

An Ounce of Improper Preparation Isn't Worth the Cure: The Impact of Military Rule of Evidence 612 on Detecting Witness Coaching

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*[A counsel's] duty is to extract the facts from the witness, not to pour them into him.*¹

I. Introduction

You are the Chief of Military Justice at a large installation. A batch of new litigators has been entrusted to your care and you have dutifully taught them everything you know about military justice over the past six weeks. One of your more promising young counsel has recently interviewed his first victim. On your way out of the building Friday night, you stop and ask him how the interview went. He excitedly tells you that it went great: he took your advice and provided the victim a clean copy of her statement, but he also went “off-script” and showed the victim a group of three to five pictures he selected from the thirty pictures the criminal investigators took, as well as the statement of an eyewitness that had highlights, stars, underlines, and notes the counsel had made in the margin because the victim was having trouble remembering key facts. The counsel tells you that he feels the victim is well prepared for trial next week, even though the events took place almost one year ago. In addition, he tells you he is sure that there are no issues because all of the statements and pictures have previously been turned over in discovery to defense. You sit back down at your desk, call your spouse to say you will be late for dinner, and you begin to wonder what the ramifications are of your young counsel's actions.

The above hypothetical illustrates a common problem many new counsel face. No one has ever taught them what they should and should not do when interviewing a witness. One of the major reasons for this deficiency is that the parameters of what is permitted are unclear. In addition, the scenario highlights the ambiguity that often exists in witness preparation and the role Military Rule of Evidence (MRE) 612² plays in discovering when the line has been crossed

into impermissible coaching³ of the witness. There are no Supreme Court or military cases dealing with MRE 612. However, the federal circuits have grappled with the scope of the corresponding federal rule⁴ with varying degrees of success. This article discusses why it is difficult to discern when witness coaching has occurred; the role MRE 612 plays in aiding cross-examination to detect coaching; the various tests developed to analyze Federal Rule of Evidence (FRE) 612 issues; and which test should be adopted by the military courts. Finally, this article addresses the issues presented by the three types of documents the counsel showed the victim in the above hypothetical.

II. Determining When Witness Preparation Turns into Coaching

Determining when the line has been crossed between witness preparation and coaching is difficult because the limits of what is allowed are poorly defined. Furthermore, the work product doctrine shields from discovery the vast majority of the steps counsel take to prepare for trial. The application of that doctrine makes it difficult for the opposing side to detect coaching and to cross-examine witnesses on the difference between their actual memory and what may have been suggested to them during pre-trial interviews. The following shows how the confluence of vague witness preparation rules and the protections of the work product doctrine necessitated the development of FRE 612.

³ See Robert K. Flowers, *Witness Preparation: Regulating the Profession's "Dirty Little Secret,"* 38 HASTINGS CONST. L.Q. 1007 (2011) (noting that impermissible witness preparation techniques are often referred to as coaching). The term coaching will be used throughout this article.

⁴ While Military Rule of Evidence (MRE) 612 and Federal Rule of Evidence (FRE) 612 are not mirror images of each other, the main aspect of the rule is the same in both rules: if the witness (1) used a writing; (2) to refresh memory prior to testifying; (3) the court may order disclosure in the interest of justice. The remaining portion of MRE 612 (not appearing in the FRE) details the procedure for attendant claims of privilege. The MRE also deletes discussion of the *Jencks Act* due to the more liberal discovery rules applicable in the military. Compare MCM, *supra* note 2, MIL. R. EVID. 612, with FED. R. EVID. 612 (Writing Used to Refresh a Witness); see also UCMJ, app. 22, at 50 (2012).

Rule 612 is taken generally from the Federal Rule but . . . [l]anguage in the Federal Rule relating to the Jenks Act . . . which would have shielded material from disclosure to the defense under Rule 612 was discarded. Such shielding was considered to be inappropriate in view of the general military practice and policy which . . . encourages broad discovery.

Id.

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¹ *In re Eldridge*, 82 N.Y. 161, 171–72 (Ct. App. N.Y., 1880).

² MANUAL FOR COURTS-MARTIAL UNITED STATES, MIL. R. EVID 612 (2012) (Writing Used to Refresh Memory).

A. The Vague Line

Witness testimony is the life blood of any trial, particularly criminal trials, as confrontation clause jurisprudence has shown. As such, one would expect that the limits of what is permitted when preparing a witness for trial to be a source of significant proscription. Unfortunately, what constitutes proper preparation as opposed to coaching is largely a matter of opinion. This is because the parameters of what is allowed have not been the subject of much judicial or legislative review.⁵

There are no military cases dealing with witness coaching in a significant way.⁶ The only Supreme Court case addressing the issue does not define what is permissible. Instead, the Supreme Court in *Gerdes v. United States* placed the burden on cross-examination to reveal any impropriety in the procurement of testimony.⁷ While it is obvious that an attorney may not procure false testimony, determining what is allowed is far less definitive.⁸ Perhaps the most salient description of where the line is between proper and improper preparation can be found in *In re Eldridge*.⁹ In that case, the highest court of the state of New York held “[a counsel’s] duty is to extract the facts from the witness, not to pour them into him.”¹⁰ While this opinion does not serve as binding precedent in the military justice system, it explains the difference between what is and is not allowed when preparing a witness in a manner that can be easily conceptualized.

To effectively cross-examine the opposing side’s witnesses, and determine whether preparation crossed into coaching, counsel would certainly be interested in the steps the opposition took to prepare for trial. To that end,

⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 (2000) [hereinafter RESTATEMENT] (noting that beyond the obvious prohibition against suborning perjury, the limits on witness preparation is supported by relatively sparse authority); Flowers, *supra* note 3 (“The fine line between proper witness ‘preparation’ and improper witness manipulation . . . — sometimes called ‘coaching’—is rarely disciplined or even detected.”).

