Interactions Between Memory Refreshment Doctrine and Work Product Protection Under the Federal Rules

Memory refreshment doctrine, a common law rule of evidence codified in Federal Rule of Evidence 612, permits a witness to use documents in order to stimulate his recollection. Under the doctrine, the opposing attorney may be given the opportunity to inspect documents used for this purpose. In civil cases, a possible conflict arises between this doctrine and that of work product protection, which is codified in Federal Rule of Civil Procedure 26(b)(3). The conflict arises when a witness sees work product prior to testifying. If all the materials he sees are automatically considered memory refreshment materials, the opposing side may be able to obtain them without the showing required by Rule 26(b)(3), even if they have not contributed to the testimony in the manner anticipated by Rule 612.

This conflict materialized in Berkey Photo, Inc. v. Eastman Kodak Co., in which a federal court established the rule that all materials seen by a witness prior to testifying may be inspected by opposing counsel under Rule 612. The refreshment doctrine, the court said, encompasses all materials shown to a witness prior to testifying.
this interpretation, Rule 612, a rule of evidence, acts to override the rule of discovery that requires a showing of substantial need and undue hardship before work product may be obtained. This Note argues that such an interpretation substantially alters the law of memory refreshment and unnecessarily sacrifices protection of work product. After examining the background, nature, and purposes of the memory refreshment and work product protection doctrines, the Note concludes that the expansion of memory refreshment doctrine authorized by Berkey is unwarranted. The proper balance is the one struck by existing law, which limits the scope of memory refreshment inspection and requires litigants to rely on discovery procedures in order to obtain those materials not strictly within the proper scope of memory refreshment inspection.

I. Memory Refreshment Doctrine

A. Memory Refreshment While Testifying

At common law and under Rule 612, when the memory of a witness fails while that witness is testifying, the attorney examining him may seek to stimulate his recollection. He may show the witness documents, photographs, or any other materials that may cause him to recall the facts he has forgotten. If the witness's memory is refreshed and the witness testifies from that memory, the opposing

9. Fed. R. Evid. 612 states, in part:

[I]f a witness uses a writing to refresh his memory for the purpose of testifying, either—

(1) while testifying, or

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

10. See Phillips v. Wyrick, 558 F.2d 489, 496-97 (8th Cir. 1977), cert. denied, 434 U.S. 1088 (1978) (witness who is unable to recall matters about which he will testify may use notes to refresh his memory); United States v. Morlang, 531 F.2d 183, 190-91 (4th Cir. 1975) (attorney may supply memorandum to witness to refresh his memory at trial); Comment, Witness' Use of Memoranda: Present Recollection Revived and Past Recollection Recorded, 6 COLUM. L. REV. 471, 471 (1975) (refreshment permissible). If the witness's recollection is not stimulated, the doctrine of memory refreshment cannot apply. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 612[01], at 612-12 (1977) (if memory not refreshed, memorandum may enter evidence only as past recollection recorded) [hereinafter cited as WEINSTEIN & BERGER].

11. United States v. Rappy, 157 F.2d 964, 967-68 (2d Cir. 1946), cert. denied, 329 U.S. 806 (1947) (anything may be used to refresh witness's recollection).

12. The memory, and not the materials refreshing it, is the evidence. United States v. Morlang, 531 F.2d 183, 191 (4th Cir. 1975); 10 MOORE'S FEDERAL PRACTICE § 612.02, at VI-199 (2d ed. 1976); see 3 WEINSTEIN & BERGER, supra note 10, ¶ 612[01], at 612-12.
attorney has the right to inspect the materials involved and to employ them in cross-examining the witness.\textsuperscript{13}

The judge participates in every step of this process.\textsuperscript{14} Before the witness may see anything, the judge must find that his memory has lapsed.\textsuperscript{15} Then, after the attorney shows or gives the witness the materials, the judge must be satisfied that they have apparently refreshed the witness's memory;\textsuperscript{16} whether they have actually done so is a question of fact bearing on the credibility of the witness.\textsuperscript{17} Upon motion by the opposing party, the judge will order that the materials be given to that party for inspection and use in cross-examination.\textsuperscript{18} If no privilege or possibility of prejudice dictates a contrary result,\textsuperscript{19} the judge may allow the jury to see the materials.\textsuperscript{20}

