Summary of Chapter 16

Refreshing a Witness's Memory: Legal Guidelines

When witnesses struggle to recall details during testimony, attorneys have several options to refresh their memory. This document explores the process of refreshing witness recollection under Federal Rule of Evidence 612, including proper procedures, limitations, and rights of adverse parties. Understanding these guidelines is essential for effective courtroom advocacy and ensuring witness testimony remains both credible and admissible.

Federal Rule of Evidence 612 provides the framework for refreshing a witness's recollection during testimony. The rule applies to both direct and cross-examination, allowing attorneys to use writings, objects, or other stimuli to help witnesses remember facts they cannot otherwise recall completely or accurately. This process differs from introducing past recollection recorded, as the witness must still testify from their refreshed memory rather than adopting the document itself as their testimony.

The proper procedure for refreshing recollection involves several steps. First, counsel must establish that the witness cannot recall a specific fact. Then, counsel must request permission to refresh the witness's memory and approach with the refreshing item. The witness reviews the material, and counsel confirms whether the witness's memory has been refreshed. If successful, the witness then testifies from their refreshed memory, not by reading the document itself.

Importantly, Rule 612 grants significant rights to adverse parties when a witness's memory is refreshed. The opposing counsel has the right to inspect the material used, cross-examine the witness about it, and introduce relevant portions into evidence. These protections serve as important safeguards against improper coaching or manipulation of witness testimony.

Courts impose various limitations on the process to prevent abuse. The refreshing material need not be admissible evidence itself, but it must be reliable enough to legitimately trigger the witness's memory. Additionally, courts generally require that counsel not lead the witness or suggest answers when using refreshing materials. Some jurisdictions have specific requirements regarding when and how often a witness's memory may be refreshed during testimony.

Mastering the technique of refreshing recollection requires both technical legal knowledge and practical courtroom skills. Attorneys must balance the need for complete testimony against the risk of appearing to coach witnesses. Strategic considerations include timing of memory refreshment, selection of refreshing materials, and anticipation of adverse party challenges.



by Roger Batchelor

The Process of Refreshing Recollection

Trials often occur months or years after the events in question, causing memories to fade. While leading questions can help jog a witness's memory, they may diminish the testimony's persuasive impact as jurors hear the attorney suggesting answers. Rule 612 provides a more effective alternative: refreshing a witness's recollection with a document or other item.

Establish Memory Failure

The attorney must first establish that the witness cannot recall the answer to a specific question.

Identify Refreshing Material

The attorney describes the writing they wish to use and asks if it would help refresh the witness's recollection.

Show the Writing

After showing the writing to the witness and allowing them to review it, the witness puts it aside.

Confirm Refreshed Memory

The attorney asks if the writing has refreshed the witness's recollection, then the witness testifies from memory.

Throughout this process, the attorney must provide the opposing counsel with a copy of the writing. The witness must testify from their refreshed memory, not simply recite information from the document. If a judge determines the witness has no independent recollection, they may not allow further testimony on that matter.

Rights of Adverse Parties Under Rule 612

Rule 612 allows attorneys to refresh a witness's recollection, but only at a price. The rule gives adverse parties significant rights when a writing is used to refresh memory:

Production and Inspection

The adverse party is entitled to have the writing produced at the hearing and to inspect it.

Cross-Examination

The adverse party may cross-examine the witness about the writing, potentially exposing uncertainties in recollection.

Introduction into Evidence

The adverse party may introduce relevant portions of the writing into evidence, even if it would not otherwise be admissible.

Importantly, while the adverse party may introduce the writing under Rule 612 for the limited purpose of assessing witness credibility, the refreshing party cannot use Rule 612 to admit the writing. The refreshing party must comply with other evidentiary rules, including hearsay exceptions, to introduce the document.

If a party claims the writing includes unrelated matter, the court must examine it in camera, delete unrelated portions, and preserve any deleted portions for the record. If a party refuses to produce a writing, the court may issue appropriate orders, including striking testimony or declaring a mistrial in criminal cases.



Practical Considerations and Limitations

Types of Writings

Rule 612 does not limit the type of writing that may refresh recollection. It can be a handwritten note, deposition transcript, or even a document prepared by someone else. "Writings" can include photographs, audiotapes, and other media. As Judge Learned Hand famously noted, "Anything may in fact revive a memory: a song, a scent, a photograph, an allusion..."

Rule 101(b)(6) clarifies that "electronically stored information" may also be used. However, practical considerations limit an attorney's choices when refreshing recollection.

Practical Limitations

Jury perception

Using third-party documents may appear as though the attorney is feeding answers to the witness

Witness credibility

Poor choice of refreshing material can signal that the witness's perception was unreliable

Opposing counsel's rights

Any item used to refresh recollection becomes available to the adverse party

Pre-Testimony Refreshment

Rule 612 allows parties access to documents a witness reviews before testifying if "justice requires." Courts typically limit this access to prevent "fishing expeditions" through opposing counsel's files, as witnesses commonly review their documents before testifying.