

# Recollections Refreshed and Recorded

LEN NIEHOFF

---

The author is Professor from Practice at the University of Michigan Law School, of counsel to Honigman LLP in Ann Arbor, and an associate editor of *LITIGATION*.

Witnesses forget stuff. When they do, the evidence rules give us two tools to help solve the problem. Lawyers call one “refreshed recollection” and the other “past recollection recorded,” labels just similar enough to guarantee confusion. Nevertheless, these principles get at very different things and are well worth the effort necessary to distinguish and understand them.

So how do we get there?

Let’s begin with a story—a true one, even. The place is Ann Arbor. Specifically, the University of Michigan Law School, where I teach. It’s August 2005. A truck runs into a car stopped at a traffic light. The impact is so great that it forces the car into another one, which strikes yet another. The truck drives away. The driver doesn’t even pause to see if anyone is hurt.

A remarkable phenomenon brings this generic traffic accident to the attention of the Associated Press and a leading television morning talk show. On this particular day, a squad of cheerleaders from the neighboring town of Ypsilanti happens to be in Ann Arbor for a camp being conducted by the Universal Cheerleaders Association. The young women and their coach, Patricia Clark, witness the accident. They see the truck pull off and head down the street. Coach Clark springs into action, chases the truck, and gets a good look at its license plate number.

To her team, she yells out, “Remember this!” Then she calls out the number. The cheerleaders begin repeating it over and over. Then they come up with an idea. To make sure they recall it

accurately until they have a chance to write it down, they transform it into a cheer. “[We] just turned it into a big chant,” observed Kimmie Ostrowski, a team captain later interviewed about the events on the NBC *Today* program.

Later, the team provides the license number to the police, who—using it—successfully track down the driver.

As far as we can discern from the reporting on those events, no serious injury to person or property resulted from the accident. The driver faced, at most, a misdemeanor charge for leaving the scene. No trial occurred.

But, as I’m a law professor, my job description includes trying to tease out the lessons that emerge when we imagine alternative universes in which facts play out a little differently. So let’s switch up the facts and see what happens.

First, let’s assume that the occupants of the cars did, indeed, suffer extensive injuries from the collision. Let’s further assume that the prosecutor has charged the truck driver with felony reckless driving. And that the defense has refused to concede any facts, forcing the prosecution to present its proof.

The prosecutor’s first order of business is to establish that the truck was at the scene of the crash.

Imagine that, at the time of the accident, Coach Clark had found her way to a pen and paper, listened to the chant of her cheerleaders, recognized it as correct, and written down “HTNRN 666 3X”—the number that she saw on the plate and

called out to the team. Clark scribbled it, let's say, on the back of a receipt from Crazy Jim's Blimpy Burger restaurant, where the team had enjoyed a wholesome lunch, and then she passed the note on to police.

Now let's step inside the room where the prosecutor is privately preparing Coach Clark to testify. She asks if Coach Clark remembers the number she saw on the plate the day of the accident.

"Honestly, no," the coach responds. "Of course not. A lot of time has passed since then till now." And the coach has dozens of energetic adolescents in her care; she has better things to do than commit to memory a random license plate number.

That makes complete sense. But it's not what the prosecutor hoped for.

All is not lost. She shows Coach Clark the Blimpy Burger receipt. On the receipt is written the number "HTNRN 666 3X."

"Does seeing this help?" she asks the coach.

"Yes, it does," Coach Clark responds.

And now the coach recalls the number. After all, as she explains, she repeated it over and over again at the time, she heard the cheerleading squad make a chant out of it, and now she sees it written in her own handwriting. Seeing it, she remembers some of the characteristics of the number that made it memorable at the time. She remembers that the "HTNRN" part sounds like "hit and run" and that the number 666 suggests evil things, like fleeing an accident scene where someone may have been gravely injured.

Her memory thus refreshed, Coach Clark can speak based on her personal knowledge—her actual firsthand recollection, prompted into recognition. If her memory stalls again when the prosecutor calls her as a witness at trial, they can go through the very same exercise. The prosecutor can ask the question. If the coach doesn't remember, she can simply say so. Then the prosecutor can ask if the note on the receipt helps Coach Clark to remember. The coach can say—truthfully—that it does, and then proceed to testify based on her prompted recollection.

"Yes, thank you. Now I remember. The license number on the truck was HTNRN 666 3X."

There we have it. A perfect example of "refreshed recollection."

It's important to recognize that, under these circumstances, the evidence being offered is not the *note*; it's the *testimony*. The prosecutor might want to introduce the note *in addition to* the testimony or *instead of* the testimony, but that's a separate idea that raises separate issues. Doing so poses additional challenges that we'll get to in a moment. But for now, let's assume that the prosecutor wants to admit the testimony just by itself.

You'll notice that the testimony does *not* give rise to any hearsay concerns. The prosecutor is not offering into evidence any statement that was previously made outside of court. Rather, the evidence consists entirely of the witness's in-court testimony, her memory having been refreshed by her glance at her note, written much earlier.

