Refreshing Recollections Without Waiving Work Product Protections

The Interplay Between Rule 612 and the Work Product Doctrine

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This article analyzes the relationship between the work product doctrine and Rule of Evidence 612 in the context of whether documents compiled by an attorney and reviewed by a fact witness in preparation for a deposition must be disclosed.

Is a party taking a deposition entitled to a compilation of key documents that the defending attorney used to prepare the witness if the documents refreshed the witness's memory?

Answering this question requires considering the interplay between the work product doctrine, which protects attorney work product prepared in anticipation of litigation, and Rule of Evidence 612, which gives an adverse party the right to obtain documents that "refresh" a witness's memory. Although the question has not been answered by Colorado courts, this article looks at the latest decisions from other district courts in the Tenth Circuit for guidance. This article also offers practical takeaways based on the factors that courts use to determine whether documents an attorney showed their witness during deposition preparation must be produced.

"Objection! I instruct the witness not to answer."

It is 9:17 on Monday morning, and you are sitting in a spacious conference room on a top floor of a downtown Denver high-rise, ready to defend your client's deposition. The sun is up over the Rockies. The hustle and bustle of the morning has slowed to silence. Opposing counsel sits across the table, eager for the deposition to start. A few minutes later, the videographer has the camera up and running, fixes the last microphone, and the court reporter begins the oath.

Your witness takes the oath.

You settle into the chair for a long day.

It's been a grueling month. You've spent much of it preparing this witness—the company's chief operating officer—for this critical deposition. As part of that process, you and a few talented associates whittled down the million-document database to 50 key documents that you compiled in a binder that you provided to the witness. You and your witness ran through the documents in the binder together during a mock deposition and preparation session. You are confident your witness will do a good job.

Then, a few questions in, your confidence collapses as the following exchange occurs:

Q: Mr. Huxley, what did you do to prepare for this deposition?

A: I met with my lawyer.

Q: Did your lawyer show you any documents?

A: Yes.

Q: Did those documents refresh your recollection about the underlying facts in this case?

A: I definitely recalled a few things after looking at documents.

Q: Would you please tell me which documents you looked at, and will you produce those documents?

This casual exchange raises several strategic considerations that you must resolve right now. Oh, and make sure you're right, because you may need to defend whatever decision you make to a judge—possibly within the hour during a discovery dispute phone call.

Here are just few of the many strategic considerations:

- Do you object and tell the witness not to answer based on the work product doctrine? Is opposing counsel entitled to benefit from all the hard work you put into understanding and identifying the key documents in the case?
- Do you object that the questioning attorney has not laid the appropriate foundation under Rule 612 to demand any documents?[1]

- If you do object, do you risk prolonging this deposition?
- Will this go to a hearing? If it does, will you win? Apart from the merits, is a hearing worth the trouble?

To answer these and related questions, you must at least consider the work product doctrine, Rule 612, and the relevant case law. Fortunately, we aren't in the middle of a deposition, and we don't have to make a split-second strategic decision.

The Work Product Doctrine

Federal Rule of Civil Procedure 26(b)(3) codifies the work product doctrine:

> Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).[2]

The rule provides an exception for documents that "are otherwise discoverable under Rule 26(b)(1)" if "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[3] Furthermore, it states: "If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."[4]

Similarly, Colorado Rule of Civil Procedure 26(b)(3) provides, in relevant part, that

> a party may obtain discovery of documents and tangible things otherwise discoverable under [the discovery standard] and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.[5]

Note that, given the similarity in language between the federal and Colorado rules, the Colorado Supreme Court prefers "to interpret [its] own rules of civil procedure harmoniously with [the court's] understanding of similarly worded federal rules of practice."[6]

Rule of Evidence 612

Federal Rule of Evidence 612 "gives an adverse party certain options when a witness uses a writing to refresh memory: (1) while testifying, or (2) before testifying, if the court decides that justice requires the party to have those options."[7] The rule explains that the adverse party's "options" are "to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony."[8] Finally, the rule states: "If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order."[9]

Similar in substance, Colorado Rule of Evidence 612 provides that if a witness uses a writing to refresh their memory while testifying or before testifying, the court may "in its discretion" and "in the interests of justice" order that the document be produced to the adverse party. There is limited precedent in Colorado discussing and applying Colorado Rule of Evidence 612.

