By Robert L. Wise and David E. Gluckman

Fed. R. Evid. 612—Use It or Lose It

Your corporate representative is totally prepared for her deposition. You culled thousands of pages of documents and materials already produced in discovery to come up with the select few documents she needed to review to prepare for the noticed topics. You spent hours with her preparing and going over the documents. She spent even more time preparing on her own. You are ready to roll.

But when the deposition starts, the first question out of the deposing attorney's mouth is the one you did not prepare for: "Ms. Smith, what documents did you review to prepare for your deposition today and would you please produce them?"

You think the question sounds bad, but you are not sure. After all, every one of the documents your witness reviewed was already among those you produced in discovery. You know the rules, and you know they frown on instructing witnesses not to answer deposition questions, to put it mildly. You also know the rules governing corporate-representative depositions and the duties a company has to prepare someone to speak on its behalf. Still, you wonder, "Isn't that information protected? Should we object? Should we instruct the witness not to answer?" Under normal circumstances, the answers are "yep," "you bet," and "heck, yeah."

This article will explore this type of fact scenario involving deposing attorneys' efforts to discover corporate-representative witness preparation materials and information. It will review the extensive body of case law recognizing the protected status of this information, as well as how and under what circumstances, a deposing attorney may be entitled to preparation materials and information. Finally, this article will discuss what in-house and outside counsel

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can do both before and during corporate-representative depositions to comply with the law, and how counsel can use the rules, specifically Federal Rule of Evidence 612, to protect this often overlooked form of work product.

Attorney Preparation of Corporate Representatives—Protected Work Product

Most practitioners are familiar with the purpose and scope of corporate-representative depositions, commonly known as "30(b)(6) depositions" in federal court. *See* Fed. R. Civ. P. 30(b)(6). Many states also have similar rules providing a mechanism for deposing a corporation or other company through its designated representative. *See*, *e.g.*, Cal. Civ. Pro. Code §2025.230 (providing for deposition where "the deponent named is not a natural person"); Fla. R. Civ. P. 1.310(b)(6) (mirroring Fed. R. Civ. P. 30(b)(6)); R. Sup. Ct. Va. 4:5(b)(6) (same).

There are numerous articles on the topic of corporate-representative depositions explaining the background of these types of depositions, the rules governing them, and the preparation obligations accompanying them. *See*, *e.g.*, Joseph W. Hovermill & Matthew T. Wagman, *When Nobody Knows What the Company "Knows,"* For The Defense, Nov. 2008, at 52; Kevin C. Baltz, *The Scope of Rule 30(b)(6) Depositions*, For The Defense, Feb. 2008, at 22. However, the discoverability of attorney document compilations used to prepare corporate representatives, and what to do when the deposing attorney asks the question mentioned above, is not often discussed in any great detail. Yet, that question often goes to the heart of what inside counsel and the company's outside counsel usually strive so hard to protect—work product.

Typically, a corporate representative does not prepare for his or her deposition in a vacuum. Instead, the process is usually collaborative: inside and outside counsel work together to identify the appropriate witness, to determine with the witness the relevant scope of materials responsive to the noticed topics, and to select and compile written materials for the witness to review to be reasonably prepared for the deposition. And it is the selection and compilation of documents for the witness to review that brings the work-product doctrine squarely into play.

Certainly, the law recognizes work-product protection for information generated both by counsel and by other party representatives. *See* Fed. R. Civ. P. 26(b)(3) ("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)."). However, the majority of the case law examining this issue has dealt with situations in which counsel was involved in the document selection and compilation process to prepare for the deposition. For that reason, this article approaches this issue from a similar perspective.

It is the selection and compilation of documents for the witness to review that brings the work-product doctrine squarely into play.