---

## The Rules of Evidence and Refreshed Recollection

The Federal Rules of Evidence address refreshed recollection in Rule 612. Unfortunately, the odd structure of Rule 612 triggers confusion. The rule does not say that a party may use a writing to refresh a witness's recollection. It assumes as much, then focuses instead on the process that applies when a party does so. Thus, for example, Rule 612(b) provides that, in a criminal case, the opposing party has the right to see the writing used at the hearing and to cross-examine the witness about it.

The key to understanding refreshed recollection lies in recognizing that it is not a very complicated idea. As noted, witnesses forget stuff. Sometimes we can help jump-start their memory by showing them something, not because we want to introduce that something into evidence, but because we want to spark their memory.

All that has nothing to do with the bedeviling complexities of the hearsay doctrine, because it does not entail the offering into evidence of any statement made outside of court. Indeed, at least in theory, the thing that refreshes the witness's recollection does not need to be a *writing*. Something else may do the trick just as well, or even better.

Imagine, for example, that at trial Coach Clark suffers a catastrophic paralysis of memory. The prosecutor asks her why she was in Ann Arbor. Coach pauses, frozen. She says she can't remember. The prosecutor holds up Kimmie's brightly colored megaphone.

"Does seeing this help you to remember?" she asks Coach Clark.

"Oh yes, of course," replies the coach. "I was there to coach at a cheerleading camp."

Now, let's change up our facts, this time to raise an entirely different problem. As before, in the course of preparing Coach Clark to testify at trial, the prosecutor asks the coach if she remembers the number she saw on the plate.

"No, I do not," Coach Clark answers.

As before, the prosecutor then shows her the Blimpy Burger receipt with the number on it.

"Does seeing this help?" she asks the coach.

This time, however, the coach does not say "yes." Instead, she equivocates.

"I recognize my handwriting. I remember the receipt. That's the familiar Blimpy Burger slogan—'Cheaper than food!'—right there on it. And I remember scribbling on the back of that receipt the number that the cheer team was chanting. But, to tell you the truth, seeing that license plate number, even in my own handwriting, actually does not ring a bell. Not even a soft and distant one."

That shift in memory may seem like a subtle or nuanced difference, but it's actually all the difference in the world.

And it poses quite a problem for the prosecutor. If she puts the coach on the stand and asks if she remembers the license plate number, the coach will say "no." If she shows the coach the receipt and asks if that refreshes her memory, the coach will say "no."



Now what?

The solution lies in offering the note itself into evidence. And that concept brings with it an entirely different problem. Doing so will prompt a hearsay objection from the defense. Indeed, the writing on the Blimpy receipt fits neatly right into the definition of hearsay in Federal Rule of Evidence 801(c). It is a statement *not* being made by the declarant at the current trial *and* being offered to prove the truth of what it asserts. Here, in essence, to try to prove that this is the license number of the truck that sped away.

Absent an applicable exception, the court will likely sustain a hearsay objection.

## The Doctrine of “Past Recollection Recorded”

Fortunately for our prosecutor, the doctrine of “past recollection recorded” offers a route to admission. As Federal Rule of Evidence 803(5) indicates, a record comes within that exception when it meets three conditions: (1) the witness once knew about the subject but now can’t recall sufficiently to testify fully and accurately; (2) the record was made by the witness, or was adopted by the witness, when the matter was still fresh in the witness’s memory; and (3) the record accurately reflects what the witness once knew.

In Coach Clark’s case—check, check, and check—all three points are satisfied. If asked, Coach will say, “No, I do not remember the number. But I know that I saw it at the time, that I called it out, that we chanted it so we’d get it right, and that I accurately wrote down what we all were chanting.”

With that testimonial foundation, the note should come into evidence. Well, almost.

Rule 803(5) adds a curious proviso at the end: “If admitted, the record may be read into evidence but may be received as an exhibit *only if offered by an adverse party.*” (Emphasis added.)

That limitation has its roots in a common-law controversy over what to do about the record itself once the witness vouched

for its accuracy, given the general preference for live testimony over written hearsay. To satisfy that preference, courts came up with several possibilities: admit the document and allow the jury to review it; allow it to be read by the witness but not admitted by its proponent; or allow it to be admitted and to go to the jury but with instructions that it is merely “auxiliary” to the testimony. See Timothy G. Westman, *Past Recollection Recorded: The Forward-Looking Federal Rules of Evidence Lean Backward*, 50 NOTRE DAME L. REV. 737, 739 (1975).

Candidly, the weird compromise struck by the last sentence of Rule 803(5) makes little sense. The evidence at issue is not the witness’s living memory. To the contrary, for the exception to apply, the proponent of the evidence must establish that *no such memory exists*. Rather, the evidence is the content of the document. Under those circumstances, keeping the document *out* but instead allowing *a reading of* it into evidence seems downright bizarre.