⁶ *United States v. Rodriguez-Rivera*, 63 M.J. 372 (2006) (holding that the accused did not establish prosecutorial misconduct based on the allegation that a six-year-old child victim was improperly coached by trial counsel, assistant trial counsel, and her parents during recess regarding her testimony). This case is the closest any military court has come to addressing witness coaching, but still no guidance is given regarding what is allowed.

⁷ *Gerdes v. United States*, 425 U.S. 80, 90–91 (1932) (“The opposing counsel in the adversary system is not without weapons to cope with ‘coached’ witnesses. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant’s credibility.”).

⁸ RESTATEMENT, *supra* note 5, § 116.

⁹ *In re Eldridge*, 82 N.Y. 161, 171–72 (Ct. App. N.Y., 1880).

¹⁰ *Id.*; see also *United States v. Millan*, 16 M.J. 730, 734 (A.F.C.M.R., 1983).

discovery requests might legitimately focus on which witnesses were interviewed and what documents were shown to each witness. However, acquiring that information is usually difficult due to the work product doctrine.

B. The Work Product Doctrine

The work product doctrine was created to prevent access to the opposition’s files and allow mental impressions to remain confidential.¹¹ In *Hickman v. Taylor*,¹² the Supreme Court recognized that “[u]nder ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production.”¹³ The Court was concerned that if the fruits of a counsel’s labor were subject to the normal rules of what must be produced, then an impossible choice would have to be made between preparing for trial and maintaining secrecy.¹⁴ Thus, the work product doctrine was created to protect the internal deliberative process of counsel.¹⁵

Typically, the work product doctrine is viewed as primarily a civil rule; however, it applies equally to criminal cases.¹⁶ The rule applies to military justice cases through *United States v. Vanderwier*¹⁷ and the Rules for Courts-Martial.¹⁸

¹¹ *Hickman v. Taylor*, 329 U.S. 495, 498 (1947).

¹² *Id.*

¹³ *Id.*

¹⁴ See *id.* at 511–12. The court was concerned about the likelihood of disclosed work product revealing the mental impressions of counsel. Specifically, the court noted, “[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.” *Id.*

¹⁵ *Id.*; see also *James Julian Inc. v. Raytheon Co.*, 93 F.R.D. 138 (D. Del. 1982) (“Indeed, in a case such as this, involving extensive document discovery, the process of selection and distillation [of specific documents] 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.”).

¹⁶ *United States v. Nobles*, 422 U.S. 225, 239–41 (1975).

¹⁷ 25 M.J. 263 (1987). In *United States v. Vanderwier*, the defense sought discovery of the notes that the trial team took of a certain witness. The court reinforced that “[e]ven though liberal, discovery in the military does not ‘justify unwarranted inquiries into the files and mental impressions of an attorney’” and held that the notes were protected by the work product doctrine. *Id.* at 269.

¹⁸ MCM, *supra* note 2, R.C.M. 701(f) (Information not subject to disclosure).

While the doctrine protects against disclosure, it is not an absolute bar and may be waived.¹⁹ However, waiver of the work product protection is a very narrow concept, and only applies to the most intentional of abuses.²⁰ If counsel used notes from a previous interview to assist a witness in testifying at trial, those notes would be protected from disclosure unless the court found that work product doctrine was purposefully waived.²¹ This would prevent the opposing party from effectively cross-examining the witness on the difference between what the witness actually remembers and what may have been suggested to him. Thus, absent egregious conduct, the work product doctrine acts as a barrier to cross-examination by preventing discovery of the facts necessary to challenge the witness.

III. Federal Rule of Evidence 612 and Military Rule of Evidence 612

Without a rule, a definite conflict exists between the work product doctrine and *Gerdes v. United States*' mandate of cross-examination as the means for detecting coaching.²² While the work product doctrine favors secrecy, effective cross-examination requires production of the documents shown to the witness. Prior to the enactment of FRE 612, the work product protections could only be overcome by the narrow concept of waiver.²³ Thus, producing the documents needed to test the limits of the witness's true memory was significantly limited. Federal Rule of Evidence 612 was created to counterbalance the protections of the work product doctrine and ensure access to such documents.

¹⁹ *Nobles*, 422 U.S. at 239–40 (“Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination.”) (citations omitted). *Id.*

²⁰ *Nutramax Labs. Inc. v. Twin Labs. Inc.* 183 F.R.D. 458, 463–64 (D. Md. 1998) (noting that waiver of the work product doctrine requires egregious, intentional conduct).

[F]or work product, waiver does not take place unless a disclosure has been made which is consistent with a conscious disregard of the advantage that is otherwise protected by the doctrine. The work product doctrine, therefore, is both broader and more robust than the attorney client privilege, as it does not appear that it can be waived by inadvertent disclosure in the same way that the attorney client privilege can.

Id. (citations omitted). Thus, waiver is ordinarily only found in extreme cases, making waiver of the work product doctrine narrower than the scope of FRE 612.

²¹ *Id.*

²² *Id.* at 461. Specifically, the court noted that “it has been recognized that there is a clear conflict between Fed. R. Civ. P. 26(b)(3), which codifies the work product doctrine, and Fed. R. Evid. 612.” *Id.*

²³ Waiver only applies in the limited circumstance where the work product doctrine has been intentionally abused. *See id.* at 464.

