Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by the Rules of Criminal Procedure, 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 if otherwise admissible to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires.

(Amended effective January 1, 1990.)

Committee Comment - 1977

The rule continues existing practice, requiring disclosure of any statements that are used by a witness for the purpose of refreshing his recollection on the witness stand. Once the witness' recollection is refreshed the witness can testify from present recollection. Documents used for refreshing recollection need not satisfy any requirements of trustworthiness, authenticity, etc. This should be contrasted with the process involved when a witness has no present recollection and attempts to introduce a document into evidence pursuant to Rule 803(5). The rule substantially expands the common law approach by requiring production, within the discretion of the Court, of writings that were reviewed by a witness in preparation for testifying. Most of the writings that would be used for these purposes would be discoverable prior to trial pursuant to Minn. R. Civ. P. 26-37 and Minn. R. Crim. P. 9. The rule is expressly made subject to the Rules of Criminal Procedure. Specifically the operative provisions of the criminal rules would be Rules 9.01 subd. 3 and 9.02 subd. 3 which preclude inquiry into legal theories, opinions, and conclusions as well as certain reports and internal documents. Additionally, Rule 9.01 provides for the timing of the disclosure in certain cases.

Although it was the committee's view that in most cases the materials reviewed by a witness prior to testifying should be turned over upon request, it was thought that the trial court should have some discretion in the matter. Cf. State v. Grunau, 273 Minn. 315, 141 N.W.2d 815 (1966). Some flexibility might be necessary in the large case if the witness reviewed an extraordinary amount of documentary material and in the very small case where the attorney might not have access to all of the materials reviewed by a witness prior to trial.

If the statements are turned over, the opposing party may use the statements for cross-examination purposes. If admissible for impeachment purposes or otherwise the statements can be introduced into evidence. The rule should not be read to disregard applicable privileges that are validly asserted to protect the confidentiality of a communication. See Rule 501. The rule does not speak to the issue that will be raised in civil cases if the document that is used to refresh a witness' recollection falls under the work product doctrine. See Minn. R. Civ. P. 26.02 subd 3. The issue is left for development in the traditional common law fashion. See 3 J. Weinstein and M. Berger, Weinstein's Evidence paragraph 612(04) (1975).