

A witness for the prosecution in a murder case testified on direct examination that she saw the defendant and the victim in a heated argument at a local bar the same night the victim was murdered. When asked by the prosecutor what time she left the bar, the witness was unable to remember. The prosecutor seeks to show the witness his handwritten notes of the witness's pretrial interview during which she stated that she left the bar at 10:00 p.m.

How is the trial court likely to view the prosecutor's request to show the witness his notes?

- A. A proper attempt to introduce a recorded recollection.
- B. A proper attempt to refresh the witness's recollection.
- C. An improper attempt to lead the witness.
- D. An improper attempt to support the witness's credibility.

Explanation:

A party may use **any item** (usually a writing) to **refresh a witness's recollection** when: the witness **once had personal knowledge** of a fact or event but is now **unable to recall** it *and* the item will **help the witness recall** that information.

Here, it is clear from the prosecutor's notes that the witness knew what time she left the bar during her pretrial interview and that viewing those notes would help her recall and testify to that time. Therefore, the court will likely view the prosecutor's request to show the witness his notes as a proper attempt to refresh her recollection.

(Choice A) It would only be proper to *admit* the prosecutor's notes into evidence as a **recorded recollection** if the witness had reviewed the notes when the matter was fresh in her mind and been satisfied that they accurately reflected her knowledge. But the notes can be used to *refresh* her recollection without regard to their admissibility.

(Choice C) **Leading questions** are ones that suggest the desired response to the person being asked. Although these questions are generally prohibited on direct examination, using a writing or other item to refresh a witness's memory does not constitute leading the witness.

(Choice D) It is improper to offer evidence to support a witness's credibility *before* it has been attacked (ie, before the witness has been impeached). But here, the prosecutor's notes are being used to refresh the witness's memory—not to establish her credibility.

Educational objective:

Any item may be used to refresh a witness's memory when (1) the witness once had personal knowledge of a matter but is now unable to recall it and (2) the item will help the witness recall that matter.

References

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

Refreshing witness's recollection