Thus, the scope of inspection granted under memory refreshment

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\item See United States v. Wright, 489 F.2d 1181, 1188 (D.C. Cir. 1973) (that materials are inspectable when used to refresh memory of witness while testifying is "hornbook rule of evidence"); 3 WEINSTEIN & BERGER, supra note 10, § 612[01], at 612-13 (adverse party entitled to inspect materials used for recollection and to show materials to jury; common law practice followed in federal courts). Dean Wigmore points out that the rule permitting inspection has two parts: the right to inspect the materials in order to avoid "imposition and false aids" and the right to cross-examine on the materials in order to "detect circumstances not appearing on the surface, and [to] expose all that detracts from the weight of testimony." 3 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 762, at 136 (J. Chadbourn ed. 1970) [hereinafter cited as WIGMORE].
\item See Goings v. United States, 377 F.2d 753, 760 (8th Cir. 1967) (court reviews aspects of memory refreshment doctrine and how judges participate in all steps of process); Symposium, Article VI of the Federal Rules of Evidence: Witnesses, 36 LA. L. REV. 99, 106-07 (1975) (court should balance "the likelihood that the memorandum will actually refresh the witness's memory against the possibility of undue suggestion").
\item 3 WEINSTEIN & BERGER, supra note 10, § 612[01], at 612-9 (witness must satisfy trial judge that he lacks "effective present recollection"); see Goings v. United States, 377 F.2d 753, 760 (8th Cir. 1967) (before attempt to refresh memory may take place, witness's recollection must be exhausted).
\item See Goings v. United States, 377 F.2d 753, 761 (8th Cir. 1967) (witness must testify that his memory has been refreshed); United States v. Riccardi, 174 F.2d 883, 890 (3d Cir.), cert. denied, 337 U.S. 941 (1949) (trial judge "investigated . . . claim to present recollection"); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 9, at 17 (E. Cleary 2d ed. 1972) ("preliminary question for [the trial judge's] decision whether the memorandum actually does refresh") [hereinafter cited as MCCORMICK].
\item See United States v. Cheyenne, 558 F.2d 902, 905-06 (8th Cir.), cert. denied, 434 U.S. 957 (1977) (weight to be given to refreshed testimony is matter for trier of fact); United States v. Riccardi, 174 F.2d 883, 888-89 (3d Cir.), cert. denied, 337 U.S. 941 (1949) (truth of assertion of present memory is matter of witness's credibility for trier of fact).
\item See note 13 supra.
\item See Phillips v. Wyrick, 558 F.2d 489, 497 (8th Cir. 1977), cert. denied, 434 U.S. 1088 (1978) (if notes are prejudicial and jury would be unable to weigh their credibility, they might not be admissible, read aloud, or seen by jury).
\item See, e.g., United States v. Smith, 521 F.2d 937, 969 (D.C. Cir. 1975) (although it may not ordinarily be admissible, report used by witness to refresh memory may be admitted when opposing party so moves or when jury asks to see it). The court admits the materials into evidence because of their function as memory aids and not for the truth of their contents. See 3 WIGMORE, supra note 13, § 763.
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document is limited. Only those materials or portions of materials that refresh the memory of the witness on the specific contents of his testimony may be inspected by opposing counsel.21

B. Memory Refreshment Prior to Testifying

Even though memory refreshment prior to testifying22 is not visible to the court, it is theoretically identical to memory refreshment while testifying: the attorney merely anticipates a possible lapse in memory and forestalls it.23 Determining the proper scope of inspection for pretrial memory refreshment materials in a given case is difficult, since pretrial memory refreshment, unlike refreshment during trial, does not occur in front of the judge. The difficulty is based on the fact that the judge has no power to rule on whether to allow refreshment before the fact. In order to compensate for this lack of judicial supervision, pretestimony refreshment materials are only open to inspection if the judge, in his discretion, so decides.24 The judge is to be guided by a presumption that, because the goals of inspection are the same no

21. United States v. Wright, 489 F.2d 1181, 1188 (D.C. Cir. 1973); Schwartz v. Broadcast Music, Inc., 16 F.R.D. 31, 33 (S.D.N.Y. 1954). Few problems exist in determining which materials are involved when refreshment takes place on the stand. In that situation, the issue arises in relation to a specific answer to a specific question or line of questions. The process of refreshment is public; the refreshment occurs in the presence of the judge, and the materials given to the witness are identifiable.

22. Refreshing a witness's memory prior to that witness's testifying is permissible. See, e.g., McCormick, supra note 16, § 9, at 14-15 (memory refreshment prior to trial advocated); 3 Wigmore, supra note 13, § 762, at 140 ("no objection" to pretrial refreshment).

23. For example, in State v. Deslovers, 40 R.I. 89, 100 A. 64 (1917), the medical examiner, prior to testifying, used notes that he dictated at the time of the examination to refresh his memory. Id. at 103-05, 100 A. at 69-70. He then testified from memory. The court held that inspection should have been permitted because the doctor had used the notes prior to testifying as he would have used them had his memory lapsed while he was on the stand. Id. at 104-05, 100 A. at 69-70.

24. Fed. R. Evid. 612; see Needelman v. United States, 261 F.2d 802, 806-07 (5th Cir. 1958), cert. dismissed, 362 U.S. 600 (1960) (request for inspection denied). A requirement of inspection of pretestifying refreshment materials has arisen only when the memory of the witness is refreshed while the witness is testifying. Thus no unlimited right to inspection of materials used to refresh the witness's memory prior to testifying exists. Goldman v. United States, 316 U.S. 129, 132 (1942), overruled on other grounds, Katz v. United States, 389 U.S. 347 (1967); see United States v. Atkinson, 513 F.2d 38, 41 (4th Cir. 1975). The final draft of Fed. R. Evid. 612 gave the opposing side a right to materials used to refresh the memory of the witness prior to his testimony, but the House Judiciary Committee, concerned that such breadth would lead to fishing expeditions, eliminated the right to inspection and rewrote the portion of Fed. R. Evid. 612 relating to pretestifying refreshment. The rewritten provision embodies the common law requirement that judicial discretion be exercised. See Fed. R. Evid. 612, Advisory Committee's Note; H.R. Rep. No. 650, 93d Cong., 1st Sess. 13 (1973), reprinted in FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 74 (1975), appended to Fed. R. Evid. 612.
matter when the refreshment takes place, the scope of inspection should remain constant. The court should thus find that the witness's memory was refreshed within the meaning of the term as applied to refreshment while testifying before it orders inspection.