Numerous courts have recognized that a subgroup of documents selected and compiled by counsel from a larger set of documents is protected opinion work product, even if the party to be deposed has already produced the selected documents in discovery. *See*, *e.g.*, *In re Allen*, 106 F.3d 582, 608 (4th Cir. 1997) (stating that the selection and compilation of materials by or at the direction of an attorney, including for the purpose of showing them to a witness, is work product protected under Fed. R. Civ. P. 26); *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986) ("In cases that involve reams of documents and extensive document discovery, the selection and compilation of documents is often more crucial than legal research…. We believe [counsel's] selective review of [her clients'] numerous documents was based on her professional judgment of the issues and defenses involved in this case."); *Sporck v. Peil*, 759 F.2d 312, 316 (3d. Cir.), *cert. denied*, 474 U.S. 903 (1985) ("We believe that the selection and compilation of documents in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work-product."); *James Julian, Inc. v. Raytheon Corp.*, 93 F.R.D. 138, 144 (D. Del. 1982).

There is some limited authority holding that attorney compilations are sometimes unprotected. *See*, *e.g.*, *In re San Juan duPont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1018 (1st Cir. 1988) (describing as "flawed" the *Sporck* court's reasoning that "[i]n selecting and ordering a few documents out of thousands, counsel could not help but reveal important aspects of his understanding of the case."); *Audiotext Communications Network, Inc. v. US Telecom, Inc.*, 164 F.R.D. 250, 252 (D. Kan. 1996) ("The selecting and grouping of information does not transform discoverable documents into work product."). But those cases are often distinguishable from typical litigation—even typical complex litigation—and from the hypothetical situation addressed in this article. *See*, *e.g.*, *In re San Juan*, 859 F.2d 1007 (requiring the *deposing* party to disclose exhibits that it intended to use as exhibits in the depositions because (1) the deposing party had no reasonable expectation that the identity of those selected documents would not be disclosed and (2) it was part of the court's inherent "case management" powers to control "massive litigation" involving more than 200 defendants, 2,000 plaintiffs, 2,000,000 documents, and more than 2,000 anticipated depositions). Even when they are not distinguishable, those cases represent the minority view.

In contrast, the greater weight of authority holds that the identity of the documents counsel has selected and compiled for a corporate-representative witness to review is protected work product—and for good reason. *See* 7 James Wm. Moore *et al.*, *Moore's Federal Practice* ¶26.70[2][b] n.15 (3d. ed. 2008). Attorney document compilations can reflect the most sacrosanct kind of work product. They provide a window into counsel's mental impressions about the case, which documents counsel thinks are

most relevant to a certain topic, and which documents counsel will rely on to defend the case. *Sporck*, 759 F.2d at 316. There is precious little in our legal system more deserving of protection. *See Hickman v. Taylor*, 329 U.S. 495, 510 (1947) ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."); *see also* Fed. R. Civ. P. 26(b)(3) (instructing courts to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.").

The *Sporck* case highlights this reality and the reasoning behind protecting this type of work product. *See* 759 F.2d 312. Looking at whether a deposing party should be entitled to discover an attorney's document compilation used to prepare a witness, that court wrote:

> In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case. Indeed, in a case such as this, involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research. There can be no doubt that at least in the first instance the binders were entitled to protection as work product.

Id. at 316 (quoting *James Julian*, 93 F.R.D. at 144) (citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977)).

Thus, as a beginning point, counsel should consistently treat the selection and compilation of documents provided to corporate witnesses for review in preparation for their depositions as protected work product. And counsel should take all the appropriate steps to safeguard that information from unnecessary disclosure and production, just as they would for any other form of work product. The question becomes, is a deposing party ever entitled to this work-product compilation? The answer is, maybe, but only if that party follows the rules.

Federal Rule of Evidence 612—A Sword and a Shield

Several courts have noted that while an attorney compilation of otherwise unprotected and unprivileged materials may enjoy work-product status and protection, that protection is not impenetrable. Rather, many courts recognize that otherwise protected and privileged materials, including an attorney's compilation of otherwise unprotected documents, may be discoverable if they are put to a "testimonial use." *See*, *e.g.*, *Nutramax Labs., Inc. v. Twin Labs., Inc.*, 183 F.R.D. 458, 463 (D. Md. 1998) ("[W]here, as here, counsel attempts to make a testimonial use of [work-product information] the normal rules of evidence come into play with respect to cross-examination and production of the documents.") (quoting *United States v. Nobles*, 422 U.S. 225, 239–40 (1975)) (alteration in original). So, what does it mean to put a document to a "testimonial use?"