The US District Court for the District of Colorado has held that the "adverse party" seeking the production of documents pursuant to Fed. R. Evid. 612 must show that:

1. the witness used the writing to refresh their memory,
2. the witness used the writing for the purpose of testifying,
3. the production is necessary in the interests of justice, and
4. the documents actually influenced the witness's testimony.[10]

The advisory committee notes to Fed. R. Evid. 612 explain that the purpose of the rule is "to promote the search of credibility and memory."[11] In other words, the rule aims to ensure that the adverse party can test the witness's credibility and memory. If a deposing or cross-examining attorney has access to writings that impact the witness's memory, and therefore testimony, the attorney will be in a better position to question the witness's memory and credibility.[12]

Practically, a party opposing disclosure should attack each of the requirements for disclosure under Rule 612.[13] Although it is not necessary to obtain formalistic recitations that either the witness cannot remember pertinent information without the aid of the document or that the document in fact assisted in refreshing the witness's memory,[14] the mere fact that a witness looked at a document is not alone sufficient to satisfy the rule.[15] Even if the witness's testimony satisfies the first two prongs of the rule, counsel resisting disclosure could still argue that the questioning attorney failed to establish that disclosure is necessary in the interest of justice, or that the documents influenced the witness's testimony.

Tension Between the Work Product Doctrine and Rule 612

Returning to the hypothetical, neither the work product doctrine nor Rule 612 provides an obvious answer on whether to instruct your well-prepared COO not to answer.

One the one hand, the binder of documents you compiled to prepare your client for testimony arguably constitutes work product, since you—as the witness's attorney—spent hours compiling the binder for the exclusive purpose of his deposition. Indeed, the binder includes documents that you consider to be particularly important to the case: documents you consider helpful (which your client might rely on during the deposition to paint a favorable picture), and documents you consider damaging (which your client is now more prepared to respond to, if asked about them during the deposition). It follows that this information is arguably the precise sort of information the work product doctrine protects.[16]

On the other hand, the documents refreshed your witness's recollection, triggering Rule 612. Without knowing those documents, how can opposing counsel properly question the witness's memory and credibility? How will counsel know that the testimony was not solely based on documents favorable to the witness's position?

Case Law

As of the date of this article, you, opposing counsel, and the judge in the hypothetical could not find binding precedent in Colorado

on whether documents compiled by counsel that refresh a deposition witness's recollection are discoverable, or if they instead constitute non-discoverable attorney work product.

One recent Colorado Court of Appeals criminal case deals with an improper attempt to invoke Rule 612, as a writing wasn't used to refresh a witness's recollection.[17] Another appellate decision mentions Rule 612 as one of several reasons to find waiver of a child's psychotherapist-patient privilege. But that since-overruled decision is not helpful because the court ultimately held that the party expressly waived the privilege, mooting any Rule 612 considerations.[18]

Meanwhile, neither the Tenth Circuit Court of Appeals nor the US District Court for the District of Colorado has addressed the issue. Only one Colorado case has evaluated Rule 612 in the context of a writing reviewed before a deposition, and that lone Colorado case does not deal with documents compiled by an attorney or the work product doctrine.[19] One other Colorado case reached the decision that "the compilation of materials by plaintiffs' counsel through his personal research constitutes work product," but this finding was not in the context of a deposition witness's refreshed recollection under Rule 612.[20]

Helpfully, however, other district courts within the Tenth Circuit's jurisdiction have analyzed this issue.[21]

Consider first the decision out of the US District Court for the District of Kansas, *Northern Natural Gas Co. v. Approximately 9117.53 Acres*.[22] In that case,