The most important element in finding that the witness's memory was refreshed prior to his testimony is the statement of the witness to that effect. This testimony replaces the apparent refreshment that

25. See State v. Hunt, 25 N.J. 514, 525, 138 A.2d 1, 7 (1958) (reasons for inspection are same no matter when memory is refreshed); 3 WIGMORE, supra note 13, § 762, at 140 ("the risk of imposition and the need for safeguard is just as great" if memory refreshed prior to trial); 37 Mo. L. Rev. 571, 575 (1972) ("The same evils which attend use of the document to revive memory on the stand also attend the use of the document to revive memory out of court.")

26. The Advisory Committee's Note to FED. R. EVID. 612 implies that the scope of inspection of pretestimony refreshment materials should match the scope of inspection of materials used by the witness while testifying by repudiating the distinction between memory refreshment prior to testifying and memory refreshment on the stand. Judicial discretion was added to the final draft of the Rule in order to prevent the scope of pretestimony refreshment materials from becoming broader than the scope of inspection of materials used at trial. H.R. REP. No. 650, 93d Cong., 1st Sess. 13 (1973), reprinted in FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 71 (1975), appended to FED. R. EVID. 612. FED. R. EVID. 612 this seeks to make memory refreshment one internally consistent doctrine. In order to accomplish this, the scope of inspection of pretestimony memory refreshment materials must match the scope of inspection allowed when memory is refreshed on the stand.

27. State v. Mucci, 25 N.J. 423, 456, 136 A.2d 761, 769 (1957) (memory refreshment rule applicable to writings used prior to trial as they would have been used on stand); State v. Deslovers, 40 R.I. 89, 104-05, 100 A. 64, 70 (1917) (witness "must be said to have obtained substantially the same assistance from the record [examined prior to testifying] which he would have obtained from its perusal during his examination"). Judicial discretion exercised after the fact of refreshment replaces the judicial participation that accompanies refreshment while testifying. The fact that judicial discretion must be exercised before inspection of pretrial refreshment materials is allowed implies that the court must find that memory refreshment has actually occurred; otherwise, there would be no reason to require the exercise of discretion. See United States v. Wright, 489 F.2d 1181, 1189 (D.C. Cir. 1973) (no inspection when no memory refreshment took place); Spurrier v. United States, 389 F.2d 367, 368 (5th Cir. 1967), cert. denied, 391 U.S. 922 (1968) (per curiam) (no inspection when notes made by witness to refresh his recollection were not so used by him).

28. To establish that a witness's memory was refreshed prior to testifying, the opposing attorney must ask him whether his recollection was refreshed. See, e.g., Needelman v. United States, 261 F.2d 802, 806 (5th Cir. 1958), cert. dismissed, 362 U.S. 600 (1960) (witness "admitted" he refreshed his memory prior to testifying); State v. Deslovers, 40 R.I. 89, 104, 100 A. 64, 69 (1917) (witness testified that he had refreshed his memory); cf. Fuenlen, supra note 4, at 597 (memory refreshment could be uncovered if all witnesses were routinely asked if their memory was refreshed prior to testimony). When a witness does not testify that his memory was refreshed prior to his testimony, either because he was not asked or because, when asked, he answered that his memory was not refreshed, no inspection will result. See United States v. Wright, 489 F.2d 1181, 1189 (D.C. Cir. 1973) (inspection denied because no statement by witness that his memory was refreshed appeared in record); Rawlings v. Andersen, 195 Neb. 686, 695-96, 240 N.W.2d 568, 574 (1976) (witness, though she "glanced" at materials, did not use them to refresh her memory since her memory had not failed). FED. R. EVID. 612 indicates that the opposing party is not entitled to inspect a document used to refresh a witness's memory prior to his testimony until after the witness takes the stand and the fact of memory refreshment has been established. By allowing inspection only at this stage, Congress and the courts
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must occur in court before the judge will order inspection when memory is refreshed on the stand. Courts also consider the time that has elapsed between the witness's perusal of the documents and his testimony, the nature and intent of the perusal, and the immediacy of the effect on the witness's testimony.

Because establishing that memory refreshment has taken place is more difficult when it does not take place under the court's direct supervision, it is arguable that the scope of inspection should be broader when the refreshment has taken place privately. A broader sweep might forestall improper attorney influence over the witness's testimony. Courts have not, however, responded to this problem by broadening the scope of inspection; instead, they have made inspection orders specific and imposed strict controls to ensure that inspection does not become overly broad. When materials are used prior to the giving of testimony, the need for inspection prevails over interests in trial preparation privacy only when the materials have been used by

have decided that the interest in advance preparation for cross-examination does not outweigh the danger of excessive intrusion into the trial preparation process. See, e.g., Hickman v. Taylor, 329 U.S. 495, 512-13 (1947) (request for materials to help in preparing to cross-examine witnesses not enough to justify violating attorney privacy). 29. See p. 392 supra. The testimony helps to ensure that the scope of inspection is no broader when the witness's memory is refreshed prior to testifying than it would have been had his memory been refreshed on the stand. See Rawlings v. Andersen, 195 Neb. 686, 693-96, 240 N.W.2d 568, 574 (1976). Of course, nothing in the memory refreshment doctrine operates to prevent the witness from perjuring himself by testifying that his memory was not refreshed prior to his testimony. See 3 Weinstein & Berger, supra note 10, ¶ 612[05], at 612-35 n.1 ("There is no machinery for ascertaining [sic] the existence of [memory refreshment materials] other than reliance on the integrity of witness and counsel.")