A. The Legislative History of Federal Rule of Evidence 612

Since MRE 612 is derived from FRE 612, understanding the rationale behind the enactment of FRE 612 is important. As the advisory committee began drafting the Federal Rules of Evidence, the potential misuse of the work product doctrine led to the inclusion of Rule 612 in the submission to Congress in 1972.²⁴

After seven years of research conducted by the advisory committee, Congress held hearings to discuss the enactment of the FRE.²⁵ The House Committee on the Judiciary called numerous witnesses, taking over 600 pages of testimony.²⁶ After the proceedings closed, the committee submitted a twenty-one-page report that addressed modifications, additions, deletions, or amendments to particular rules.²⁷ One of the rules the House Committee specifically amended was FRE 612. The committee noted that while the treatment of documents used to refresh recollection at trial is well-settled, the treatment of documents used prior to trial had been left to the discretion of the trial judge.²⁸ The committee stated the “purpose of the rule is essentially the same as the *Jencks*²⁹ statute: . . . to promote the search of credibility and memory.”³⁰ Unlike the *Jencks Act*, FRE 612 is equally applicable to both the government and defense, making the scope of the rule much broader. While the committee was concerned with ensuring that witnesses could be fairly cross-examined regarding their testimony, they were equally concerned about the rule completely abrogating the work product doctrine. To that end, the committee noted that

[t]he purpose of the phrase “for the purpose of testifying” is to safeguard against using the rule as a pretext for wholesale exploration of an opposing

²⁴ FED. R. EVID. 612 advisory committee's notes; *see also* *Berkey Photo Inc v. Eastman Kodak Co.*, 74 F.R.D. 613, 616–17 (S.D.N.Y. 1977) (expressing concern for a counsel's ability to use the work product doctrine as a shield against disclosure).

²⁵ H. R. REP. NO. 93-650 at 1–4 (1973).

²⁶ *Id.* The subcommittee held six days of hearings, heard twenty-eight witnesses, and received numerous written communications. Additionally, the subcommittee held seventeen markup sessions which culminated in a Committee Print of the proposed rules. The Committee Print was circulated nationwide for comment and printed in the *Congressional Record* to assure the widest distribution. Over the course of six weeks, approximately ninety comments were received by the subcommittee. *Id.* at 3.

²⁷ *Id.*

²⁸ FED. R. EVID. 612 advisory committee's notes.

²⁹ The *Jencks Act*, 18 U.S.C. § 3500, requires that the government produce all prior statements of a witness to the defense after a witness testifies. The rule does not apply to the defense. It has long been settled that the *Jencks Act* applies to the military. *See* *United States v. Strand*, 17 M.J. 839, 841 (N.M.C.M.R. 1984) (citations omitted).

³⁰ FED. R. EVID. 612 advisory committee's notes.

party's files and to ensure 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.³¹

Finally, the committee cautioned that “nothing in the Rule shall be construed as barring the assertion of privilege with respect to writings used by a witness to refresh his memory.”³² Thus, the committee attempted to strike the balance between the protections the work product doctrine affords the mental impressions of counsel, and the need for effective cross-examination to test the credibility of the witness.

B. The Text of the Rule

Military Rule of Evidence 612 states,

[i]f a witness uses a writing to refresh his or her memory for the purpose of testifying, either while testifying, or before testifying, if the military judge 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.³³

While there is a lack of case law from military courts analyzing the parameters of MRE 612, cases from the federal district courts citing FRE 612 are instructive.

To conduct a FRE 612 analysis, federal courts have isolated three elements that must be met: (1) a witness must use a writing to refresh his memory; (2) for the purpose of testifying; and (3) the court must determine that, in the interests of justice, the adverse party is entitled to see the writing.³⁴ The first two elements are factual predicates and must be established before moving on to the third element.³⁵

³¹ *Id.*

³² *Id.* The committee was very concerned that the rule not be turned into an avenue for a wholesale exploration of an opposing party's files. This concern was codified into MRE 612, as it directs, “[i]f it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing *in camera*, excise any privileged information or portions not so related, and order delivery of the remainder.” MCM, *supra* note 2, MIL. R. EVID. 612.

³³ MCM, *supra* note 2, MIL. R. EVID. 612.

³⁴ *Nutramax Labs. Inc. v. Twin Labs. Inc.* 183 F.R.D. 458, 461 (D. Md. 1998).

³⁵ *Id.*

C. The Factual Predicates—The First Two Elements

The first element, that a witness used a writing to refresh his or her memory, is essentially a matter of relevance.³⁶ It ensures that only documents actually reviewed by the witness are potentially subject to disclosure. On the surface, that standard seems easy to establish: either the witness reviewed the document or they did not. However, courts have required a much greater showing than simply reviewing a document. To establish this prong, there must be evidence that the witness *relied upon* the document such that their memory was somehow influenced.³⁷ Thus, counsel must determine what documents a witness reviewed and the effect that reviewing the documents had on their memory to establish this prong.

The second element of the rule requires that the document shown to the witness was for the purpose of testifying. The advisory committee noted that language was used

to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to ensure 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.³⁸

The stage at which the document is shown to the witness is important. The closer to trial the witness's memory is refreshed, the easier it is to establish that the writing was shown to the witness for the purpose of testifying. However, courts have held that pretrial testimony taken under oath also satisfies the “for the purpose of testifying” language within the rule.³⁹ For the military practitioner, this means that documents shown to a witness for the purpose of refreshing memory prior to an Article 32 hearing should qualify as well. Fleshing these facts out with the witness in a pretrial interview, or under oath at an Article 32 hearing, is critically important to ensuring that the factual predicates can be established later at trial.

³⁶ *Alfreda Robinson, Duet or Duel: Federal Rule Of Evidence 612 and the Work Product Doctrine Codified in Civil Procedure Rule 26(B)(3)*, 69 U. CIN. L. REV. 197 (2000).

³⁷ *United States v. Sheffield*, 55 F.3d 341, 343 (8th Cir.1995) (“[E]ven where a witness reviewed a writing before or while testifying, if the witness did not rely on the writing to refresh memory, Rule 612 confers no rights on the adverse party.”) (citing 28 Charles Wright & Victor Gold, *Federal Practice and Procedure* § 6185, at 465 (1993)); *Leucadia, Inc. v. Reliance Ins. Co.*, 101 F.R.D. 674, 679 (S.D.N.Y.1983) (noting that nothing in the deponent's testimony revealed he relied upon the documents reviewed).

³⁸ FED. R. EVID. 612 advisory committee's notes.

³⁹ *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985) (noting that, for depositions, cross-examination of witnesses is conducted to the same extent as permitted at trial under the provisions of the Federal Rules of Evidence).