> a dispute arose in the first deposition when it was determined that the witness had been provided with a CD containing documents selected by [the witness's counsel] for his review prior to his deposition. During questioning, the witness acknowledged that he had reviewed these documents prior to his deposition and that they did refresh his recollection.[23]

The deposing attorney requested to review the CD of documents, and the witness's counsel refused, claiming the CD constituted attorney work product. The defending party conceded that none of the documents on the CD individually constituted work product. So, the dispute turned on whether counsel's curation of a subset of produced documents meant that the CD—as a particular compilation of those documents—constituted work product.

> "Even if the witness's testimony satisfies the first two prongs of the rule, counsel resisting disclosure could still argue that the questioning attorney failed to establish that disclosure is necessary in the interest of justice, or that the documents influenced the witness's testimony."

After discussing the lack of Tenth Circuit authority on the issue, the *Northern Natural Gas* court turned to prior Kansas federal cases. The court noted that all but the oldest of them—a 1986 case titled *Aguinaga v. John Morrell & Co.*[24]—held that an attorney's selection of documents shown to a witness does not constitute work product. The *Northern Natural Gas* court followed the Kansas federal cases and held that the CD at issue did not constitute attorney work product shielded from disclosure.

For context, it is useful to understand the *Aguinaga* holding, which instead treated the attorney's compilation of documents as work product. *Aguinaga* relied on two federal appellate court cases: a 1985 Eighth Circuit case, *Shelton v. American Motors Corp.*, and a 1986 Third Circuit case, *Sporck v. Peil*. These cases emphasize that Rule 612 "is a rule of evidence, not a rule of discovery,"[25] and that since a deposing party already has the produced documents compiled by the deponent's attorney and shown to the witness, the sole purpose for ordering the production of the compilation of documents would be to "reveal nothing more than what documents the attorneys thought were relevant to the transactions . . . ."[26]—in other words, the deponent's attorney's mental impressions.

The *Northern Natural Gas* court disagreed with this line of cases because the analysis in those decisions "assumes that one can extrapolate backwards from the results of a selection process to determine the reason a document was selected for review by the deponent . . . ."[27] Rather, according to the *Northern Natural Gas* court:

> The most that can be said from the fact that the witness looked at a document is that someone thought that the document, or some portion of the document, might be useful for the preparation of the witness for his deposition. This is a far cry from the disclosure of the lawyer's opinion work product.[28]

In so holding, the court also relied on (1) post-*Aguinaga* amendments to the Federal Rules of Evidence requiring that information previously deemed work product, like information concerning persons likely to have discoverable information,[29] be disclosed in discovery, and (2) out-of-circuit cases from the 1990s and 2000s dealing with an attorney's selection and arrangement of documents, which progressively rejected the broad view of the work product privilege adopted in *Aguinaga*, *Sporck*, and *Shelton*.[30]

"Many of these courts justify the balancing approach in recognition of the apparent conflict between the work product doctrine and Rule 612, and emphasize that Rule 612's 'interest of justice' standard incorporates the protections afforded by the work product doctrine."

Having dispelled the work product doctrine's blanket protection of the CD, the *Northern Natural Gas* court analyzed whether Rule 612 required its disclosure. The court's analysis of this issue concerned Rule 612's limitation that disclosure of documents is only required in the "interests of justice." The court accordingly adopted a "balancing test" from *Nutramax Laboratories, Inc. v. Twin Laboratories, Inc.*, a 1998 District of Maryland case. As applied by the *Nutramax* court, the non-exhaustive "interests of justice" factors include:[31]

