.²⁰⁶ According to the magistrate, a conclusion that the need to cross-examine amounts to a showing of substantial need "ignore[s] the rather clear Congressional intent" behind Rule 612.²⁰⁷ The magistrate characterized the decisions requiring disclosure as eliminating the difference between discoverability of documents used to refresh memory before testifying and those used while testifying.²⁰⁸ Ignoring that distinction, according to the court, eliminates the discretion granted the trial court under Rule 612.²⁰⁹

In assessing whether the assertion of work product protection was overcome by a showing of substantial need, the magistrate looked at the factors usually examined under a Rule 26(b)(3) analysis outside of the Rule 612 context. It rejected the defendant's argument that it had "substantial need" of the plaintiff's notes:

This is not a case in which [defendant] does not have equal access to the events which are the subject matter of the notes. The notes presumably are of meetings and communications which the plaintiff has had with agents and/or employees of [defendant]; [defendant] has full access to those agents and/or employees in order to obtain evidence respecting the meetings and communications.²¹⁰

The magistrate also rejected Polaroid's argument that the disclosure was necessary because of the lapse of time between the events recorded in the notes and the deposition and because of the "extensiveness of Plaintiff's contemporaneous record".²¹¹ The magistrate said that "[t]he lapse of eighteen months . . . is simply not that long a period of time, especially when all parties were aware of the events which form the basis of this dispute."²¹²

204. 121 F.R.D. 13 (D. Mass. 1988).

205. *Id.* at 14.

206. *Id.* at 15.

207. *Id.* at 16.

208. *Id.* at 15.

209. *Id.* at 16.

210. *Id.* at 16-17.

211. *Id.* at 17.

212. *Id.*

Finally, the magistrate also rejected the defendant's argument that substantial need was shown because "[w]ithout reviewing Plaintiff's notes, Polaroid is unable to explore discrepancies between Plaintiff's Complaint and her notes, and may also be deprived of access to substantive evidence in the form of admissions and statements against interest."²¹³ In response to this argument, the court said "Rule 612 . . . is a rule of evidence, not a rule of discovery."²¹⁴ Therefore,

[t]he fact that what the plaintiff has written down may contain 'admissions' and/or 'statements against interest' is not a ground for ordering disclosure. The sole purpose of the rule is to allow disclosure when necessary 'to promote the search of credibility and memory' as a result of the use of documents to refresh recollection.²¹⁵

V. A PROPOSED SOLUTION

A review of the cases in which courts have struggled to reconcile Rule 612 with those protections traditionally afforded by the work product doctrine and attorney-client privilege reveals that the resolution is not becoming clearer with experience. To the contrary, experience seems to be exacerbating the uncertainty stemming from a less than clear rule. The courts have made the issue difficult by their confusion of the several distinct analyses that can arise when a party requests disclosure of a document because it was shown to a witness before testifying.

If a court decides that the interests of justice require disclosure of a document under Rule 612,²¹⁶ and the party opposing disclosure asserts work product protection, the court needs to answer two questions: 1) Does the document contain work product? 2) If it does, has the party seeking disclosure overcome work product protection by the required showing of substantial need and undue hardship under Rule 26(b)(3) or has the party resisting disclosure

213. *Id.*

214. *Id.*

215. *Id.* at 17 (citing *Sporck*). The magistrate did note, however, that the decision might be different at trial, rather than, as in this instance, when the documents were used to prepare for a deposition, because "[t]he issues of credibility are more clearly drawn at that time." *Id.* Therefore, the court ordered that the plaintiff preserve her notes: "I make no ruling whatever on whether or not the trial judge, in his discretion, might order disclosure at the time of plaintiff's testimony at trial regardless of whether plaintiff again reviews her notes before testifying at trial." *Id.* at 17-18.

216. This decision would include the court's finding both that the document was used to refresh the witness's memory and that, in the absence of some asserted protection, the court would order disclosure "in the interests of justice." FED. R. EVID. 612.

waived the right to claim work product protection by disclosing the document to an adversary or disclosure under circumstances that will enable an adversary to have access to that information? A court should analyze whether to order disclosure by applying one of the existing tests for determining whether work product is discoverable.

This approach does not make Rule 612 irrelevant. Rule 612 gives the party the right to ask for disclosure of a document at trial because it was used to refresh a witness's memory, a right that is not otherwise explicitly provided for in the Federal Rules of Evidence. Further, Rule 612 manifests a policy of the importance of effective cross-examination that might help a court find that substantial need has been shown. However, the fact that a witness has been shown a document before testifying should not necessarily lead to a conclusion that work product is overcome. The court must find that the document should be disclosed based on a work product analysis rather than that Rule 612 itself overcomes work product.

Similarly, if a party asserts that a document requested under Rule 612 is protected by the attorney-client privilege, the court should look to see if the circumstances under which the witness was shown a document to refresh his or her memory constituted a waiver of attorney-client privilege, that is, whether the document was revealed to someone other than the attorney, the client, or a representative of either. Again, the court should not find that Rule 612 constitutes an automatic waiver of the attorney-client privilege under circumstances that would not otherwise constitute a waiver.

