

REFRESHING MEMORY (INCLUDING APPLICABLE TRE)

PRESENT RECOLLECTION REFRESHED

Foundation for Present Recollection Refreshed

1. Ask question to elicit testimony.
2. Witness says he does not remember or does not recall.
3. Ask if something will refresh his recollection, referring to what will be used to refresh memory.
4. If answer is “Yes”, and it is a writing, have marked as an exhibit (for identification and possible admission by opposing counsel; see TRE 612).
5. If he says “No” and it is a writing prepared by witness, see TRE 803(5).
6. Show writing or object to opposing counsel.
7. Ask to approach witness.
8. Show him the object or writing.
9. Take object or writing back.
10. Ask witness if his memory is refreshed.
11. If he says “yes”, re-ask the question and get his answer based on his present recollection.
12. If he says “no” and it was a writing that the witness previously created, see TRE 803(5) Recorded Recollection.

Note: Usually used on direct. Recollection can be refreshed with anything. A writing is not required. Party refreshing present recollection does not offer writing into evidence. However, adverse party can do so. (See below). See Mauet, pp. 184-186.

TRE 612. Writing Used to Refresh a Witness’s Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

- (1) while testifying;
- (2) before testifying, in civil cases, if the court decides that justice requires the party to have those options; or
- (3) before testifying, in criminal cases.

(b) Adverse Party’s Options; Deleting Unrelated Matter. An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness’s testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness’s testimony or—if justice so requires—declare a mistrial.

PAST RECOLLECTION RECORDED

If during refreshing present recollection, (1) the answer to Nos. 3 or 10 above is “No”, meaning the witness’ recollection is not refreshed and (2) the writing was made by the witness, you can use Past Recollection Recorded in attempt to have witness testify about the forgotten fact.

Foundation for Past Recollection Recorded

1. Ask question to elicit testimony.
2. Witness says he does not remember or does not recall.
3. Ask if witness once had personal knowledge of the facts being asked about.
4. Ask witness if he made an accurate record of the facts when those facts were fresh in the witness’ mind.
5. If answer is “Yes”, have the record marked as an exhibit (for identification and possible admission by opposing counsel; see TRE 803(5)).
6. Show writing or object to opposing counsel.
7. Ask to approach witness.
8. Show him the writing.
9. Ask if Exhibit _____ is the record he prepared which accurately reflects the facts when they were fresh in his mind.
10. After he says “Yes”, say to Court, “we offer Exhibit ____ as part recollection recorded.
11. If judge “admits” the exhibit, you can have witness, read all or part of the record.

Note: When the offering party offers the record into evidence and the Court “admits” it, it differs from the typical exhibit in these ways: (1) you do not have to ask to publish it to the jury as the Court’s “admission” gives permission to have the record read to the jury; (2) the manner of publishing is only the reading of the record (it is not passed to the jury); (3) the record does not go back to the jury room during deliberations unless it is the adverse party wants it to and “admits” it for that purpose. (See Mauet, pp. 335-336).

TRE 803 (5) *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document’s trustworthiness. If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.
