

Common Pitfalls in Refreshed Recollection and Prior Inconsistent Statements

Refreshing a witness's recollection. *See* FRE 612.

Anything can be used to refresh a witness's recollection, even if it is not itself admissible and regardless of whether the witness created it or has even seen it before. Counsel must make anything used to refresh recollection available to opposing counsel for review.

A witness may only testify from their refreshed *present* memory. A witness can't just read a document to the jury. To refresh a witnesses' recollection:

1. Ask the witness your question, without reference to any document.
2. *If* the witness cannot remember, ask if reviewing a document might refresh their recollection.
3. *If* the witness says yes, provide them the document and ask them to review it silently.
4. Take the document back from the witness or instruct them to turn it face down.
5. Ask the witness if their recollection has been refreshed.
6. If they say no, move on. If they say yes, ask your question again.

If the document does not refresh the witness's recollection—that is, if the witness still does not have a present memory of the fact—the contents of the document are admissible only if the requirements of FRE 803(5) (past recollection refreshed) are met or there is some other basis for admission.

Do not read unadmitted portions of the document to the witness in front of the jury as a means of “refreshing” recollection. If you wish to refresh recollection with a recording, bring headphones or do it during a recess.

Using a witness's prior inconsistent statements. *See* FRE 613, 801(d)(1).

1. Ask the witness your question without reference to the prior statement. It's not appropriate to begin a line of questioning, “Now, you stated at your deposition that...” Until a witness has testified *at trial* inconsistently with their prior statement, you may not recite their prior statement in front of the jury.
2. *If* you think their trial testimony is inconsistent with their prior statement, tell the Court and opposing counsel precisely which part of the prior statement you would like to read.
 - a. You must have hard copies of the prior statement for the Court and opposing counsel to review. If you plan to play an audio or video recording, you must have hard copies of the transcript, if one exists. If you don't, the Court cannot determine whether the statement is inconsistent, and you won't be allowed to read or play the statement. (If there is no transcript, for example in a criminal case with lots of bodycam footage, you must be prepared to front the content of the footage with the Court, preferably during a recess.)
 - b. The Court may require you to read or play a longer excerpt to give the jury appropriate context (and opposing counsel may request this), so be sure you are prepared to do so (especially if you plan to play a recording).
3. With the Court's permission, read or play the witness's prior inconsistent statement.
4. Then you can move on, or you can ask the witness to explain the inconsistency. Opposing counsel may give the witness a chance to explain any inconsistency on cross or re-direct.

Note that only prior *sworn* statements may be admitted as substantive evidence. *See* FRE 801(d)(1)(A).

Unsworn statements may be used to impeach, *see* FRE 801(c)(2), but the opposing side may request a limiting instruction.