30. See State v. Mucci, 25 N.J. 423, 434, 436, 136 A.2d 761, 766, 768 (1957) (one factor favoring inspection was that witnesses had their memories refreshed on morning of trial); State v. Deslovers, 40 R.I. 89, 104, 109 A. 64, 69 (1917) (phenomenon of pretestimony refreshment was "refreshment on stand partly because witness had refreshed his memory "that very morning"); Burke, Witness Rules Change, Codify Nebraska Law, 53 Neb. L. Rev. 406, 414 (1974) (refreshing memory on "courthouse steps" no different from refreshing memory on stand); Symposium, supra note 14, at 108 ("slight temporal difference" in point at which memory refreshed should not affect right to inspection of materials).


32. See United States v. Cheyenne, 558 F.2d 902, 905 (8th Cir.), cert. denied, 434 U.S. 937 (1977) (where witness testified at hearing from refreshed recollection one day, and then testified to same facts at trial on subsequent day, witness did not refresh his recollection for purpose of testifying at trial). In the text of Fed. R. Evid. 612 itself, the requirement that the memory be refreshed "for the purpose of testifying" embodies the immediate impact rule of the common law.

33. See p. 400 infra.

34. See, e.g., United States v. Wright, 489 F.2d 1181, 1188 (D.C. Cir. 1973). Under Nebraska Evidence Rule 612, Neb. Rev. Stat. § 27-612 (Supp. 1975), the opposing party has a right to all materials used to refresh the memory of the witness prior to trial. This has not led to broad inspection because Nebraska courts adhere strictly to a narrow conception of memory refreshment. See Rawlings v. Andersen, 195 Neb. 686, 695-96, 240 N.W.2d 568, 574 (1976).
the witness as they would have been had the witness been on the stand.\textsuperscript{35} Narrow construction of the memory refreshment doctrine highlights its nature as a rule of evidence, as opposed to a rule of discovery.\textsuperscript{38}

II. The Conflict Between Memory Refreshment Doctrine and Work Product Protection

A. The Source of the Conflict: Work Product Protection

A possible conflict exists in civil cases between memory refreshment doctrine, which allows inspection of materials, and work product protection, which guards materials from discovery.\textsuperscript{37} Work product protection, endorsed by the Supreme Court in \textit{Hickman v. Taylor}\textsuperscript{38} and codified in Federal Rule of Civil Procedure 26(b)(3),\textsuperscript{39} prevents one

\textsuperscript{35} The court in State v. Deslovers, 40 R.I. 89, 100 A. 64 (1917), argued that the witness had used the materials prior to testifying exactly as he would have done on the stand; hence, the fact that refreshment had occurred prior to testifying could not justify noninspection. \textit{Id.} at 104-05, 100 A. at 69-70; see \textit{Spurrier v. United States}, 389 F.2d 367 (5th Cir. 1967), \textit{cert. denied}, 391 U.S. 922 (1968) (no inspection when witness made notes to refresh his memory but did not use them).

\textsuperscript{36} See United States v. Nobles, 422 U.S. 225, 235-36 (1975) (rules of pretrial discovery not applicable to "evidentiary questions arising at trial"). If the witness does not testify about the contents of his refreshed recollection, no inspection will result. Moreover, the scope of inspection is restricted rigidly to the materials that refreshed the witness's memory relating to the specific content of his testimony. Memory refreshment doctrine is more specific and limited than pretrial discovery. See \textit{United States v. Wright}, 489 F.2d 1181, 1188-89 (D.C. Cir. 1973) (even if witness saw whole document prior to testifying, only portions that refreshed his memory on exact contents of testimony would be inspectable); \textit{Schwartz v. Broadcast Music, Inc.}, 16 F.R.D. 31, 33 (S.D.N.Y. 1954) (inspection of memory refreshment materials limited to those portions actually used to refresh recollection; for "fuller discovery of these documents, [the defendants] must utilize the normal discovery procedure"). Memory refreshment doctrine also permits inspection of materials that may not be obtained through pretrial discovery. See \textit{Bailey v. Meister Brau, Inc.}, 57 F.R.D. 11, 13 (N.D. Ill. 1972) (if documents handed to plaintiff at deposition to refresh his recollection, then those documents necessary for cross-examination and lose their work product status); \textit{Doxtator v. Swarthout}, 38 A.D.2d 782, 782, 328 N.Y.S.2d 150, 151-52 (1972) (when witness stated that she used notes protected from discovery as work product to refresh her recollection prior to testifying, notes were subject to inspection); \textit{cf. State v. Hunt}, 25 N.J. 514, 524, 138 A.2d 1, 6 (1958) (court differentiates between request for discovery of notes prior to trial and request for inspection as memory refreshment materials at trial, when memory was refreshed prior to trial).

\textsuperscript{37} See notes 44 & 45 infra.

\textsuperscript{38} 329 U.S. 495 (1947).

\textsuperscript{39} Fed. R. Civ. P. 26(b)(3) states, in part: [A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he 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 the litigation.
party from obtaining the trial preparation materials of the other. These materials include witness statements taken by an attorney that reflect his mental processes and memoranda consisting entirely of attorney opinion. Some courts have held opinion work product protection to be absolute; those that have permitted its discovery have carefully sought to protect the opinion element.

