

Refreshed Recollection and Prior Inconsistent Statements

At trial, lawyers often waste juror time, and embarrass themselves in front of the jury, when attempting to use a document to refresh a witness's recollection and when attempting to use a witness's prior statements. In fact, lawyers often forfeit entire lines of cross-examination by not knowing how to execute these tasks.

Refreshing a witness's recollection. See FRE 612.

A writing (or essentially any other material) 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. But the witness must then 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.
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 personal knowledge—the contents of the document are admissible only if the requirements of FRE 803(5) are met. They usually aren't.

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

Lawyers love to use witnesses' prior statements at trial. But if a witness has not given inconsistent testimony in court, it is usually not appropriate to introduce or mention their prior statement. Instead:

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..."
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.)
 - 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.