1. **The status of the witness.** For 30(b)(6) witnesses, there is a greater interest in knowing the materials reviewed by the witness because the testimony may be based on matters beyond the witness's personal knowledge.
2. **The nature of the issue in dispute.** Is the witness testifying generally about the subject of the case, or more precisely about a subset of facts that relate to a dispositive issue?
3. **When the events took place.** The more time that has passed since the events in question occurred, the greater the need for production, since it becomes more likely that the witness relied on old documents to refresh their memory.
4. **The number of documents reviewed.** If an attorney culled many documents down to a small subset, this is more likely to reflect "work product" that weighs against disclosure. Likewise, a small number of documents selected may be more likely to divulge an attorneys' thought processes.
5. **When the documents were reviewed.** If the documents were reviewed shortly before the deposition, this suggests that the sole purpose of the review was to prepare for the deposition.[32]
6. **Whether the witness prepared the documents.** If the witness prepared the documents in the regular course of business, this weighs in favor of disclosure.
7. **Whether the documents contain "pure" work product.** Documents that constitute "pure" attorney work product, including attorney mental impressions, are more likely to be protected than documents that contain factual information.
8. **Whether there are credible concerns of concealment or destruction of evidence.** A credible concern of concealment or destruction militates in favor of disclosure.
9. **The circumstances leading to the deposition.** For instance, documents reviewed in advance of a 30(b)(6) deposition held for the purpose of uncovering discovery collection procedures may warrant nondisclosure.[33]

Notably, the work product doctrine is implicated in this multifactor analysis, including explicitly in factor seven. Ultimately, after considering many of these factors, the *Northern Natural Gas* court decided that the CD should be produced.

Other cases in the Tenth Circuit provide further guidance. For instance, rather than treating work product as merely a "factor" to be considered when determining whether documents must be produced under Fed. R. Evid. 612, the US District Court for the Western District of Oklahoma in *Broadway Park, LLC v. Hartford Casualty Insurance Co.* held that documents constituting pure work product are not subject to disclosure under Rule 612.[34] There, the court held that an attorney-witness's review of his own notes containing legal strategy in advance of his deposition did not warrant production of the notes, which were protected by both the attorney-client and work product privileges.[35]

Taken together, this case law establishes that (1) an attorney's compilation of produced documents alone is unlikely to, without more, raise a valid work product defense to a production request under Rule 612; (2) whether documents are required to be disclosed under Rule 612 will depend on an analysis of many contextual factors, which generally attempt to determine if the sought documents are more like work product, or more like factual documents bearing on key testimony; and (3) Rule 612 likely cannot be used to obtain the production of documents constituting "pure" work product. Further, the case law demonstrates that the analysis is fact-specific,

fluid, and somewhat nebulous. Therefore, an attorney resisting disclosure should rely on the specific facts and circumstances of the particular case to appeal to the "interests of justice" in resisting disclosure.

Law From Other Jurisdictions

Case law from other jurisdictions reflects two general approaches nationwide.[36] Most federal courts, including those in New York, New Hampshire, and Oregon apply a balancing approach similar to the Kansas federal courts. However, these courts do not apply precisely the same factors or weigh them similarly.[37] Many of these courts justify the balancing approach in recognition of the apparent conflict between the work product doctrine and Rule 612, and emphasize that Rule 612's "interest of justice" standard incorporates the protections afforded by the work product doctrine.[38] A minority of federal courts, including some in California, apply an automatic-waiver rule, holding that Rule 612 automatically renders privileged or work-product-protected documents discoverable when a deponent reviews them in preparation for a deposition.[39]

Note that neither approach is congruent with the 1980s circuit court of appeals cases of *Sporck* and *Shelton*, which land on the opposite end of the spectrum from the automatic-waiver cases by holding that even where the documents have previously been disclosed, an attorney's selection of documents that refreshed a witness's recollection prior to a deposition automatically constitutes work product that is protected from disclosure.[40] It should be noted, however, that while this principle announced in *Sporck* and *Shelton* has been chipped away by later district court cases, *Sporck* and *Shelton* remain the only circuit court of appeals cases that have ruled on the precise issue of whether an attorney's selection of documents used to prepare a deposition witness and that refresh the witness's recollection constitutes work product. As such, these cases remain influential.

