States Adopting Federal Rules of Evidence Sometimes Add Their Own Variations

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In his April 30, 2014 “Privilege Points” release, Tom Spahn discusses Rule 612, refreshing recollection, and privileged documents:

Under Federal Rule of Evidence 612, courts can order the production of privilege or work product protected documents that witnesses review before they testify if (1) the review refreshed the witnesses’ recollection, and (2) “justice requires” the production. Fed. R. Evid. 612(a). This contrasts with documents the witnesses review while testifying, which witnesses must always produce. Some states have adopted Rule 612, some have not – and some have adopted variations.

In Accusoft Corp. v. Quest Diagnostics, Inc., the federal court found that Rule 612 did not require production of a protected email an in-house lawyer reviewed before testifying, noting that the witness "never testified specifically that [the email] refreshed his recollection." Civ. A. No. 12-cv-400070-TSH, 2014 U.S. Dist. LEXIS 18976, at *12 (D. Mass. Feb. 14, 2014). About two weeks later, the Nevada Supreme Court applied that state's version of Rule 612 – focusing on testimony by a witness at a sanctions hearing, who admitted that his pre-testimony review of documents had refreshed his recollection. The Nevada court noted an enormous difference between Federal Rule 612 and its Nevada counterpart – explaining that the Nevada rule "mandates that documents relied on before and during testimony to refresh recollection be treated the same [and thus automatically produced].” Las Vegas Sands Corp. v. Eighth Judicial Dist. Court, 319 P.3d 618, 623 (Nev. 2014) (emphasis added). However, the Nevada rule is also narrower than the federal rule, because it requires the adversary to invoke the rule during the hearing at which the witness testifies. The Nevada Supreme Court therefore concluded that the trial court improperly ordered production of the protected documents two months after the hearing. Id. at 624.

Many states have adopted federal evidence rules, but some have "tweaked" their rules in significant ways. As always, lawyers must check the applicable rule.