Last week’s Privilege Point dealt with the debate among courts about opinion work product protection for a lawyer’s selection of certain documents to show witnesses before they testify. Courts adopting the majority view protect the lawyer’s selection, but only if the other side has equal access to the collection from which the lawyer picks the documents to review with the witness.

As explained last week, Magistrate Judge Dolinger applied the Sporck doctrine to a lawyer’s deposition preparation in Brese Lichttechnik Vertriebs GmbH v. Langton No. 09 Civ. 9790 (LTS) (MHD), 2011 U.S. Dist. LEXIS 7333 (S.D.N.Y. Jan. 24, 2011). However, Judge Dolinger then noted that “[the analysis would differ if the attorney had shown the witness privileged documents] which therefore had not been available to the other side. /Id/ at *22 n.6. In that case, Federal Rule of Evidence 612 would “presumably” allow the deposing lawyer to ask whether the privileged (and thus non-produced) documents “had refreshed the witness’s recollection, in which case the document would be producible notwithstanding its otherwise privileged status.” /Id/.

It is worth noting the irony of this majority rule. An adversary usually cannot learn the identity of non-privileged documents that a lawyer shows witnesses before they testify. But an adversary often can learn the identity of (and even obtain access to) privileged documents that a lawyer shows witnesses before they testify.