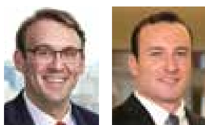
Practice Tips

Though it does not fully answer whether to instruct our hypothetical COO not to answer the questions posed in his deposition, this analysis does help us understand how courts might rule in this scenario. It also leaves us with a few important practice pointers for preparing witnesses, deposing witnesses, and defending depositions.

1. **As a threshold matter, Rule 612 requires establishing the appropriate foundation before there is an issue.** In the hypothetical at the outset, the questioning lawyer asked only vaguely if the deponent's memory was refreshed. Arguably, Rule 612 is not implicated at all if the party opposing disclosure can establish that the documents were not relied upon by the witness to refresh recollection, or that justice does not require disclosure. Keep these threshold issues in mind in evaluating this issue during a deposition.
2. **Consider the work product issue in preparing a witness.** It is unsettled whether Rule 612 requires the disclosure of documents reviewed by a witness during deposition preparation, especially when the information at issue is potentially subject to work-product privilege claims. Because of this uncertainty, it may make sense to avoid giving the witness any documents in preparation for a deposition that you do not wish the other side to be able to review, and thereby avoid the issue altogether.
3. **The law is not settled but may favor disclosure.** As recounted above, the law is not settled in Colorado or the Tenth Circuit. However, the trend appears to be in favor of requiring the deponent to identify or produce the documents relied on.

Conclusion

Colorado courts have not ruled on the issue of whether documents that an attorney compiles for a witness in preparation for a deposition and that refresh the witness's memory constitute attorney work product shielded from discovery or instead are discoverable under Rule 612. However, rulings from other federal district courts in the Tenth Circuit provide guidance and indicate that, in at least some circumstances, courts are likely to allow adverse parties to review attorney-prepared documents that a witness reviewed before testifying at a deposition. CL



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NOTES

1. Note that in Colorado, such an objection is usually not a valid basis for instructing a witness not to answer, further complicating the decision. Indeed, you may be violating local rules and practice by objecting to more than "form."

2. Fed. R. Civ. P. 26(b)(3)(A).

3. Fed. R. Civ. P. 26(b)(3)(A)(ii).

4. Fed. R. Civ. P. 26(b)(3)(B).

5. CRCP 26(b)(3).

6. *Warne v. Hall*, 2016 CO 50, ¶ 13 (citing *Leaffer v. Zarlengo*, 44 P.3d 1072, 1080 (Colo. 2002)). *See also Garcia v. Schneider Energy Servs.*, 2012 CO 62, ¶ 7 ("This Court relies on various interpretational aids, including the federal rules and federal precedent interpreting federal rules, in interpreting the Colorado Rules of Civil Procedure.").

7. Fed. R. Evid. 612(a).

8. Fed. R. Evid. 612(b). The rule further states: "If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record." This portion of the rule is beyond the scope of this article.

9. Fed. R. Evid. 612(c). The rule further states: "But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial." This portion of the rule is beyond the scope of this article.

10. *See Meeker v. Life Care Ctrs. of Am., Inc.*, No. 14-CV-02101, 2015 WL 7882695, at *7 n.6 (D.Colo. Dec. 4, 2015), *aff'd*, No. 14-CV-02101, 2016 WL 11693704 (D.Colo. Feb. 1, 2016).