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This is where Federal Rule of Evidence 612 comes into play. That rule provides, in part:

> if a witness uses a writing to refresh 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.

Fed. R. Evid. 612.

Many states have similar rules. *See*, *e.g.*, Ariz. R. Evid. 612; *Samaritan Health Servs., Inc. v. Superior Court*, 690 P.2d 154, 156 (Ariz. Ct. App. 1984) (recognizing that Arizona's Rule of Evidence 612 is "virtually identical" to the federal rule and looking to Federal Rule 612 for interpretive guidance). Some states have slightly different rules. *See*, *e.g.*, Fla. Stat. §90.613 (2008) (providing only for production of documents used *while* testifying, not before testifying or in preparation for the deposition). And still others, such as Virginia, have no codified rules of evidence at all.

Focusing on the federal rule, it is the "before testifying" subpart of Rule 612(2) that is particularly relevant for purposes of attorney-selected and attorney-compiled deposition preparation materials. Courts have almost uniformly held that Rule 612 applies equally to depositions as to trials. *See*, *e.g.*, *Sporck*, 759 F.2d at 317 (Fed. R. Evid. 612 "is applicable to depositions and deposition testimony by operation of Federal Rule of Civil Procedure 30(c)"); *Frazier v. Ford Motor Co.*, No. 4:08CV04153 JLH, at 2 (W.D. Ark. Dec. 17, 2008) ("The greater weight of authority holds that Rule 612 is therefore applicable to depositions."); *Heron Interact, Inc. v. Guidelines, Inc.*, 244 F.R.D. 75, 76 (D. Mass. 2007) (same); *Eckert v. Fitzgerald*, 119 F.R.D. 297, 299 (D.D.C. 1988) (same). And many courts have held that a witness' testifying from recollection refreshed by his or her review of a document before the deposition amounts to a "testimonial use" of that document under Rule 612, thereby waiving any privilege or protection that might otherwise apply. *See*, *e.g.*, *Nutramax*, 183 F.R.D. at 467.

So, does that mean a deposing party automatically can have all of the documents a witness reviewed to prepare for the corporate-representative deposition? Not so fast. In *Nutramax Laboratories, Inc. v. Twin Laboratories Inc.*, one of the leading cases on this issue, the District Court of Maryland explained that Rule 612 provides a means for the deposing party to discover this otherwise protected attorney-compilation work product, but only if the deposing party first lays a proper foundation. *See* 183 F.R.D. at 468.

Nutramax involved a discovery dispute centering on the defendant's request to review documents that plaintiff Nutramax's counsel provided to its witnesses

to prepare them for their depositions. *Id.* at 460. The court first recognized that the document compilations were protected work product, but that pursuant to Rule 612, Nutramax could have waived the protection for certain documents by putting them to "testimonial use." *Id.* at 467. In other words, if there were a "testimonial use" waiver of a particular document used in preparation, the deposing party might be entitled to request production of that document. However, to show that such a "testimonial use" warranted production under Rule 612, deposing counsel first had to lay a proper foundation under the rule. *Id.* at 468.

First, deposing counsel had to show that the witness used the particular document to refresh his or her memory on a specific topic or subject matter of testimony, which ensures that the requested document "is relevant to an attempt to test the credibility of the deponent." *Id.*

Second, deposing counsel had to show that the witness actually used the document for the purpose of testifying, which ensures against the use of Rule 612 "as a pretext for wholesale exploration of an opposing party's files." *Id.* (internal quotations omitted). It also "insures 'that access is limited only to those writings which may fairly be said in part to have an impact upon the testimony of the witness,' because only writings which actually influenced a witness' testimony are of utility in impeachment and cross-examination." *Id.* (citing *Sporck*, 759 F.2d at 317–18; *Omaha Pub. Power Dist. v. Foster Wheeler Corp.*, 109 F.R.D. 615, 616–17 (D. Neb. 1986)); *see also United States v. Sheffield*, 55 F.3d 341, 343 (8th Cir. 1995) ("Rule 612 is not a vehicle for a plenary search for contradicting or rebutting evidence that may be in a file but rather is a means to reawaken recollection of the witness to the witness's past perception about a writing.").