Furthermore, a rule that keeps the record itself from being admitted deprives the trier of fact of “the most accurate account of a witness’s past observations, as well as a sufficient guarantee of trustworthiness.” *Id.*

And what if the witness reads the writing poorly, or too quickly, or incorrectly? Why is it preferable to have to ask the witness to read it *again*, rather than just admit the document into evidence and let the jury read it for themselves?

Finally, the oddity of this approach is compounded by the fact that the same record might be fully admissible into evidence under other exceptions that do *not* include such a limitation, such as the one that applies to “present sense impressions” under Rule 803(1).

Granted, the last sentence of Rule 803(5) is neither the greatest nor the only anomaly in hearsay doctrine, but that’s not saying much. In any event, the rule says what it says, so the note on the receipt will be read to the jury, but the jury will not have the opportunity to see or examine the actual document unless the defense so requests.

Illustration by Lisa Haney

All these hypotheticals share one important attribute. In each scenario, the prosecutor's ability to get the document into evidence depends on the presence of a fairly cooperative witness. In the first set of examples, the witness—Coach Clark—needs to acknowledge that the note refreshes her recollection. In the last hypothetical, the witness needs to confirm the reliability of the document, even while indicating that it does not itself help her to remember.

If instead the witness is confused and unhelpful, or downright hostile, the lawyer faces a more daunting challenge. That the lawyer personally knows that truthful testimony would result in admissibility doesn't make any difference.

---

### *Johnson v. State*

Professor George Fisher's outstanding book on evidence law includes an excellent case to demonstrate the point, *Johnson v. State*, 967 S.W.2d 410 (Tex. Crim. App. 1998).

There, the prosecution had charged Arnold E. Johnson with the capital murder of Frank Johnson Jr. The jury found him guilty, he was sentenced to death, and he appealed. The central issue on appeal was whether the trial court had erred by admitting into evidence a written statement given to police by a Reginald Taylor, who claimed to have witnessed the crime.

At trial, the prosecutor called Taylor to testify and quickly ran into trouble. In response to the question "Mr. Taylor, could you state your name for the record, please?" the witness answered "You already know my name." Taylor continued to argue. "You already know it"; "[My name's] right there in front of you man"; and so on. The prosecutor had a tough journey ahead.

Wisely, he appears to have skipped the formality of trying to refresh Taylor's purportedly nonexistent recollection. We can imagine how that might have gone if he had done so.

Q: "Does this writing remind you of what you told the police?"

A: "What is a writing? Who are the police? I don't remember anything about either of them."

The prosecutor knew a futile endeavor when he saw one.

Instead, the prosecutor tried to extract from Taylor the necessary endorsements of the earlier written statement to admit it as a recorded recollection. That proved to be more than difficult. Indeed, when the appellate court described Taylor as "uncooperative," it engaged in almost hilarious understatement.

Taylor acknowledged that his signature appeared on the statement, but pretty much nothing else. He professed no memory at all of when he had given that statement, what he had said in it, whether the events would have been fresher in his mind at the time he provided the statement, or what happened on the day of the killing.

While our counterpart hypothetical about Coach Clark went "check, check, check," this attempt to use Rule 803(5) went "nope, nope, nope."

Given that the prosecutor failed to secure from his immovable witness any of the vouching testimony required by the rule, the appellate court found that the trial court had erred in admitting the statement and reversed the conviction.

As armchair quarterbacks, we might contend that the prosecutor could have asked a few additional questions to bolster the argument that the document fit within the exception. For example, he might have pushed for a concession that Taylor would not have lied to the police at the time he gave the statement. But, given Taylor's level of resistance to everything he was asked, more questions may well have just resulted in more evasions.

Of course, lawyers often confront hostile witnesses with their prior statements for purposes having nothing to do with either refreshing recollection or trying to establish the admissibility of a recorded past recollection. For example, they may use prior inconsistent statements for impeachment or, when the party made the assertion, to show an admission under Rule 801(d)(2). Those strategies have a critical role in witness cross-examination, but they have nothing to do with the rules discussed here.

"Refreshed recollection" and "recorded recollection" therefore have inherent limitations, particularly with hostile witnesses, dissembling witnesses, or witnesses with profound memory issues.

The comedian Steven Wright said, "I think I had amnesia once. Or twice." You don't want to try these tools with a witness like that.

---

### Lessons

Three straightforward lessons emerge.

First, if there's confusion about these two doctrines, a good place to start is by asking whether the evidence being presented is (a) the witness's *testimony* based on his or her refreshed memory or (b) the content of a *document or thing* that records what was once known but is now forgotten. The former points toward the simple technique of "refreshed recollection." The latter implicates the hearsay doctrine and the somewhat more complex strictures of Rule 803(5).

Second, both of these doctrines work best with witnesses who are friendly and cooperative, or at least neutral and responsive. A witness determined to fight won't acknowledge any "refreshing" of memory or concede the essential foundational points under the hearsay exception.

Finally, let's add two items to the all-important list of existential prohibitions:

Don't expect much help from a witness who won't even tell you his name.

And don't commit any crimes in front of an Ypsilanti, Michigan, cheer squad. They will chant you all the way to the slammer. ■