Where the courts have taken a wrong turn is in not recognizing that these necessary analyses are distinct. Some courts, for example, have held that attorney-client privilege is waived upon a showing of substantial need and undue hardship. This is a finding that Rule 612 itself constitutes a waiver because, by showing a witness a document before testifying, the opposing party has substantial need of the document for effective cross-examination, and that the substantial need overcomes an assertion of attorney-client privilege. Such a holding confuses work product and attorney-client privilege. It is also completely contrary to the usual ways for finding that attorney-client privilege has been overcome and is inconsistent with the policy concerns that have for many years sustained that privilege. Nowhere in the legislative history is there any indication that Congress meant such a result when it enacted Rule 612.

Rule 612 should be amended to clarify the conditions under which a court may exercise its discretion to order disclosure of a document used to refresh a witness's memory in the face of an as-

sertion of work product or privilege. The analysis has been so far confused by the courts that judicial efforts to clarify it are not likely to be successful, especially in light of disagreement about the intent behind the rule.

The pertinent section of Rule 612 should be amended to add the following language:

If a court finds that the interests of justice require disclosure of a writing used to refresh a witness's memory before testifying, the court may order disclosure of materials:

(a) to which a claim of protection under Federal Rule of Civil Procedure 26(b)(3) is asserted if:

(1) such disclosure would be permitted under Rule 26(b)(3); or

(2) the court finds that the asserted protection has been waived by disclosure of the writing to an adverse party or under circumstances under which disclosure to an adverse party is likely;

(b) to which a claim of attorney-client privilege is asserted if the court finds that the claimed privilege has been waived.

In determining whether these requirements are met, the court may consider the effect of the witness's using the document to refresh memory, but use of the document to refresh memory does not necessarily overcome assertions of protection of trial preparation materials or materials protected by the attorney-client privilege.

Such an amendment would have changed the analysis in many of the cases discussed in this article. For example, the *Berkey Photo*²¹⁷ waiver analysis would not be sound under the amended rule. In *Berkey Photo*, the court found a waiver (at least, a prospective one) of work product based on the use of trial notebooks to prepare a testifying expert. The court in essence held that Rule 612 itself effected a waiver.²¹⁸ Yet, that decision is not consistent with work product waiver analysis, which requires that the document have been disclosed to the adversary or have been disclosed under circumstances likely to result in disclosure to the adversary.

A more sound approach would be that required by the proposed amendment to the rule. Under that amendment, the court's analysis would not have rested on a waiver theory, but the court could still have reached a conclusion to compel disclosure. Instead of relying on waiver, the court would have had to decide whether the work product protection was overcome by a showing of substantial need and undue hardship under Rule 26(b)(3). Had the *Berkey Photo* decision applied the analysis of the suggested amendment, the court's decision would not have created confusion

217. 74 F.R.D. 613 (S.D.N.Y. 1977).

218. See *supra* notes 75-92 and accompanying text.

by introducing a waiver theory into the analysis, would not have led to a line of cases holding that Rule 612 necessitates disclosure, and would have been consistent with treatment of work product in other contexts.

Similarly, the analysis in cases such as *Bank Hapoalim*²¹⁹ and *Barrer*,²²⁰ dealing with assertions of the attorney-client privilege, would have proceeded differently had the courts been applying the analysis of the suggested amendment. In those cases, the courts found that Rule 612 operated as a waiver of the attorney-client privilege; by showing the document to a witness in preparation for testifying, the party had waived the attorney-client privilege. Yet, those holdings are inconsistent with the long-established rules of attorney-client privilege, which protect documents within the privilege unless they have been revealed to someone outside of the attorney-client relationship. In *Barrer*, the documents were shown to the client to prepare her for testifying.²²¹ In *Bank Hapoalim*, the documents were shown to a witness who was an investigator for the defendant insurance company's claims handling agent.²²² Under a traditional privilege analysis, those uses of the document would not have effected a waiver, and the balancing test relied on by the courts would not have been apposite. In those cases, Rule 612 alone was enough to find a waiver. Again, that result was not intended by Congress in drafting Rule 612.

The magistrate in *Derderian* stated that Rule 612 "is a rule of evidence, not a rule of discovery."²²³ That may be an accurate distinction in theory, but it is not one that holds up in the face of experience. Rule 612, to the extent it allows a court to order disclosure of documents to an adversary, is a rule of discovery. Therefore, the rule needs to recognize explicitly the traditional limitations on discovery: work product protection and the attorney-client privilege. The best way to do that is through an amendment to Rule 612.

219. No. 92 CIV. 3561, 1994 U.S. Dist. LEXIS 4091 (S.D.N.Y. Apr. 1, 1994).

220. 96 F.R.D. 202 (D.D.C. 1982).

221. See *supra* notes 132-43 and accompanying text.

222. See *supra* notes 118-31 and accompanying text.

223. 121 F.R.D. at 17.