Discovery of work product is permitted only when that work product contains important facts not obtainable elsewhere. In such a situation, the need for the facts outweighs the need for protection. A further

40. There has been much debate over the value of work product protection. See, e.g., Cooper, Work Product of the Rulesmakers, 53 MINN. L. REV. 1269 (1969) (argues against absolute work product protection); Developments in the Law—Discovery, 74 HARv. L. REV. 940, 1027-46 (1961) (supports strong, nonabsolute work product protection). The debate in the literature has not prompted similar doubts in Congress or the courts: protection of work product under Fed. R. Civ. P. 26(b)(3) has increased so as to be virtually absolute. See note 44 infra (citing cases).


42. Hickman v. Taylor, 329 U.S. 495, 513 (1947) (notes on witness statements taken by attorney reflect "what he saw fit to write down").

43. The most compelling showing of need must be made in order to discover attorney opinion. See Bird v. Penn Cent. Co., 61 F.R.D. 43, 46 (E.D. Pa. 1973) (discovery of opinion work product only when opinion itself has become fact in issue; issue here is what "plaintiffs knew or should have known"). For an analysis of the issues surrounding discovery of opinion work product, see Note, Protection of Opinion Work Product Under the Federal Rules of Civil Procedure, 64 VA. L. REV. 333 (1978).


45. Even when work product is not absolutely protected, discovery will only be permitted after a strong showing of need. See Xerox Corp. v. IBM Corp., 64 F.R.D. 357, 375-82 (S.D.N.Y. 1971) (rigorous showing required for discovery); Bird v. Penn Cent. Co., 61 F.R.D. 43, 47 (E.D. Pa. 1973) (court exercised "extreme diligence to protect" work product). Discovery doctrine operates only to ensure that both sides have the facts; other materials, and particularly opinions, are rigorously excluded. See Reliable Transfer Co. v. United States, 53 F.R.D. 24, 25 (E.D.N.Y. 1971) (no discovery of opinions based on discoverable facts); United States v. Columbia Steel Co., 7 F.R.D. 183, 185 (D. Del. 1947) (discovery of economic facts but not conclusions based on them).


47. Mutual knowledge of facts is the purpose of discovery; avoiding surprise at trial is a major goal. See United States v. IBM Corp., 68 F.R.D. 315, 316 (S.D.N.Y. 1975).
sense of the importance of work product protection is indicated by the fact that, although work product protection is a pretrial discovery doctrine, attorney privacy is considered so essential that the protection continues during trial and even after litigation has ended.

The possibility of conflict between work product protection and memory refreshment inspection arises when a witness sees work product prior to testifying. The conflict is most likely to occur when the witness’s participation in the litigation goes beyond testifying and extends into the realm of trial preparation. For example, a client-witness or an investigator-witness often has contact with work product prior to testifying. If the court were to classify such work product as memory refreshment material, it would lose its protected status and be open to inspection. Moreover, a court can further erode the protection afforded to work product by ordering inspection of all such material the witness has seen, rather than only that material actually used to refresh the witness’s memory.

B. The Berkey Ruling on Memory Refreshment

The potential conflict between memory refreshment doctrine and work product protection materialized in an interlocutory evidence decision in the Berkey Photo, Inc. v. Eastman Kodak Co. antitrust


50. This potential conflict between the two doctrines was foreseen by Congress, the treatises, and the scholarly literature. See, e.g., 120 CONG. REC. 2382 (1974) (Rep. Hugate) (conflict exists when “two legal concepts at each other’s throats”); 3 WEINSTEIN & BERGER, supra note 10, ¶ 612[04], at 612-30, 32-35; Comment, Witnesses Under Article VI of the Proposed Federal Rules of Evidence, 15 WAYNE L. REV. 1236, 1271 (1969). The issue was raised in Congress during the consideration of the Federal Rules of Evidence. Representative White expressed concern that work product might be obtained by the adverse party under FED. R. EVID. 612 if anything a witness might “use” prior to testifying would be a “memory refreshener” and hence subject to inspection under FED. R. EVID. 612. 120 CONG. REC. 2381-82 (1974).

51. See note 28 supra (inspection only if materials actually used to refresh memory). Courts draw a boundary line between materials merely looked at by a witness prior to testifying and materials actually used to refresh the witness’s memory prior to testifying. See Bercow v. Kidder, Peabody & Co., 39 F.R.D. 357, 358 (S.D.N.Y. 1965) (court denied motion to compel answer to question “what documents have you looked at in preparation for this deposition today?” because question represented “an indirect attempt to ascertain the manner in which an adversary is preparing for trial”); cf. United States v. Smith, 521 F.2d 957, 969 & n.25 (D.C. Cir. 1975) (alternative holding) (report read by police officer on stand admissible as memory refreshment material and would have been admissible if reviewed prior to testifying).
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The plaintiff sought several notebooks of facts prepared to assist two experts hired by the defendant in formulating their opinions. The notebooks clearly were work product, although the particular facts had already been discovered by the plaintiff, the order in which defendant's attorneys had organized them in the notebooks involved attorney mental processes.

Plaintiff sought the notebooks under Rule 612, and Judge Marvin Frankel said that, although the motion would not be granted, similar motions would be granted in the future. Rule 612, the court held, covers all materials shown to a witness prior to his testimony because any materials that have an impact on testimony qualify as memory refreshment documents subject to inspection. Since everything seen by a witness arguably has such an impact, the court reasoned, Rule 612 covers all such materials. The result was dictated by the danger.