11. Fed. R. Evid. 612, advisory committee notes.

12. *See Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs., Inc.*, 81 F.R.D. 8, 10 (N.D.Ill. 1987) ("Under Rule 612 an adverse party is entitled to production of a writing used for refreshing one's recollection for use on cross-examination so that he may search out any discrepancies between the writing and the testimony."). *Accord SEC v. Brady*, 238 F.R.D. 429, 442 (N.D.Tex. 2006) ("[D]ocuments, including business records, that were specifically selected and compiled by a party or its representative in preparation for litigation are opinion work product because the mere acknowledgment of their selection would reveal mental impressions concerning the potential litigation.") (citing *Peterson v. Douglas Cnty. Bank & Tr. Co.*, 967 F.2d 1186, 1189 (8th Cir. 1992)). *But see Fisher v. Halliburton*, Nos. H-05-1731 & H-06-1971, 2009 U.S. Dist. LEXIS 14736, at *6–8 (S.D.Tex. Feb. 25, 2009) (rejecting this argument without discussion of the role counsel played in selecting the documents, noting that the argument would "all but write Rule 612 of the Federal Rules of Evidence out of existence."), *rev'd on other grounds*, 667 F.3d 602 (5th Cir. 2012). *See also* Floyd, "A 'Delicate and Difficult Task': Balancing the Competing Interests of Federal Rule of Evidence 612, the Work Product Doctrine, and the Attorney-Client Privilege," 44 *Buffalo L. Rev.* 101 (Winter 1996), https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1321&context=buffalolawreview; Leonetti, "What Do You Know? Discovering Document Compilations in 30(B)(6) Depositions," 94 *Wash. L. Rev.* 481 (Mar. 2019), https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5062&context=wlr.

13. *See, e.g., Nutramax Labs., Inc. v. Twin Labs., Inc.*, 183 F.R.D. 458, 468 (D.Md. 1998).

14. *United States v. Carey*, 589 F.3d 187, 190–91 (5th Cir. 2009).

15. *See, e.g, id.* (noting that "[c]aution must be exercised to [e]nsure that the document is actually being used for purposes of refreshing and not for purposes of putting words in the mouth of the witness") (quoting *Esperti v. United States*, 406 F.2d 148, 150 (5th Cir. 1969)).

16. Weinstein and Berger, *Weinstein's Evidence Manual* § 10.05[3][e] (Matthew Bender 2012) ("[A] rule of automatic disclosure does not comport with the policies underlying work product protection.").

17. *People v. Stewart*, 2017 COA 99, ¶¶ 9–10 (ruling that prosecutor's leading question: "And if you told the officer at the time that you heard 'stop police' would that be accurate?" did not properly invoke Rule 612; opining that the court's decision to admit the evidence "was in error not only because the prosecution was leading the witness but also because it violated [Rule] 612. That rule deals with situations where a witness indicates a lack of recollection and has his or her recollection refreshed with a writing. No writing was introduced in this instance.").

18. *People ex rel. L.A.N.*, 296 P.3d 126, 133 (Colo. App. 2011) (holding that the court "need not resolve this dilemma" of implied waiver through review or other disclosure because the parties "expressly waived the privilege because [they] obtained privileged information from the therapist and then disclosed that information to the court in advocating to terminate mother's parental rights"), *rev'd* 2013 CO 6, ¶¶ 32–33.

19. *See Meeker v. Life Care Ctrs. of Am., Inc.*, No. 14-CV-02101, 2015 WL 7882695, at *7 n.6 (D.Colo. Dec. 4, 2015), *aff'd*, No. 14-CV-02101, 2016 WL 11693704 (D.Colo. Feb. 1, 2016).

20. *Wollam v. Wright Med. Grp., Inc.*, No. 10-cv-03104, 2011 U.S. Dist. LEXIS 106768, at *5–6 (D.Colo. Sept. 20, 2011) (denying motion to compel two withheld documents because they constituted protected work product and "defendants have failed to make any showing of substantial need for the materials to prepare their case or undue hardship to obtain substantially equivalent information"). *But see Fisher*, 2009 U.S. Dist. LEXIS 14736, at *6–8 (refusing to protect a compilation of documents prepared by counsel as privileged, noting that such an argument would "all but write Rule 612 of the Federal Rules of Evidence out of existence"), *rev'd on other grounds*, 667 F.3d 602 (5th Cir. 2012).