D. The Balancing Test—The Third Element

The third element mandates that the court determine whether the adverse party is entitled to the writing in the interests of justice. This element requires balancing the need for disclosure—to promote effective cross-examination—against the policies underlying the work product doctrine.⁴⁰ As one court stated,

[i]n the setting of modern views favoring broad access to materials useful for effective cross-examination, embodied in rules like 612, . . . it is disquieting to posit that a party's lawyer may "aid" a witness with an item of work product and then prevent totally the access that might reveal and counteract the effects of such assistance.⁴¹

The role of FRE 612 in aiding the truth seeking process by revealing evidence that may impeach a coached witness was specifically set out in the legislative history.⁴² Thus, if the facts show that a document was relied upon by the witness, for the purpose of testifying, FRE 612 allows the opposition to test the credibility and true memory of the witness, but only if the interests of justice require disclosure.

E. When the Interests of Justice Require Disclosure

The purpose of FRE 612 is to overcome the usual protections afforded work product by shifting the policy in favor of promoting effective cross-examination.⁴³ Therefore, determining when the interests of justice require disclosure addresses the balance between these two goals. If there are credible concerns that a witness's testimony has been influenced by a piece of work product, then the item should be produced. However, not all federal courts have given an equal amount of credence to determining when the interests of justice are implicated. As the following will show, two approaches have developed in the federal circuits: one where disclosure is nearly automatic, and one that balances the competing concerns of the work product doctrine and the need to effectively cross-examine the witness. The *Military Rules of Evidence Manual* suggests a third approach for dealing with MRE 612 issues, but this test

⁴⁰ *Nutramax Labs. Inc.*, 183 F.R.D. at 468; *Hickman v. Taylor*, 329 U.S. 495 (1947); *United States v. Vanderwier*, 25 M.J. 263 (1987) (explaining that the purpose of the work product doctrine is to prevent unwarranted inquiries into the files and mental impressions of counsel).

⁴¹ *Berkey Photo Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977).

⁴² FED. R. EVID. 612 advisory committee's notes (stating that the expressed purpose of the rule is to promote the search of credibility and memory).

⁴³ *In re Comair Disaster Litigation*, 100 F.R.D. 350, 353 (E.D.Ky. 1983).

fails to adequately balance the concerns of the work product doctrine against MRE 612's role in promoting cross-examination to detect coaching.

1. Cases Finding Nearly Automatic Disclosure

Determining when the line is crossed between proper preparation and misuse of work product has been a source of division in the federal circuits. One method for addressing these issues can be found in *Berkey Photo Inc. v. Eastman Kodak*, where the court cautioned that any material shown to a witness will be produced to the opposing side.⁴⁴ In that case, counsel for the defendant (Eastman Kodak) used several notebooks to prepare a witness to testify at a deposition.⁴⁵ The plaintiff sought production of the notebooks under FRE 612, and the defendant objected on work product grounds. While the court did not order disclosure, it did issue a stern warning to prevent future litigants from using the work product doctrine to gain an unfair advantage.⁴⁶ In particular, the court advised,

[f]rom now on, as the problem and the pertinent legal materials become more familiar, there should be a sharp discounting of the concerns on which defendant is prevailing today. To put the point succinctly, there will be hereafter powerful reason to hold that materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties.⁴⁷

This rule favoring near automatic disclosure has also been the holding in other courts.⁴⁸

⁴⁴ *Berkey Photo Inc.*, 74 F.R.D. at 617; *Robinson*, *supra* note 36 (discussing *Berkey Photo Inc.* as the seminal case for automatic disclosure of all documents shown to a witness).

⁴⁵ *Berkey Photo Inc.*, 74 F.R.D. at 614.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 145 (D. Del. 1978) ("Plaintiff's counsel made a decision to educate their witnesses by supplying them with the binders, and the Raytheon defendants are entitled to know the content of that education."); *Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs. Inc.*, 81 F.R.D. 8, 10 (D.C. Ill. 1978) ("If the paramount purpose of federal discovery rules is the ascertainment of the truth, the fact that a document was used to refresh one's recollection prior to his testimony instead of during his testimony is of little significance."); *see also Robinson*, *supra*, note 36.

2. *Cases Balancing Work Product Protections With the Need to Test Credibility*

Cases such as *Berkey Photo Inc.* apply the factual predicates—the first two elements—but contain very little review of when the interests of justice require disclosure—the third element.⁴⁹ The analysis tends to be nothing more than a rule that disclosure to a witness requires disclosure to the opposition.⁵⁰ By contrast, an approach that seeks to balance protecting work product and the need to test a witness’s memory can be found in *Nutramax Laboratories Inc. v. Twin Laboratories Inc.*⁵¹

In that case, the plaintiff sued the defendant for infringement of their patent. During the pretrial phase, the defendant sought the disclosure of materials used by the plaintiff’s counsel to prepare witnesses for their depositions.⁵² Noting the conflict between the work product protections and FRE 612, the court stated,

[N]o competent counsel can afford to ignore reviewing with witnesses the documents which relate to critical issues. During a deposition, counsel questioning a witness will seldom fail to ask the witness about what he or she did to prepare for the deposition, and the identity of any documents reviewed for this purpose [W]here, as here, many thousands of pages of documents have been produced and counsel have analyzed them and selected a population of “critical documents” relevant to case dispositive issues, a deposition question aimed at discovering what documents were reviewed to prepare for a deposition may draw an assertion of the work product doctrine. In response, the deposing attorney may contend that if the witness used the documents to prepare for the deposition, then work product immunity has been waived, and Fed.R.Evid. 612 requires the production.⁵³

The court went on to give a detailed review of the work product doctrine. Specifically, the court looked at the cases⁵⁴ that discussed waiver and concluded that a balance

must be struck, especially when testimonial use is made of work product.⁵⁵

Once the two factual predicates are met, the court established a list of nine factors to consider when weighing the balance between work product protections and the interests of justice.⁵⁶ These factors are:

- (1) the status of the witness (either expert or lay);
- (2) the nature of the issue in dispute (whether the witness is testifying about the crux of the case or some lesser issue);
- (3) when the events took place: . . . the ability of a witness to perceive, remember, and relate events is fair game for cross-examination, and a deposing attorney has a legitimate need to know whether the witness is testifying from present memory, unaided by any review of extrinsic information, present memory “refreshed” by reference to other materials, or really has no present memory at all, and can only “testify” as to what is memorialized in writings prepared by the witness or others—the greater the passage of time since the events about which the witness will testify, the more likely that the witness needed to refresh his or her recollection;
- (4) when the documents were reviewed (the review of documents close to the date of the deposition may affect whether the court concludes that the purpose was to prepare for testimony);
- (5) the number of documents reviewed (a court may be less inclined to order the production of several hundred documents than if the witness reviewed a single document, or very few documents, selected by the attorney that relate to a critical issue in the case);

⁴⁹ *Berkey Photo*, 74 F.R.D. at 616–17.

⁵⁰ *Id.*

⁵¹ *Nutramax Labs. Inc. v. Twin Labs. Inc.* 183 F.R.D. 458, 468 (D. Md. 1998).

⁵² *Id.* at 458.

⁵³ *Id.* at 461.

⁵⁴ In particular, the court compared *In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir.1988) and *In re Allen*, 106 F.3d 582, 607 (4th Cir.1997)

with *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y.1977).

⁵⁵ *Nutramax Labs. Inc.*, 183 F.R.D. at 467. The court also noted that waiver occurs in only the most intentional abuses of the work product doctrine. Military Rule of Evidence 612 covers a much broader scope, and favors the production of documents to test the true nature of a witness’s memory when the elements of the rule are met. While intentional abuse of the work product protections is a significant factor, less egregious conduct may satisfy the factors listed in the *Nutramax Labs. Inc.* balancing test.

⁵⁶ *Id.* at 469–70.

(6) whether the witness prepared the documents (greater need than documents prepared by others);

(7) whether the documents contain pure work product (such as discussion of case strategy);

(8) whether the documents reviewed have been previously disclosed; and

(9) whether there are credible concerns regarding manipulation of a witness's testimony (if the court believes that there was inappropriate conduct affecting testimony in the case, and the documents demanded relate to these concerns, then the rationale for disclosure increases significantly).⁵⁷

The court noted that the list was illustrative, and the weight to be assigned to each factor may vary on a case-by-case basis.⁵⁸ However, given the legislative history and the express purpose of FRE 612—to prevent the misuse of the work product doctrine—the final factor is seemingly the most important: if there are credible concerns regarding the manipulation of a witness's testimony, then disclosure will invariably be required.

The remaining eight factors listed in *Nutramax Labs. Inc.* are a thorough recitation of the additional issues that should be considered when deciding whether the work product doctrine should yield to the concerns of MRE 612. For example, the factors focusing on when the events occurred and when the challenged materials were shown to the witness demonstrate the importance of time in the analysis. The further away from the event and closer to trial, the greater the chances are that review of the document can fairly be said to have had an effect on the witness.

The *Nutramax Labs. Inc.* approach to determining when the interests of justice require disclosure completely addresses the concerns of FRE 612. The nine factors balance the work product concerns with the need to test the credibility and true memory of the witness.

3. The Military Rules of Evidence Manual Suggested Approach

Another approach to define the limits of MRE 612 can be found in the *Military Rules of Evidence Manual*.⁵⁹ The

authors suggest that the military judge consider the following factors in determining whether justice requires disclosure:

(1) the degree to which the witness actually relied upon the document;

(2) how similar the witness's testimony is to the document's content;

(3) what other documents, conversations, or independent events may have contributed to refreshing the witness's memory;

(4) how important to the litigation is the refreshing document; and

(5) whether it contains privileged or work product information.⁶⁰

The common theme between the *Nutramax Labs. Inc.* factors and those laid out in the *Military Rules of Evidence Manual* is that it matters which witness was shown the material. As the importance of the witness to the outcome of trial increases, and as it appears more likely that the documents were used to manufacture favorable testimony, the likelihood of disclosure increases.

However, the *Military Rules of Evidence Manual's* approach is flawed. The test suggested in the *Manual* combines the factual predicates identified in *Nutramax Labs. Inc.* with the issue of when the interests of justice require disclosure.⁶¹ The clearer approach is to view the factual predicates separately, so that the party seeking disclosure is first required to demonstrate that the documents were relied upon by the witness for the purpose of testifying. Doing so will ensure that the intent of the rule is met—shielding work product that has not had any effect on a witness's testimony and disclosing documents that have.⁶²

⁶⁰ *Id.* Though the end of the comment to the rule states that while attorney client privilege information is not likely to be produced under Rule 612(2), “[t]here is less reason to be protective of work product [I]f a witness uses work product to prepare testimony, the trend in federal cases . . . is to hold that the work product should be subject to disclosure under the Rule.” *Id.* at 6-146.

⁶¹ In particular, the *Military Rules of Evidence Manual* simply applies the five-part test and weighs all parts of the test equally. There is no requirement to first establish that the witness relied on the document, for the purpose of testifying, before weighing the factors to determine if the interests of justice require disclosure. *See id.*

⁶² FED. R. EVID. 612 advisory committee's notes (“The purpose of the phrase ‘for the purpose of testifying’ is to safeguard against using the rule as a pretext for 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.”).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 2 STEPHEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* 6-141 (6th ed., 2006).

In addition, the approach proposed in the *Military Rules of Evidence Manual* fails to address the third element of MRE 612. This final element requires disclosure “if the military judge determines it is necessary in the interests of justice.” The language mandates judicial review of the manner in which the witness was prepared to testify. The *Military Rules of Evidence Manual* fails to address critical components of the final element. Factors such as the timing of when the documents were shown to the witness or the appearance of intentional abuse of the work product doctrine are key to determining whether the interests of justice are implicated.⁶³ If an unfair advantage was gained, justice requires disclosure, no matter the ordinary protections afforded the material used.⁶⁴ The *Military Rules of Evidence Manual* test is incomplete because it does not strike the necessary balance between the protections of the work product doctrine and the need for effective cross-examination found in the third element of the rule.