If the deposing party cannot lay this two-step foundation, then the inquiry ends, and defending counsel need not produce the document or documents in question. *Nutramax*, 183 F.R.D. at 468. But even if the deposing party meets these first two steps, there is still one more step. Rule 612(2) specifically provides that the deposing party must show, and the court must likewise find, that the "interests of justice" support having the witness produce the document that reviewed before testifying to refresh recollection. *Id.* ("Whether disclosure is required then turns on the third element of Rule 612 [the "interests of justice" analysis].").

This final "interests of justice" element entails a "balancing test designed to weigh the policies underlying the work product doctrine against the need for disclosure to promote effective cross-examination and impeachment." *Id.* The *Nutramax* court provided nine illustrative, but not exhaustive, factors for a court to consider (1) status of the witness—for example, fact, expert, or corporate representative; (2) nature of the issue in dispute; (3) when the events took place; (4) when the documents were reviewed; (5) the number of documents reviewed; (6) whether the witness prepared the documents reviewed; (7) the extent to which the documents contain "pure" attorney work product; (8) whether the documents had been previously disclosed; and (9) whether there are legitimate concerns regarding destruction of the documents. *Id.* at 469–70.

Deposing counsel had to show that the witness actually used the document for the purpose of testifying.

Notably, the *Nutramax* court found the interests of justice favored ordering production of the documents that the two 30(b)(6) witnesses reviewed. *Id.* at 472–73. As the court explained, "there is a greater need to know what materials were reviewed by expert and designee witnesses in preparation for deposition since the substance of their testimony may be based on sources beyond personal knowledge." *Id.* at 469. But *Nutramax* did not hold that this "status of the witness" factor alone was dispositive.

Even some of the courts that have refused to recognize work-product status of attorney document compilations used for witness preparation have nonetheless required a deposing party to comply with Rule 612 before ordering production of documents reviewed in preparation for deposition. For instance, the District Court of Kansas declined to accord work-product status to the selection and grouping of documents by counsel for a witness preparation, but still required the deposing party to meet the three requirements of Rule 612 before it would compel production of those materials. *See Audiotext*, 164 F.R.D. at 252, 254 (A party must meet three conditions before obtaining "documents used by a witness prior to testifying: (1) the witness must use the writing to refresh his or her 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." (quoting *Butler Mfg. Co. v. Americold Corp.*, 148 F.R.D. 275, 277–78 (D. Kan. 1993)).)

Thus, Rule 612 can provide a sword for a deposing party to gain access to attorney-compilation work product. However, most deposing parties attempt to demand this information without bothering to comply with Rule 612, and often without even considering it. By knowing what Rule 612 and its foundation elements require, and by invoking work-product protection up front and requiring strict compliance with Rule 612 throughout, defending counsel can better shield their work product from unnecessary and undeserved production. And counsel can also better defend the company's representatives at deposition.

Responding to a Demand for Your Work Product—Practical Suggestions

A demand for protected attorney-compilation work product in connection with a corporate-representative deposition will usually take one of two forms.

The first way deposing counsel may demand disclosure of your protected attorney-compilation work product is in a document request accompanying a deposition notice, pursuant to Federal Rule of Civil Procedure 30(b)(2), or an analogous state rule. *See* Fed. R. Civ. P. 30(b)(2) ("The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the

deposition."); *see also generally* FED. R. CIV. P. 34. Some jurisdictions debate which party bears the burden of seeking court intervention about the scope or propriety of a corporate-deposition notice and whether objections to the notice itself are proper or valid. But there should be no debate that a Rule 30(b)(2) document request in a deposition notice is no different than any other kind of document request. Indeed, Rule 30(b)(2) specifically references Federal Rule of Civil Procedure 34. Thus, when counsel receives with the deposition notice a request to produce all documents that a corporate representative witness reviewed to refresh his or her recollection to prepare to testify, defending counsel should object, just as counsel would object to a normal Rule 34 document request.

