

A defendant is on trial for bank robbery. Evidence at the trial has included testimony by a bank teller who was present during the robbery. The teller testified for the prosecution after having refreshed her memory by looking at an FBI agent's investigative report that was created shortly after the robbery.

The defendant has asked to examine the report.

How should the court respond?

- A. The court may allow the examination if the report was used by the teller to refresh her memory before testifying and must allow it if she used the report during her testimony.
- B. The court must allow the examination, but only to the extent that the report contains the teller's own statement to the FBI agent.
- C. The court should not allow the examination, because the report was not shown to have been read and approved by the teller while the matter was fresh in her mind.
- D. The court should not allow the examination, unless the report was used by the teller to refresh her memory while on the witness stand.

Explanation:

Present recollection refreshed v. Past recollection recorded

Refreshing recollection	Any item may be used to refresh witness's memory <i>regardless of admissibility</i> if: (FRE 612) witness once knew but is now unable to recall fact or event <i>and</i> item will help witness recall that information
Recorded recollection	Record is <i>admissible</i> hearsay if it: (FRE 803(5)) contains information witness once knew but cannot recall well enough to testify fully & accurately was made or adopted by witness when matter was fresh in his/her mind <i>and</i> accurately reflects witness's knowledge at time record was made

FRE = Federal Rule of Evidence.

A party may use a **writing** (or other evidence) to **refresh a witness's memory** if (1) the witness once knew but cannot recall a fact or event and (2) the writing will help the witness recall that information. The **opposing party's options depend** on whether the writing is used to refresh the witness's memory:

while testifying – in which case, the **court must allow** the opposing party to **inspect the writing**, cross-examine the witness about it, and introduce any relevant portion into evidence *or*

before testifying – in which case, the **court may allow** the opposing party to utilize these options in the interest of justice.

Therefore, the court *may* allow the defendant to examine the FBI report if the teller used it to refresh her memory before testifying and *must* allow it if the teller used the report during her testimony **(Choice D)**.

(Choice B) The court would be required to allow the defendant to examine the FBI report if the teller used it to refresh her memory while testifying—regardless of whether the report contains the teller's own statement to the FBI agent.

(Choice C) The defendant's right to examine the report does not turn on whether the teller read and approved (ie, adopted) the report while the robbery was fresh in her mind. But this would be relevant to determining whether the report is admissible as a *recorded recollection*.

Educational objective:

If a witness refreshes his/her memory with a writing *while* testifying, the opposing party *must* be allowed to inspect it, cross-examine the witness on it, and introduce any relevant portion into evidence. If the witness does so *before* testifying, the opposing party *may* be allowed to utilize these options if justice so requires.

References

Fed. R. Evid. 612 (refreshing recollection).

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