Based on the above, the most accurate and most complete analysis of an FRE 612 issue appears in *Nutramax Labs. Inc.* Therefore, when confronted with a potential MRE 612 issue, military practitioners would be well advised to follow the *Nutramax Labs. Inc.* test to frame the issue for the court.

IV. Litigating a Witness Coaching Issue

If counsel suspects that a witness has been improperly coached, care should be taken to ensure that the factual predicates can be established using the *Nutramax Labs. Inc.* test.⁶⁵ Recall that the first factual predicate is that the document was used to *refresh the witness's memory*.⁶⁶ Asking the witness simple questions such as, “Why did the counsel show you the document?” or, “After reviewing the document, did you remember anything differently?” will help demonstrate that fact.

Next, counsel will want to ensure that the facts support a finding that the witness's recollection was refreshed *for the purpose of testifying*.⁶⁷ Frequently, an opposing counsel will take the witness into the court room and prepare them with a “live fire” rehearsal. Establishing what took place during these sessions, to include what types of questions were asked and the timing of the session, will help establish the purpose.⁶⁸ Crystallizing the facts that establish the

documents were provided (1) to refresh memory and (2) for the purpose of testifying is critical. Without those predicates, the balancing test is never reached to determine if the interests of justice require disclosure.

Once the factual predicates are met, counsel should review the nine factors listed in *Nutramax Labs. Inc.*⁶⁹ The case for disclosure should be made by paying close attention to the timing of when items were shown to the witness, and any facts that demonstrate that the work product doctrine was used to gain a tactical advantage. Those factors will make the most compelling argument for production of the evidence.

Once counsel believes the facts support disclosure, care should be taken to ensure the opposing side is made aware of which document or documents are in issue. Counsel should also demand that the documents be preserved in the state in which they were shown to the witness.⁷⁰ The reason for the notice and demand to preserve is that, if those documents are subsequently destroyed or materially altered, the argument for an adverse inference instruction is significantly increased.⁷¹

An adverse inference instruction is a potential remedy for destruction of evidence issues in military courts.⁷² However, the limits of when destruction of evidence will trigger that remedy are underdeveloped in military law. Civilian courts have significantly addressed these issues, and most look favorably on claims for remedy when the opposition has given notice of what is in issue and a demand to preserve.⁷³ This is because subsequent destruction by the opposition represents an element of bad faith.⁷⁴ By borrowing from the civilian jurisprudence, using the same notice and demand procedure, counsel can strengthen the argument that the destruction of evidence instruction is appropriate, instructing the members that they may presume the evidence was

⁶³ SALTZBURG ET AL., *supra* note 59.

⁶⁴ *In re Doe*, 662 F.2d, 1073, 1079 (4th Cir. 1981).

⁶⁵ *See supra* Part III.C.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ A document shown to a witness several months before trial is less likely to be “for the purpose of testifying” than several days before trial.

⁶⁹ *Nutramax Labs. Inc. v. Twin Labs. Inc.*, 183 F.R.D. 458, 469–70 (D. Md. 1998).

⁷⁰ A memorandum is suggested to document which pieces of evidence are believed to be the subject of a MRE 612 disclosure, and a demand should be made to preserve those documents. A sample memorandum can be found in the Appendix.

⁷¹ For a sample adverse inference instruction, see 3 FED. JURY PRAC. & INSTR. § 104:27 (6th ed.). “If you should find that a party willfully [suppressed] [hid] [destroyed] evidence in order to prevent its being presented in this trial, you may consider such [suppression] [hiding] [destruction] in determining what inferences to draw from the evidence or facts in the case.” *Id.*

⁷² *United States v. Ellis*, 57 M.J. 375, 380 (2002) (“An adverse inference instruction is an appropriate curative measure for improper destruction of evidence.”).

⁷³ James T. Killelea, *Spoliation of Evidence: Proposals for New York State*, 70 BROOK. L. REV. 1045 (2005). Destruction or hiding of evidence is also known as “spoliation” of evidence in many civil contexts. *Id.*

⁷⁴ *Id.*

destroyed because it was adverse to the destroying party's case.⁷⁵

Taking the above steps, counsel can be confident they have gathered the necessary facts to litigate a MRE 612 issue. Doing so will also ensure that a remedy will be available should the challenged material no longer exist. Documents are sometimes lost or destroyed, at least in the manner in which they were shown to a witness, when the opposing counsel uses working copies of statements to refresh memory. These working copies typically contain counsel's notes, highlights, and underlines to emphasize certain facts. Those types of documents frequently change as counsel continue to prepare for trial. Thus, exercising diligence in demanding their preservation is imperative.

V. How Rule 612 Affects the Documents Your Counsel Showed the Victim

Returning to the actions taken by your zealous young counsel, recall that he provided the victim a clean copy of her statement; showed the victim the statement of an eyewitness that had highlights, stars, underlines, and notes the counsel had made in the margin; and showed the victim a group of three to five pictures he selected from the thirty pictures the criminal investigators took. Regardless of whether this material would fall under the disclosure requirements of *Brady v. Maryland*,⁷⁶ or whether the defense would need to file a motion, it would be beneficial to recognize when improper witness preparation may have occurred and preserve the documents. Doing so will make a subsequent order by the court to disclose the pertinent documents easier to comply with. In addition, preserving the document makes the most tactical sense given the potential for an adverse inference instruction to remedy the destruction of evidence.⁷⁷

Applying the *Nutramax Labs. Inc.* test, the witness's own statement is likely not subject to disclosure under MRE 612; the statement of the eyewitness with the counsel's work product is likely to be subject to disclosure; and the selected photos fall into a gray area which may or may not be subject to disclosure.

