

Refreshing Recollection and Impeachment

Present Recollection Refreshed

Purpose

Refresh the memory of a friendly witness who has temporarily forgotten a fact.

TRE 612 controls if “writing” is used to refresh recollection.

Writing is not required. Anything can be used to refresh recollection.

Method for Refreshing Present Recollection

- Ask question to elicit testimony.
- Witness must say they do not recall or remember answer.
- Ask if something will refresh recollection, referring to item to be used.
- If a writing, have it marked as an exhibit.
- Ask to approach witness.
- Show exhibit to opposing counsel.
- Show exhibit (or object if not a writing) to witness.
- Ask him to read it to himself if a writing, or if not, to look at the object.
- Take writing (or object) away from witness and ask if his memory is refreshed.
- If he says “yes”, ask the original question again.

Offering party cannot have the writing (or object) admitted for all purposes, meaning the exhibit will not go back to the jury room during deliberations.

Use of Exhibit by Opposing Counsel

- Can cross examine witness concerning the exhibit.
- Can read any portion to the jury (that is not redacted).
- Can request that the exhibit be admitted for all purposes, meaning if admitted by the Court, that the exhibit goes back to the jury room during deliberations.
- This applies not only to writings used to refresh present recollection, but also to writings used as past recollection recorded -TRE 803(5).

Past Recollection Recorded

Purpose

Elicit testimony from a friendly witness who has forgotten forever a fact that he has previously written down (or adopted) and which was accurate at the time it was recorded.

TRE 803(5) sets out the requirements. It is an exception to the Hearsay Rule.

Writing prepared by or adopted by the witness is required.

Method for Past Recollection Recorded

- Ask question to elicit testimony.
- Witness must say they do not recall or remember answer.
- Ask if something will refresh recollection, referring to the writing to be used.
- If witness says “no”, ask if witness once had personal knowledge of the fact he has now forgotten.
- Witness should say “yes”, then ask if he made (or adopted) an accurate record of the fact when it was fresh in his mind.
- Witness should say “yes”. Have the writing marked as an exhibit.
- Ask to approach witness.
- Show exhibit to opposing counsel.
- Show exhibit to witness.
- Ask if exhibit ____ is the record he prepared which accurately reflects the facts when they were fresh in his mind.
- Witness should say “yes”.
- Address the Court: Your Honor, we offer exhibit ____ into evidence as past recollection recorded.
- If Court admits the exhibit, have witness read the portion responsive to the original question you asked. (No need to ask to publish to the jury.)

Offering party cannot have the writing (or object) admitted for all purposes, meaning the exhibit will not go back to the jury room during deliberations. Adverse party can have it admitted as exhibit for all purposes.

Selected Methods of Impeachment

- Bias - Relationship or attitude exists that may color testimony.

Examples: Family or friend of a party.

- Interest - Relationship to a party or lawsuit may result in gain or loss (usually financial) due to particular outcome of the case.

Examples: Plaintiff sues for damages; expert typically testifies for one side.

- Motive – Reason (usually based on history) which may color testimony.

Examples: Love, hate, revenge.

TRE 613(b)

- Prior Inconsistent Statement – Statement made by witness before trial that is inconsistent with trial testimony.

Examples: Deposition; Statement to Police.

TRE 613(a)

Use of the 3 C's to Prove Prior Inconsistent Statement in Depositions

- **CONFIRM**

Reminds witness and jury of the prior trial testimony.

- **CREDIT**

Show credibility of the prior inconsistent statement.

“20 Questions”

- **CONFRONT**

Read prior inconsistent statement to the witness.

How to “Confirm” Statement

- “You earlier testified that _____.”

OR

- “You just told the jury _____.”

How to Credit the Prior Inconsistent Statement

Examples of “20 Questions”

You gave a deposition in this case.

It was several months ago.

You came to my office.

Your lawyer was there.

You had a chance to talk with your lawyer ahead of time about the deposition.

You knew what to expect.

You knew that your deposition was important to this case.

You knew the deposition could be read to the judge and jury.

You knew it was important to tell the truth.

There was a court reporter there.

The court reporter asked you to take an oath like the one you took before this jury earlier.

You raised your right hand.

You promised to tell the truth.

The whole truth.

And nothing but the truth.

How to Credit the Prior Inconsistent Statement “20 Questions” Continued

I asked you questions about this case.

I asked you if there was any reason you could not answer my questions truthfully.

You said you could answer my questions truthfully.

You did answer my questions truthfully.

After your deposition, you received a copy of my questions and your answers.

You were given the chance to change any answer that was incorrect.

You did not make any changes.

Ask to approach the witness with his deposition. Show to opposing counsel.

Show deposition to witness.

This is your deposition taken on date.

It says that the answers are true and correct (or whatever the certification says.)

This is your signature, certifying that your answers were true and correct.

Confront the Witness with the Prior Inconsistent Statement

I am showing you a portion of your deposition beginning on page ____, line ____.

I will read the question I asked you and the answer you gave under oath. Please follow along silently.

Read the question and answer with drama.

Remove the deposition from the Witness's sight.

Ask "Did I read that correctly?"

When witness says "Yes", STOP AND SIT DOWN.

Tips to Make Your Impeachment Effective

Do not mark the deposition as an exhibit.

Do not hand the deposition to the witness.

Do not ask the witness to read the testimony out loud.

Do not read in a monotone.

Do not thank the witness.

Do not ask the witness to explain his answer.

Do not ask “were you lying then or are you lying now?”

Do enjoy the moment!