54. Id. at 616 ("It seems clear that [the notebooks] are indeed 'work product' in an essential sense of the term. They are counsel's ordering of the 'facts,' referring to the prospective proofs, organizing, aligning, and marshaling empirical data with the view to combative employment that is the hallmark of the adversary enterprise.")

55. Id. at 617 ("The materials actually made available [to plaintiff] . . . cover all the concrete and specifically identifiable points on which the experts were instructed or advised for their testimony.")

56. Id. at 616 ("The pages collate the expected or imagined or hoped-for proofs of the propositions counsel has learned and written. There is the evident residue and reflection of ' . . . mental impressions, personal beliefs,' and other products of the advocate's professional interaction with the materials of his art.")

57. Id. at 614.

58. The court created the prospective rule that all materials seen by a witness prior to testifying are open to inspection by the other side. Id. at 617. The rule was made prospective because "[t]here is no indication at all [in this case] of a calculated plan to exploit the work product . . . for preparing the experts while planning to erect the shield of privilege against discovery" and because "given the current development of the law in this quarter, it seems fair to say that counsel were not vividly aware of the potential for a stark choice between withholding the notebooks from the experts or turning them over to opposing counsel." Id.

59. Id. at 615.

60. Compare id. ("Rule 612 . . . was designed to permit 'access * * * to those writings which may fairly be said in fact to have an impact upon the testimony of the witness'") (quoting Fed. R. Ev. 612, Advisory Committee's Note) (ellipsis in original) with Fed. R. Ev. 612, Advisory Committee's Note ("The purpose of the phrase 'for the purpose of testifying' is to safeguard against . . . wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.") To fall within the scope of Fed. R. Ev. 612, documents must have both refreshed the witness's memory and had an impact on the testimony; in other words, they must have refreshed the witness's memory on facts to which he testifies. The Berkey court made impact the sole test, leading to the conclusion that all materials seen by a witness prior to his testifying are open to inspection under Fed. R. Ev. 612.

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that such materials would impermissibly influence a witness's testimony.61

In Berkey, Rule 612 becomes a rule of discovery62 covering everything shown to a witness prior to his testimony, whether used to refresh memory or not. As a result, Rule 612 does not remain a rule of evidence dealing exclusively with memory refreshment. In Berkey, no refreshment took place; in fact, there was testimony showing that it had not.63 The overriding concern of the court, however, was to prevent the attorney from using his work product to structure a witness's testimony and then withholding that work product from the opposing party.64

The court mentioned possible conflict between the rule it created and work product protection,65 but did not attempt to balance the two doctrines. After classifying the materials as work product,66 the court continued: "the privilege sheltering [work product] materials may be waived. It is not, in any event, absolute."67 Judge Frankel then examined the waiver doctrine and the qualified nature of work product privilege,68 but did not assess the specific need for work product discovery under the circumstances. Such an inquiry would probably not lead to disclosure in fact situations similar to Berkey. All relevant materials in Berkey had already been "made available for cross-

61. The Berkey rule renders all other goals secondary to the need for cross-examination in order to expose impermissible influence on the witness. 74 F.R.D. at 617. But see Hickman v. Taylor, 329 U.S. 495, 513 (1947) ("Petitioner's counsel frankly admits that he wants the [work product] only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. That is insufficient... to permit him an exception to the policy underlying the privacy of [opposing counsel's] professional activities."); United States v. IBM Corp., 72 F.R.D. 78, 82 (S.D.N.Y. 1976) (assertion of need for materials to cross-examine is not enough to justify discovery of materials not otherwise discoverable).

62. See 74 F.R.D. at 617 ("[t]here would appear ... to be room for allowing discovery" under FED. R. EVD. 612) (emphasis added). The term "discovery," however, belongs to the Federal Rules of Civil Procedure and to pretrial revelation of materials. FED. R. EvD. 612 deals with inspection of materials under an evidentiary doctrine, not a rule of discovery. See note 36 supra.

63. See 74 F.R.D. at 614 (footnote omitted):
At his deposition, one of defendant's experts... testified that he had received the ... notebooks at some point during the past winter.... To the question whether he had the notebooks in his possession when he prepared the outline of his "witness book" for production to plaintiff, the witness replied: "I don't recall, because we did not use them...." Another of the experts... states that he read the... volume and that this "served to fill in details...."

64. Id. at 617.

65. Id. at 616 ("We are led to assess, therefore, the countervailing force of the work product privilege invoked by defendant.")

66. Id.

67. Id.

68. Id. at 616-17.
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examination” through discovery, and there was persuasive evidence that the plaintiff did not need the materials. The absence of need for work product, however, does not appear to have been a factor in the court’s decision to allow discovery in future, identical cases.

The court attempted to explain the policy basis for its holding by asserting that “[t]here would appear . . . to be room for allowing discovery, either on a theory of waiver [of work product protection] or of qualified [work product] privilege, where an attempt is made to exceed decent limits of preparation on the one hand and concealment on the other.” But although this explanation is relevant to the showing of need required by Rule 26(b)(3), it is irrelevant to the showing of memory refreshment demanded by Rule 612. The use of the word “discovery” in connection with Rule 612 typifies this confusion.