21. One case from the US District Court for the District of New Mexico, *Am. Auto. Ins. Co. v. First Mercury Ins. Corp.*, offers little guidance because it provides limited analysis for adopting its categorical rule: "When a witness relies upon documents provided to the witness for review before testifying, Federal Rule of Evidence 612 requires that those documents be identified and produced, if they have not previously been provided to the other side." No. 1:13-cv-00439, 2016 WL 7395219, at *3 (D.N.M. Oct. 22, 2016) (citing Kansas cases discussed herein).

22. *N. Nat. Gas v. Approximately 9117.53 Acres*, 289 F.R.D. 644 (D.Kan. 2013).

23. *Id.* at 646.

24. *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671 (D.Kan. 1986).

25. *Id.* at 683 (quoting *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985)).

26. *Id.*

27. *N. Nat. Gas*, 289 F.R.D. at 649 (quoting *Sporck*, 759 F.2d at 319 (dissenting opinion)).

28. *Id.* (quoting *Sporck*, 759 F.2d at 319 (dissenting opinion)).

29. *See* Fed. R. Civ. P. 26(a). *See also Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.*, 92 F.R.D. 779, 780–81 (S.D.N.Y. 1982) (holding that "core" work product should be disclosed under Rule 612 only to the extent that failure to disclose would prevent the other side from testing the accuracy of the deponent's testimony); Weinstein and Berger, *supra* note 16, § 10.05[3][e] ("Given the liberality of disclosure and the work product exception in the discovery rules, the opponent should be required to make a substantial showing of need in order to obtain materials that a witness reviewed before a deposition instead of achieving wholesale disclosure.").

30. *N. Nat. Gas*, 289 F.R.D. at 649.

31. *Id.* at 651–52.

32. *See also Torix v. United States*, No. CV-19-086, 2020 WL 1068061, at *3 (E.D.Okla. Mar. 5, 2020) (witness reviewed document prior to knowing about his deposition, so production under Fed. R. Evid. 612 was not warranted).

33. *See also Radiologix, Inc. v. Radiology & Nuclear Med., LLC*, No. 15-4927, 2018 WL 4851609, at *3 (D.Kan. Oct. 5, 2018).

34. *Broadway Park, LLC v. Hartford Cas. Ins. Co.*, No. CIV-05-584, 2007 U.S. Dist. LEXIS 1499 (W.D.Okla. Jan. 5, 2007).

35. *Id.*

36. *See generally* Wright and Miller, 28 *Fed. Prac. & Proc. Evid.* § 6188, Privilege and Work-Product Limits on Adverse-Party Rights (2d ed. Thomson Reuters June 2024 update), (discussing the two approaches).

37. *Adidas Am., Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389, 399 (D.Or. 2017); *Heron Interact, Inc. v. Guidelines, Inc.*, 244 F.R.D. 75, 77 (D.Mass. 2007) (balancing the discovering party's need for the documents against the opposing party's need for protecting privileged information); *In re Rivastigmine Pat. Litig.*, 486 F.Supp. 2d 241, 243 (S.D.N.Y. 2007) (considering multiple factors, including whether the party seeking the documents is engaged in a fishing expedition).

38. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 119 F.R.D. 4, 5 (E.D.N.Y. 1988).

39. *Mattel, Inc. v. MGA Ent., Inc.*, No. 04-9049, 2010 WL 3705782, at *5–6 (C.D.Cal. Aug. 3, 2010) (noting that Fed. R. Evid. 612 "renders discoverable" documents reviewed prior to a deposition and that "'[a]ny privilege or work product protection against disclosure is deemed waived as to those portions so reviewed,'" and ordering production of all privileged documents "reviewed" by the witness "to refresh her recollection prior to her deposition"); *United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 25 (N.D.Cal. 1985); *In re Polyester Staple Antitrust Litig.*, No. 03-1516, 2005 WL 3766934, at *2–3 (W.D.N.C. Sept. 7, 2005) ("Rule 612 applies to deposition testimony and requires production of otherwise privileged documents.").

40. *Sporck*, 759 F.2d at 319; *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986).