⁷⁵ *Id.* If the document needed to test the witness's credibility and memory no longer exists, this instruction is really the only recourse to impeach the coached witness.

⁷⁶ 373 U.S. 83 (1963) (holding that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment); *see also* Giglio v. United States, 405 U.S. 150 (1972) (finding "nondisclosure of evidence affecting credibility falls within rule that suppression of material evidence justifies a new trial irrespective of good faith or bad faith of the prosecution"). *Id.*

⁷⁷ *See supra* Part IV.

A. The Victim's Own Statement Will Not Be Subject to Disclosure Under MRE 612

Of the three types of documents shown to the victim, the most benign is the clean copy—free from notes highlights and underlines—of the victim's own statement. This is because it includes no facts other than those the witness has already attested to. As discussed earlier, what constitutes proper preparation as opposed to coaching is largely a matter of opinion because the parameters of what is allowed have not been the subject of much judicial or legislative review.⁷⁸ However, providing a witness a clean copy of their own statement is a common practice⁷⁹ and is the type of necessary preparation that the court in *Nutramax Labs. Inc.* was referring to when they noted that "no competent counsel can afford to ignore reviewing with witnesses the documents which relate to critical issues."⁸⁰ The witness likely made the statement soon after the events in question, while they were fresh in the witness's mind; the statement contains facts known to the witness, such that there is no concern over tainting the witness with external facts; and the witness is going to be asked questions from both parties regarding the contents of the statement. Therefore, this type of witness preparation does not implicate the improper use of the work product doctrine that MRE 612 was enacted to combat.⁸¹ The opposing counsel will have already been provided a copy of the statement under Rule for Courts-Martial 701(a)(1)(C),⁸² so its content will be available for use on

⁷⁸ *See* RESTATEMENT, *supra* note 5, § 116.

⁷⁹ *See* Patricia J. Kerrigan, *Witness Preparation*, 30 TEX. TECH L. REV. 1367, 1379 (1999) (noting that every witness should be given a copy of any statement they have made); *In re Convergent Tech. Second Half 1984 Securities Lit.*, 122 F.R.D. 555, 566 (citing Fed. R. Civ. Pro. 26(b)(3), which requires counsel to furnish witnesses a copy of their statement prior to trial to prevent unfairness or embarrassment). *But see* Bennett L. Gersham, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 858 (2002) (stating that a witness should not be given their statement unless absolutely necessary).

⁸⁰ *Nutramax Labs. Inc. v. Twin Labs. Inc.*, 183 F.R.D. 458 (D. Md. 1998). Specifically, the court noted:

However, where, as here, . . . counsel have analyzed [and] selected a population of "critical documents" relevant to case dispositive issues, a deposition question aimed at discovering what documents were reviewed to prepare for a deposition may draw an assertion of the work product doctrine, . . . it has been recognized that there is a clear conflict between Fed.R.Civ.P. 26(b)(3), which codifies the work product doctrine, and Fed.R.Evid. 612, which has been held to apply during depositions by virtue of Fed.R.Civ.P. 30(c).

Id. at 461.

⁸¹ *See In re Eldridge*, 82 N.Y. 161, 171–72 (Ct. App. N.Y. 1880) (noting that there is little danger of crossing the line between extracting facts from a witness and pouring facts into a witness by providing them a "clean" copy of their own statement).

⁸² This rule specifically requires disclosure of "[a]ny sworn or signed statement relating to an offense charged in the case which is in the

cross-examination.

Looking at the factual predicates, the purpose of the meeting and the timing—the week before trial—are clearly for the purpose of testifying. Since the events occurred nearly a year ago, it would not be difficult to argue that the document refreshed the witness’s recollection. The question would then become, “do the interests of justice require disclosure?” It is on this third prong that the analysis fails. Though some factors weigh in favor of disclosure,⁸³ the fact that the document has likely been previously disclosed under the discovery rules and that there is no apparent abuse of the work product doctrine, a judge would not likely order a second disclosure.

B. The Eyewitness Statement, With Counsel’s Notes, Will Be Subject to Disclosure Under MRE 612

The next document is the statement of the eyewitness, with counsel’s notes and highlights, shown to the victim. This document squarely falls within the ambit of MRE 612 and a judge will likely order disclosure. Providing a witness with the statements of other witnesses or the notes of counsel is not a commonly accepted practice⁸⁴ and exceeds the bounds of fair preparation identified in *Nutramax Labs. Inc.*⁸⁵ In fact, that conduct falls into the type of activity that the court in *Berkey Photo* was concerned about.⁸⁶ In this case, the document had never been turned over to the opposition, at least not in the state in which it was shown to the victim. In addition, the document contained another witness’s views on what occurred, along with the views of counsel. There is a serious concern that the victim’s testimony may have been tainted by facts that are outside of the victim’s own personal knowledge. Providing the victim this type of document crosses the line between extracting facts from a witness and pouring facts in.⁸⁷ If the rationale behind FRE 612, and by extension MRE 612, is “to aid the search of credibility and memory,” then disclosure of this document certainly advances that objective.⁸⁸

possession of the trial counsel.” MCM, *supra* note 2, R.C.M. 701(a)(1)(C); *see also id.* R.C.M. 701(b)(1)(A) (defense witnesses).

⁸³ *See supra* Part III.D.1.b n.52 (factors such as the timing to the trial, importance of the witness, and who prepared the document would all be implicated).

⁸⁴ *See* Kerrigan, *supra* note 79 (discussing the parameters of commonly accepted witness preparation methods).

⁸⁵ *Nutramax Labs. Inc. v. Twin Labs. Inc.* 183 F.R.D. 458 (D. Md. 1998).

⁸⁶ *Berkey Photo Inc v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977) (“[I]t is disquieting to posit that a party’s lawyer may ‘aid’ a witness with an item of work product and then prevent totally the access that might reveal and counteract the effects of such assistance.”).