When a showing is made that there has been such an attempt “to exceed the decent limits of preparation” as the court described, it might be held that the Rule 26(b)(3) requirement of demonstrating substantial need and undue hardship has been fulfilled and that discovery should be permitted. The Berkey court, however, created an automatic rule. Work product is thus made available to the opposing side without any demonstration of need; in fact, none could have

69. Id. at 617.
70. See id.
72. 74 F.R.D. at 617.
73. See note 62 supra.
74. In Xerox Corp. v. IBM Corp., 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974), the court held that nonprivileged facts may not be hidden in work product and so kept from the other side:
A party should not be allowed to conceal critical, non-privileged, discoverable information, which is uniquely within the knowledge of the party and which is not obtainable from any other source, simply by imparting the information to its attorney and then attempting to hide behind the work product doctrine after the party fails to remember the information.
Demonstration that such a state of affairs exists satisfies the requirement of Fed. R. Civ. P. 26(b)(3). Id. at 382. There are, however, limits on the resulting discovery. If the facts are separable from the opinion, the court said, then they may be distilled and handed over separately. If the facts cannot be so distilled, the document, including the opinions, must be handed over. The breadth of the discovery therefore is deceptive: the court held that it would examine the documents and “excise, if feasible, privileged information.” Id. at 382.
Although work product must contain facts in order to be discoverable, that it does so is not a sufficient reason for discovery. See Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 41-42 (D. Md. 1974) (documents containing mental impressions of attorney or other representative of party not discoverable “merely because” they include factual data); Crocker v. United States, 51 F.R.D. 155, 156 (N.D. Miss. 1970) (no discovery of facts when facts and opinion in agent’s report are inseparable).
75. 74 F.R.D. at 617 (“materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties”).

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been made in this case. Even if such a demonstration had been made it would have related only to Rule 26(b)(3), and would have been irrelevant to Rule 612, under which the sole issue is whether the memory of the witness was refreshed.

III. The Proper Relationship of Memory Refreshment Doctrine to Work Product Discovery

The Berkey court created its new rule in order to forestall excessive use of work product in preparing witnesses to testify. But the rule catches in its broad sweep work product that should be immune from discovery. The court’s goal might have been accomplished without changing existing law or making such broad inroads into work product protection. That Rule 612 and Rule 26(b)(3) need not clash at all becomes apparent when one looks more closely at the purposes of these two doctrines and at their relationship to each other.

A. The Purposes of Memory Refreshment Doctrine

Courts have employed three major rationales to justify inspection of materials used to refresh a witness’s memory. The first is that the opposing counsel needs the materials in order to test the existence and accuracy of the memory itself. This explanation, however, is invalid because one purpose of all cross-examination is to test memory. Since the witness is supposed to be testifying from his memory and not from the document, testing a refreshed memory does not differ from testing any other memory the witness recounts on the stand. If cross-examination is effective to test unrefreshed memory, it should be sufficient to test refreshed memory as well.

The second major rationale for inspection is that the opposing attorney needs the document in order to test its power to evoke the memory to which the witness testifies. But the possibility of obscure

76. Id.; see note 55 supra.
77. 74 F.R.D. at 617.
79. McCormick, supra note 16, § 9, at 15-19 (right to memorandum to cross-examine on credibility of claim that memory was refreshed). The witness must testify from current, refreshed memory and not from the document. See, e.g., Goings v. United States, 377 F.2d 753, 761 (8th Cir. 1967) (witness must testify from present memory).
81. See McCormick, supra note 16, § 9, at 17 (inspection to seek discrepancies between document and testimony); Symposium, supra note 14, at 107 (inspection to determine capacity of document to refresh recollection).
chains of association suggests that a memory may have no readily apparent connection with the content of a document;\(^{82}\) therefore, testing whether a witness's testimony depended on a document is not always possible as a practical matter. For example, the materials may refresh memory through a chain of associations that makes sense only to the witness.\(^{83}\) Under this second rationale, however, a legitimately refreshed recollection might be discredited simply because the trier of fact could perceive no reason why the document should have refreshed the memory in the manner alleged.

The third major rationale, that inspection is necessary in order to protect against improper communications between counsel and witness,\(^{84}\) is the only one that survives thoughtful analysis. The memory refreshment doctrine accomplishes this goal by allowing opposing counsel to scrutinize the materials in order to determine if they improperly prompt the witness.

Various aspects of the doctrine support this rationale for its existence. For example, the trier of fact may see the memory refreshment materials.\(^{85}\) This serves as a further safeguard that ensures that any prompting is revealed. Another argument in support of this rationale may be derived from the fact that the opposing attorney has the right to see materials handed to the witness while the witness is on the stand, yet no such automatic right exists with respect to pretestimony refreshment materials.\(^{86}\) A plausible explanation of this rule is that the primary goal of the refreshment doctrine is preventing the attorney from prompting his witness, and such a danger is greatest while the witness is testifying. Thus, in order to fulfill its purpose, memory refreshment doctrine need only encompass those materials that stimulate the specific contents of a witness's testimony.\(^{87}\) By limiting its reach

\(^{83}\) See, e.g., M. Proust, Swann's Way 34-35 (G. Moncrieff trans. 1970) (spoonful of tea and crumbs causes considerable amount of “testimony” to be recalled).
\(^{85}\) See note 20 supra.
\(^{86}\) See note 24 supra.
\(^{87}\) Memory refreshment doctrine is designed to prevent impermissible prompting through written suggestions by the attorney of the answers he desires, during or immediately preceding the testimony. The doctrine is not designed to deter the attorney from impermissibly structuring a witness's testimony in situations where no genuine
to materials used in order to refresh memory, the doctrine ensures that materials that prompt testimony may be examined by opposing counsel.

