Owen and Freyberg in The Colorado Lawyer: Refreshing Recollections Without Waiving Work Product Protections

By Brent Owen, Michael Freyberg | July 8, 2024

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Haynes Boone Partner Brent Owen and Associate Michael Freyberg authored an article for most recent issue of *Colorado Lawyer*, discussing 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.

Read an excerpt below.

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?

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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?
- 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.

To read the full article in the July/August 2024 issue of *Colorado Lawyer*, click here.

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