



Memorandum in Support

NYSBA #17

May 23, 2023

S.7043

By: Senator Hoylman-Sigal
Senate Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the Civil Practice Law and Rules, in relation to the use of writings and object to refresh recollection.

LAW AND SECTIONS REFERRED TO: Adds new §4550 to Civil Practice Law and Rules

THE NEW YORK STATE BAR ASSOCIATION SUPPORTS THIS LEGISLATION

The New York State Bar Association Supports S7043. This legislation amends the Civil Practice Law and Rules (CPLR) to add a new section 4550, which addresses one aspect of New York's common law refreshing recollection doctrine in relation to the use of writings and objects used to refresh a witness's or deponent's recollection. Specifically, the bill addresses the issue as to when, if ever, a trial witness' or deponent's use of a writing, object, or other material to refresh the witness' recollection while testifying or before testifying requires the production of the refreshing writing, object, or other material to an adverse party. The absence of Court of Appeals precedent and the conflicting decisions among the Appellate Division departments governing this issue warrant legislation guidance on the issue and the proposed §4550 provides that guidance.

The proposed statute supplements New York's common law refreshing recollection doctrine, see Guide to New York Evidence, § 6.09, and comprises three parts. Subdivision (a) governs a witness' use of a writing, an object, or other material to refresh the witness' recollection while testifying at a trial, hearing, or deposition. Subdivision (b) governs a witness' use of a writing, an object, or other material to refresh the witness' recollection before testifying at a trial, hearing, or deposition. Subdivision (c) sets forth the terms of the production and use of the writing, object, or other material required to be produced.

Subdivision (a). Subdivision (a)'s first sentence mandates the production to an adverse party of any writing, object, or other material shown to a witness while testifying at a trial, hearing, or deposition to refresh the witness' recollection.

This subdivision restates current New York law. See Michael J. Hutter, Review of Privileged Documents in Trial and Deposition Preparation of Witnesses in New York: When, if Ever, Will the Privilege Be Lost?, 32 Pace L. Rev. 437, 472-74 (2018). New York law is similar to the rule followed in federal courts under Federal Rules of Evidence § 612(a)(1) and (b) and in all states. See Hutter, supra.

The subdivision's second sentence provides that the use of privileged or protected material to refresh a witness' recollection while the witness is testifying waives all claims of privilege or protection. This provision reflects common sense that it is obviously unfair for a witness to make testimonial use of privileged or protected material and not give to the adverse party a chance to examine the material. The one reported New York decision addressing the issue holds that the privilege is waived. McDonough v.

Pinsley, 239 A.D.2d 109, 109 (1st Dep't 1991). The state and federal courts follow this rule. See Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence (4th ed.) § 6:97 (collecting decisions).

Subdivision (a) is triggered when a court, relying on New York's refreshing recollection doctrine, allows an examining party to seek to refresh a witness' recollection when the witness shows difficulty recalling facts once known. Like Federal Rules of Evidence § 612 and the state counterparts, the proposed statute does not codify that common law doctrine.

Subdivision (b). Subdivision (b) governs where a witness before testifying at a trial, hearing, or deposition has used a writing, an object, or other material to refresh the witness' recollection. This subdivision becomes operative only when the refreshing material has had an impact on the witness' testimony. The mere fact that witnesses reviewed a file to refamiliarize themselves with the case does not show that the documents actually refreshed memory or influenced testimony. This requirement safeguards against using a right of inspection as a pretext for an unwarranted discovery fishing expedition.

Unlike when witnesses refresh their recollection while testifying, governed by subdivision (a), subdivision (b) permits, but does not mandate, a court in the interests of justice to order the writing, object, or other material produced. The factors enumerated are not exclusive, but are exemplary, and are drawn from numerous federal decisions that have employed the "interest of justice" standard. See Victor J. Gold, Federal Practice and Procedure - Evidence (2d ed.) § 6188 (collecting and discussing decisions). In the absence of Court of Appeals precedent on this issue, the Appellate Division departments' decisions give no clear resolution whether production of material used to refresh recollection before testifying is discretionary or mandatory. Grieco v. Cunningham, 128 A.D.2d 502, 502 (2d Dep't 1987); Rouse v. County of Greene, 115 A.D.2d 162,162-63 (3d Dep't 1981); Doxator v. Swarthout, 38 A.D.2d 782, 782 (4th Dep't 1972). Subdivision (b)'s approach is consistent with Federal Rules of Evidence § 612(a)(2), which authorizes disclosure in the interests of justice, an approach that many but not all state courts have taken.

The second sentence of the subdivision provides that the privileged or protected nature of the material used to refresh the witness' recollection does not preclude disclosure, but is a factor the court is to consider in determining whether to order production in the interests of justice. This approach is consistent with the overall discretion that the subdivision vests in the court and avoids the wholesale abrogation, perhaps unnecessarily, of privileges and protections. This approach is one of three approaches that the federal courts employ and the one that the majority of federal courts have adopted. See In re Rivastigmine Patent Litig., F. Supp. 2d 241, 243-44 (S.D.N.Y. 2007). The New York courts in the absence of Court of Appeals precedent have adopted conflicting approaches. See Hutter, supra at 494-99.

Subdivision (c). Subdivision (c) sets forth guidelines for a court to follow and implement when it determines production of the writing, object, or other material used to refresh a witness' recollection is warranted pursuant to subdivision (a) or (b). They are derive from Federal Rules of Evidence § 612(b) and (c), which New York law currently follows when production is ordered. See Robert A. Barker & Vincent C. Alexander, Evidence in the New York State and Federal Courts (2d ed.) § 6:81.

Based on the foregoing, the New York State Bar Association **SUPPORTS** this legislation.