The memory refreshment doctrine, therefore, exists to deter witness prompting by revealing materials used to stimulate testimony to the opposing counsel. Given this purpose, the relationship between the memory refreshment doctrine and work product protection may be examined in a new light.

B. Memory Refreshment Doctrine and Work Product Protection

An understanding of the purposes of the memory refreshment and work product doctrines indicates that the two will rarely conflict. Materials used for memory refreshment, and thus subject to inspection under Rule 612, are not protected by the work product doctrine.1

The work product doctrine only protects material that contains the opinions or thought processes of the attorney.89 Such work product will rarely become the subject of testimony,90 but if it does, there is no longer any need to protect it. Once the testimony is given, there is usually nothing left to keep secret.91 Moreover, if the opinions or thought processes of the attorney are included in materials that refresh memory because of their factual content, only the factual information

memory refreshment is possible. Indeed, the doctrine would be ineffective for that purpose because it could be easily circumvented by oral preparation. In addition, if a lawyer prepares a witness with specific written materials, the doctrine will not come into play if the witness falsely denies it. See note 29 supra.

90. Witnesses testify to facts, not opinions. See McCormick, supra note 16, §§ 10-11. Only when specialized knowledge is required to assist the trier of fact in understanding the evidence or determining a fact in issue may experts testify "in the form of an opinion." Fed. R. Evid. 702. The only witness whose testimony might be significantly affected by work product, to an extent beyond usual witness preparation, is the expert witness, and materials given to an expert may be open to discovery by an alternative route. See Fed. R. Civ. P. 26(b)(4). In United States v. IBM Corp., 72 F.R.D. 78, 82 (S.D.N.Y. 1976), the court held that everything given to the expert witness was open to discovery under Fed. R. Civ. P. 26(b)(4).
91. Most memory refreshment materials relate, at least indirectly, to the testimony they stimulate. Occasionally, a document may revive a memory without itself having any apparent connection with the resulting memory. See note 82 supra (citing cases). In those few situations in which the refreshing document is work product and has no apparent relation to the testimony, the attorney must choose which is more important, the testimony or the privacy of the document. See Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 13 (N.D. Ill. 1972) (choice between using document to refresh memory and retaining attorney-client privilege adhering to it). Such a concatenation of events will be rare, because it will occur only when the document bears no resemblance to the testimony, the content of the testimony is directly affected by the work product itself, and there are no alternative means of refreshment available.
need be disclosed in order to serve the purpose of memory refreshment doctrine. 92

When the contents of work product are used by a witness as part of his testimony, or even when they substantially influence that testimony, they necessarily contain facts in issue. 93 Once the witness has identified work product as the stimulus of his refreshed memory, the showing of need necessary for discovery under Rule 26(b)(3) could be made on that basis. In civil suits, the contents of a witness's testimony are often known prior to trial, through deposition or interrogatory. 94 When answers appear for which there is no basis apparent to the opposing party, a request for discovery of that basis—if any—might follow. If it were claimed that the basis of the testimony was work product, the Rule 26(b)(3) issue would then be reached.

When the witness's testimony at trial disagrees with testimony supplied through discovery, and no basis for the discrepancy is apparent, the witness may be discredited through the use of his prior inconsistent statements. 95 There will be no need for work product, even if work product caused the change, for the purpose of discrediting the witness through cross-examination.

It is only when testimony appears for the first time at trial or in deposition, hence necessitating more rigorous cross-examination in order to uncover improper prompting, and when the witness concedes that he would not have so testified if he had not previously refreshed his memory, that the Rule 612 issue arises. In that situation, inspection should probably follow on the basis of the memory refreshment doctrine, even in those rare cases when the materials used to refresh the witness's memory are work product. The intrusion on work product protection in such a case is minimal because only materials actually used to refresh memory must be disclosed. 96

92. Memory refreshment doctrine itself protects work product that, although part of a document used to refresh the memory of the witness, does not itself refresh that memory: only the precise portion of the document that actually refreshes the witness's memory may be inspected. See United States v. Wright, 489 F.2d 1181, 1189 (D.C. Cir. 1973):

[The rules governing documents used to refresh recollection could in no event justify requiring Reeves to turn over his entire investigative report to the prosecution. As a defense witness Reeves testified only as to two matters . . . . Assuming they had been used to refresh his recollection at trial, those parts of his investigative report relative [sic] to this testimony and of possible use to the Government in cross-examining Reeves with respect to this testimony would have to be turned over to the prosecution.]

93. Since witnesses testify to facts, work product must contain at least some facts in order to become the subject of testimony. See note 90 supra.


95. See Fed. R. Evid. 613.

96. See note 92 supra.
Conclusion

The goals of the memory refreshment doctrine are satisfied when an opposing attorney has the opportunity to expose improper prompting of a witness. The goals of work product discovery are satisfied when it is limited to factual information and does not include an attorney's opinions or thought processes absent a showing of need. A rule that discloses all materials seen by a witness prior to testifying is too broad: it allows the discovery of work product for which no need exists under either the memory refreshment or work product doctrines. A proper understanding of the goals of the memory refreshment and work product protection doctrines indicates that there is, in fact, no conflict between Rule 612 and Rule 26(b)(3).