⁸⁷ *In re Eldridge*, 82 N.Y. 161, 171-72 (Ct. App. N.Y., 1880).

⁸⁸ FED. R. EVID. 612 advisory committee’s notes.

Applying the *Nutramax Labs. Inc.* analysis, the eyewitness statement meets the factual predicates of the test. The victim was having trouble remembering key facts, according to your young counsel, so he took the step of showing her the eyewitness’s statement. This satisfies the requirement that the document was shown to the witness to refresh recollection.⁸⁹ In addition, given the timing of the meeting and its stated purpose, there is little doubt that this action was done for the purpose of testifying.⁹⁰

Finally, the interests of justice require disclosure⁹¹ under these facts. Victims are typically the most important witness to a case. The events happened almost one year ago, and the document is being shown to the victim seven days before trial. These facts weigh heavily in favor of disclosure.

In addition, the misuse of the work product doctrine in this instance is likely to sway the judge. The statement of the witness, with the notes, underlines, and highlights, reveals those work product details that the counsel believes are most important. Showing this document to the victim raises credible concern regarding the manipulation of the victim’s testimony because it contains some other witness’s account and the thoughts of counsel. This concern over work product abuse is especially true since the document in question—with the notes, underlines, and highlights—has never been provided to the opposition. The search of credibility and memory would be ill served by allowing the work product doctrine to protect this document. The best course of action is to preserve the document in the state in which it was shown to the witness.⁹²

C. The Selection of Certain Pictures Shown to the Victim Might Be Subject to Disclosure Under MRE 612

While the two previous scenarios are somewhat clear examples in the otherwise murky arena of witness preparation, the selection of particular photographs is less definitive. Just like the victim’s own statement, the photographs have probably already been turned over in discovery. There are work product concerns with allowing the opposition to see which particular photographs counsel has selected to review with the victim. Arguably, revealing those specific pictures would tell the opposition something about what the counsel felt was important. That emphasis would reveal something of the strategy or internal thought process of the opposition. This is a similar argument to the one found in the civil cases from the federal circuits dealing with the specific, critical pages selected from the

⁸⁹ *See supra* Part III.C.

⁹⁰ *See id.*

⁹¹ *See supra* Part III.D.

⁹² *See supra* Part IV.

voluminous documents provided in discovery to prepare a witness for testifying.⁹³ Here, there is a clear conflict between the need to test the victim's credibility and memory—does she remember what happened or was her testimony influenced by the pictures—and the work product doctrine's purpose of allowing counsel to prepare in secrecy.

Utilizing the *Nutramax Labs. Inc.* test, the likely result is unclear. Like the above documents, the factual predicates can probably be established based on the timing and purpose of this meeting with the victim.⁹⁴ The issue arises in determining whether the interests of justice require disclosure. While the victim is an important witness and the timing suggests disclosure is proper, there is far less concern of improper influence of the victim's testimony from merely reviewing a selection of photographs. Unlike the statement of some other witness baring the thoughts and emphasis of counsel, the photographs are neutral views of the scene. Going over the scene of the crime with the victim is a procedure that falls squarely within what the vast majority of practitioners would consider legitimate preparation for testimony.⁹⁵ Though the risk of improperly manufacturing testimony is low, there are some legitimate work product concerns in disclosing these documents.⁹⁶ Balancing those concerns with MRE 612's purpose of testing the witness's credibility and memory, the likely result is that disclosure will not be ordered. This is especially true considering that all of the pictures have invariably been produced in discovery. This would not preclude the opposition from asking the victim to identify what pictures she reviewed, but it would not result in an order to produce the specific pictures.

VI. What Is the Lesson?

Most young counsel do not understand what is allowed when conducting the critical task of preparing a witness to testify at trial. That fact should not be surprising as the parameters of witness preparation are poorly defined, and even seasoned professionals disagree on what is and is not permitted. Therefore, mistakes are likely to be made as young counsel gain experience in this arena.

When confronted with a possibility that a witness was coached, military justice managers on both sides of the issue should understand how MRE 612 operates to ensure that work product is not unnecessarily disclosed or that useful material is obtained for cross-examination. In addition, understanding the rule is imperative so that managers can properly teach counsel the parameters of proper witness preparation. Recognizing the confluence between the work product doctrine and MRE 612 will ensure that counsel will not inadvertently learn that improper preparation is not worth the cure.

⁹³ *Nutramax Labs. Inc. v. Twin Labs. Inc.* 183 F.R.D. 458, 464–65 (D. Md. 1998).

⁹⁴ See *supra* Part III.C.

⁹⁵ See Kerrigan, *supra* note 79.

⁹⁶ The revelation of which photos counsel feel are most important arguably reveals something about the counsel's mental impressions, though this example highlights that the line can be fuzzy.

Appendix

Sample Notice and Demand to Preserve



DEPARTMENT OF THE ARMY
ORGANIZATION
STREET ADDRESS
CITY STATE ZIP

OFFICE SYMBOL

Date

MEMORANDUM FOR Defense Counsel

SUBJECT: Notice and Demand to Preserve Documents Used to Prepare a Witness to Testify

1. On (date), a pretrial interview occurred between members of the defense and (the witness). The purpose of the interview was to prepare the witness for (trial/Article 32 testimony). During this interview, the following document(s) were shown to the witness: (list documents).
2. The document(s) shown to the witness have had an impact on what the witness remembers. Based on my interview of the witness, justice requires disclosure of the document(s) to the government so that the witness may be examined regarding this impact. It is requested that the document(s) be turned over to the government in the same state in which they were shown to the witness, complete with any underlines, highlights, notes or any other work product that was on the document(s) when the witness reviewed it.
3. Please respond in writing. If you object to production of the document(s), you are hereby on notice of this demand that you preserve the document(s) in the same manner in which they were shown to the witness. Any objection will be litigated and the government demands the document(s) be preserved so that it can be reviewed in camera by the military judge.

JOHN R. SMITH
CPT, JA
Trial Counsel