

A plaintiff sued an industrial facility in her neighborhood for injuries to her health caused by air pollution. At trial, the plaintiff was asked questions on direct examination about the days on which she had observed large amounts of dust in the air and how long the condition had lasted. She testified that she could not remember the specific times, but that she maintained a diary in which she had accurately recorded this information on a daily basis. When her attorney sought to refresh her recollection with her diary, she still could not remember. The plaintiff's attorney seeks to have the information in the diary admitted at trial.

Is the information admissible?

- A. No, because reviewing it did not refresh the plaintiff's recollection.
- B. No, unless it is offered by the defendant.
- C. Yes, and the plaintiff should be allowed the option of reading it into evidence or having the diary received as an exhibit.
- D. Yes, and the plaintiff should be allowed to read the diary into evidence.

Explanation:

Refreshed recollection v. Recorded recollection

	Admissibility	Use by opponent
Refreshed recollection	Item may be used to refresh witness's memory either before or during testimony if:	Inspect item Compel production
(FRE 612)	witness once knew but can no longer recall fact <i>and</i> item will help witness remember	Use on cross-examination Introduce into evidence
Recorded recollection	Record may be used as substantive proof & read into evidence if:	Offer as exhibit
(FRE 803(5))	witness once knew but can no longer recall fact witness made or adopted record when fresh in mind <i>and</i> record accurately reflects witness's knowledge	

FRE = Federal Rule of Evidence.

A witness's memory can be refreshed by allowing him/her to review a record (or other item) before or while testifying, but that record is generally not admitted into evidence. However, under the **past recollection recorded** exception to the hearsay rule, a **record** may be **read into evidence** if:

the witness **once knew** the recorded information **but cannot recall** it at trial

the witness **made or adopted** the record **when the matter was fresh** in his/her mind *and*
the record **accurately** reflects the witness's personal knowledge at the time it was made.

Here, the plaintiff could not recall specific details about the dust in the air at trial, even after her attorney tried to refresh her recollection with her diary. But she once knew this information because she had accurately recorded her personal observations in the diary on a daily basis, when the matter was fresh on her mind. Therefore, she should be allowed to read the information in the diary into evidence (**Choice A**).

However, she cannot have the diary received as an exhibit because there is a risk that the jury may give greater weight to that record simply because it is in writing. Instead, only an adverse party (eg, the defendant) can do so—allowing portions that might not have been read into evidence to also be considered in the interest of fairness (**Choices B & C**).

Educational objective:

A past recollection recorded may be read into evidence if: (1) the witness once knew the recorded information but cannot recall it at trial, (2) the witness made or adopted the record when the matter was fresh in his/her mind, and (3) the record accurately reflects the witness's personal knowledge at that time.

References

Fed. R. Evid. 612 (refreshing a witness's recollection).

Fed. R. Evid. 803(5) (recorded recollection exception to hearsay rule).

Fed. R. Evid. 106 (remainder of or related writings or recorded statements).

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