An objection to such a document request is proper because the identity of those documents in that collection is protected work product, as explained above. And even if it is not protected, or that protection is not recognized, the only way a deposing counsel is entitled to learn which documents a witness used before testifying to prepare for deposition is by laying a proper foundation, or, in other words, by meeting the three requirements of Federal Rule of Evidence 612. Clearly, because the deposition has not yet occurred, there can be no foundation, much less an "interests of justice" analysis. Thus, when faced with this type of production request in federal court, defending counsel should timely object on the basis of work product and the requesting party's failure to lay a proper foundation under Rule 612, or the jurisdiction's applicable rule. This was the strategy used recently and effectively in *Frazier v. Ford Motor Company*, No. 4:08CV04153 JLH (W.D. Ark. Dec. 17, 2008).

In *Frazier*, the plaintiff sent Ford Motor Company a corporate-deposition notice with a Rule 30(b)(2) document request for all documents "reviewed or relied upon by each witness and or [sic] designated corporate representative in preparation for the deposition or to refresh their recollection on the topic chosen." Ford objected on work product and Rule 612 grounds, because the request implicated materials selected and compiled by Ford's counsel at their direction. Rather than proceeding with the deposition and attempting to comply with Rule 612 by laying a proper foundation, the plaintiff instead moved to compel.

The magistrate judge overruled Ford's objection, granted the plaintiff's motion to compel and ordered Ford to produce the requested documents two days before the deposition. *Id.* at 1. Pursuant to Federal Rule of Civil Procedure 72(a), Ford objected to and appealed the magistrate's order. *Id.*

> Determining the controlling law is key, because some jurisdictions' evidence rules are more restrictive than Rule 612.

The district judge sustained Ford's objection. Relying on *Nutramax*, as well as controlling Eighth Circuit law that recognized attorney compilations as protected work product, the district judge explained:

> Requiring Ford to produce the documents reviewed by corporate witnesses before the depositions begin, for the most part, would not be requiring the production of hitherto unproduced documents; it would be requiring Ford's lawyers to tell the plaintiff's lawyers which documents of those already produced that Ford's lawyers deem significant to the issues about which the corporate witnesses are to testify. While it is the task of Ford's lawyers to prepare their witnesses to testify, it is the task of the plaintiff's lawyers to select the documents about which they wish to inquire. The rules do not contemplate that Ford's lawyers must assist the plaintiff's lawyers in selecting documents about which to inquire during a deposition.

Frazier, No. 4:08CV04153 JLH, at 3 (W.D. Ark. Dec. 17, 2008).

The district judge modified the magistrate judge's ruling to strike the requirement that Ford produce the documents requested two days before the deposition, and instead, required production of the requested documents if, and only if, the plaintiff's counsel first met "the foundational requirements of Rule 612." *Id.* Thus, as *Frazier* shows, objecting to such a document request and invoking the protections of Federal Rule of Evidence 612 at the notice stage is both valid and proper.

The second way in which a deposing party may try to discover which documents a corporate representative reviewed prior to his or her deposition is by asking that very question at the deposition. This is exactly what happened in *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985).

In *Sporck*, the defendant's counsel prepared Sporck for his deposition with the aid of documents the attorney culled from a much larger document collection. *Id.* at 313. At the beginning of the deposition, the plaintiff's counsel asked, "Mr. Sporck, in preparation for this deposition, did you have occasion to examine any documents?" *Id.* at 313–14. Following Sporck's affirmative response, the plaintiff's counsel first orally, and later by written request pursuant to Federal Rule of Civil Procedure 34, demanded identification and production of "[a]ll documents examined, reviewed or referred to by Charles E. Sporck in preparation for the session of his deposition…." *Id.* at 314. Sporck's counsel objected to both demands. *Id.* The deposing party moved to compel, and the trial court granted the motion, compelling production. *Id.*

On defendant Sporck's writ of mandamus, the Third Circuit reversed and remanded. The *Sporck* court identified the problem with the plaintiff's premature demands:

> In seeking identification of all documents reviewed by petitioner prior to asking petitioner any questions concerning the subject matter of the deposition, respondent's counsel failed to establish either that petitioner relied on any documents in giving his testimony, or that those documents influenced his testimony. *Without eliciting that testimony, there existed no basis for asking petitioner the source of that testimony.*

Id. at 318 (internal citation omitted; emphasis added).

To address this problem, the *Sporck* court required deposing counsel first to ask specific questions implicating particular documents. *Id.* The court explained:

> [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.

Id. (emphases added); *see also Stone Container Corp. v. Arkwright*, No. 93 C 6626, 1995 WL 88902 (N.D. Ill. Feb. 28, 1995)) (following *Sporck* and rejecting a blanket request up front, instead requiring the deposing party to question the witness "about particular topics" to show that the witness "relied on a specific document in order to refresh his recollection about a particular topic").

The *Sporck* court concluded, "[b]ecause the trial court did not properly condition its application of Rule 612 on a showing that petitioner relied upon the requested documents for his testimony and that those documents impacted on his testimony, the court committed legal error." 759 F.2d at 318. "This error became prejudicial when it implicated work product of petitioner's counsel." *Id.*

As *Sporck* demonstrates, a blanket request during a deposition asking a witness to identify the documents reviewed or relied on to refresh recollection in preparation for testifying in general on the noticed topics, without a proper foundation and without tying the request to a specific topic or a specific line of questioning, is just as invalid and improper as a similar demand in a written, Rule 30(b)(2) document request. Thus, in a jurisdiction that follows, or would likely follow the *Sporck*/*Nutramax*/*Frazier* line and Rule 612, or a similar state rule, defending counsel should object to such a blanket request on work-product and Rule 612 grounds. But determining the controlling law is key, because some jurisdictions' evidence rules are more restrictive than Rule 612. *See*, *e.g.*, *Proskauer Rose LLP v. Boca Airport, Inc.*, 987 So. 2d 116, 117–18 (Fla. Dist. Ct. App. 2008) (denying a motion to compel production of documents a witness used before testifying to prepare for deposition because "Section 90.613, Florida Statutes only requires discovery if the witness used the document 'while testifying.' In addition, there is no common law right in Florida to discovery of documents used to prepare a party to testify.").

If deposing counsel insists on an answer during the deposition, defending counsel should instruct the witness not to answer. *See* Fed. R. Civ. P. 30(c)(2) ("A person may instruct a deponent not to answer only when necessary to preserve a privilege,…."); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995) (establishing that Fed. R. Civ. P. 30(c)(2), formerly Rule 30(d)(1), provided basis to instruct a deponent not to answer to preserve work-product protection). And counsel should maintain the objection and position, unless or until deposing counsel properly lays an adequate foundation by showing the first two elements of the Rule 612 test: (1) that the witness actually reviewed a document to prepare to testify on a particular topic, and (2) that the witness actually relied on the document to testify. *See Nutramax*, 183 F.R.D. at 468.

However, there is still the third element—the "interests of justice" analysis—which is an analysis only the court can perform. *See id.*; *see also* Fed. R. Evid. 612 (allowing for document production to the deposing party only "if the court in its discretion determines it is necessary in the interests of justice"). Thus, if the deposing party meets the first two requirements, according to Rule 612, defending counsel should require an "interests of justice" analysis before producing the preparation documents.

Conclusion

Insisting on strict compliance with Rule 612 may seem like a bother to some. To others, it might seem impractical. *See*, *e.g.*, *Frazier*, No. 4:08CV04153 JLH, at 1 ("Although it might well be more practical to require that documents reviewed by a witness be produced before the deposition, it seems fairly clear that the law requires that a foundation be established before the court can order that the documents be produced."). To a certain degree, they have a point—following the rules is often harder than not doing so.

But the issue is not, "what is easier?" The issue is, "what does the law say?" And if the law says that your selection and compilation of documents for your company's representative to review to prepare for deposition is your work product, then you should fight to protect it.

And even if the identity of the documents your witness reviewed cannot properly be considered work product, the other side is still not entitled to that information without complying with the rules, specifically Rule 612. If opposing counsel does not want to play by the rules, then that is his decision, and he can simply live without the information. But there is nothing that requires you to ignore the rules.

As with all of the other rules, Federal Rule of Evidence 612 exists for a reason. It is there for your company's and your client's protection. So why not use it?